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Replies from Governments to Questionnaires of the International Law Commission

Topic:
Law of Treaties

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LAW OF TREATIES

DOCUMENT A/CN.4/19

Replies from Governments to Questionnaires of the International Law Commission

[Original text : English-French-Spanish]
[23 March 1950]

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Note by the Secrctary-General

1. In accordance with Article 18 of its Statute (annexed to General Assembly resolution 174 (II) of 21 November 1947), the International Law Commission decided at its first session to undertake the codification of three topics of international law, namely, (i) the Law of Treaties, (ii) Arbitral Procedure, and (iii) the Regime of the High Seas. In implementation of this decision and in conformity with Article 19, paragraph 2 of its Statute, the Commission further decided to request all Governments of Members of the United Nations to furnish it with texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to each of these topics.

2. Also the Commission, having been entrusted by the General Assembly, in virtue of resolution 177 (II) of 21 November 1947, with the preparation of " a draft code of offences against the peace and security of mankind ", deemed it necessary also to request the Governments to express their views concerning what offences, apart from those defined in the Charter and judgment of the Nürnberg Tribunal, should be comprehended in that draft code.

3. Accordingly, the Secretary-General, by letter LEG 291/01/YLL of 11 July 1949, communicated the Commission's requests to all Governments of Members of the United Nations.

4. By 23 March 1950, the Secretary-General had received replies from the Governments of Canada, Costa Rica, Denmark, France, Israel, the Netherlands, Philippines, Poland, Union of South Africa, the United Kingdom and the United States.

5. The texts of the replies from Governments concerning topics for codification (Part I), as well as the views expressed on what offences should be comprehended in a draft code of offences against the peace and security of mankind (Part II), are reproduced herein.

* Sections B and C contain the replies dealing respectively with " Arbitral Procedure " and the " Regime of the High Seas " and are to be found with the documents relating to these items.

Part II contains the replies dealing with the " Draft Code of Offences Against the Peace and Security of Mankind " and is to be found with the documents relating to that item.

6. Relevant materials submitted in the form of books, pamphlets, or lengthy treaty texts are not reproduced, but are held available for reference.

7. Replies received after 23 March 1950 will be reproduced as addenda to the present document.

Part I

REPLIES FROM GOVERNMENTS CONCERNING TOPICS FOR CODIFICATION

SECTION A. LAW OF TREATIES

1. Canada

[Original text : English]
Department of External Affairs
Ottawa
17 January 1950

. . .

Enclosed is one copy of each of the papers which are listed below under the subject to which they pertain :

(*a*) Concerning the Law of Treaties :

Extracts from the Canadian Abridgment, Vol. 11;

Judgment of the Privy Council - *Attorney-General for Canada v. Attorney-General for Ontario* (1937) AC 326;

Resolution of Canadian House of Commons, June 21, 1926;

Extract from Debates of House of Commons 1928, Vol. 11, p. 1974.

. . .

[Papers listed are reproduced hereinafter]

EXTRACTS FROM THE CANADIAN ABRIDGMENT, VOL. 11

TREATIES

1. *Imperial Treaties*

(a) *General Effect of Treaties not implemented by Legislation — Effect on Rights of Individuals.*

Treaties to which Great Britain is a party are contracts binding in honour upon the contracting States, but do not as such affect the rights of individual subjects of Great Britain or any other British country. Per Lamont and Cannon, JJ., (agreeing in this respect with the views of the Courts, below): A treaty in itself is not equivalent to an Imperial Act, and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign Power. For breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the Courts only if the treaty has been implemented or sanctioned by legislation, which alone can make it binding upon the subject. In the absence of such legislation, a treaty is ineffectual to impose any limitation upon the legislative power exclusively bestowed by the Imperial Parliament upon the Legislature of a province.

Arrow River & Tributaries Slide & Boom Co. v. Pigeon Timber Co., (1932) S.C.R. 495, 39 C.R.C. 161 (1932) 2 D.L.R. 250, reversing 66 O.L.R. 577, 38 C.R.C. 65, (1931) 2 D.L.R. 216, which reversed 65 O.L.R. 575, (1931) 1 D.L.R. 260.

(b) *Effect of s. 132 of the B.N.A. Act — Water-Powers International Joint Works.*

Per Duff, J. : Broadly speaking, the Dominion has under s. 132 full authority to legislate for the execution of obligations imposed upon Canada, or upon a province, in virtue of an Imperial Treaty. But the rights and jurisdiction of the Dominion and of a province, respectively, in relation to water-powers, created or made available by joint works erected in boundary waters in pursuance of a treaty aiming at improving navigation or the development of power or both can be determined only after disclosure of the facts touching the terms of the treaty, and the nature of the works, as well as the rights of the Dominion and of the province, in respect of the waters to be affected by the execution of the treaty.

Reference Re Waters and Water-Powers, (1929) S.C.R. 200, (1929) 2 D.L.R. 481.

(c) *The Ashburton Treaty, 1842 — Reservation of Rights to Province — Effect of the B.N.A. Act — Whether Act In Conflict with Treaty.*

The Ashburton Treaty of 1842 fixed part of the boundary between British North America and the United States as the middle line of the St. John River; and it provided that navigation of the river should be free and open to both parties. The Treaty also contained a proviso that it should give " no right to either party to interfere with any regulations, not inconsistent with the terms of this Treaty, which the Governments, respectively, of New Brunswick or of Maine may make respecting the navigation of the said river, where both banks thereof shall belong to the same party ". *Held,* the vesting by The B.N.A. Act, 1867, in the Dominion of the exclusive power to control the navigation of the river and the erection of bridges over it, involved no violation of the treaty but was wholly consistent with it. The proviso for protection of the existing powers of the provincial government imposed no obligation upon the British government to maintain those powers unaltered for all time, and the argument could not be upheld that s. 91 (10) of the B.N.A. Act, as to " Navigation and Shipping " must be so construed as not to interfere with the right of the province as recognized by the treaty. The Court below had held as one of the grounds for deciding against the province, that s. 132 of The B.N.A. Act, giving the Dominion the powers necessary for performing the treaty obligations of Canada, had the effect of vesting in the Dominion whatever rights and powers the province enjoyed and exercised under the treaty prior to Confederation. *Held,* since no question was involved as to an obligation to the United States of America, it was not necessary to consider the effect of s. 132.

Atty.-Gen. For N.B. v. C.P.R. and Atty.-Gen. of Can. 94 L.J.P.C. 142, 133 L.T. 436, (1925) 2 D.L.R. 732.

(d) *The Ashburton Treaty, 1842 — Free Use of River — Authorization by State Legislature to Erect Booms and Collect Tolls — Whether Valid.*

By the Ashburton Treaty of 1842, the Rainy River was established as the boundary between Canada and the United States, and the citizens of both countries were declared entitled to the free use of the river. The charter of plaintiff company, granted under the laws of the State of Minnesota empowered it to erect certain booms, and to collect tolls, for their use. In pursuance of these powers, the company erected a main boom and a sheer boom, the latter being wholly on the Canadian side of the river. The effect of the sheer boom was to divert logs floating down the stream to the main boom, where they were sorted. Plaintiff sued for payment of the tolls authorized by its charter. *Held,* plaintiff company's works were on the river without lawful authority. No legislation by a foreign power could entitle the company, by the erection of this sheer boom, to divert Canadian property from Canada into the United States, where it passed into the custody and control of a foreign corporation. The works were unlawful also as an interference with the free right of navigation guaranteed by the treaty. Even apart from these considerations, the alleged right to collect tolls rested solely on the authorization of a State Legislature, which, according to the undisputed evidence, had no power to repeal the Ashburton Treaty. The permission to collect tolls, being in direct conflict with the terms of the treaty, was *ultra vires* the State Legislature and consequently null and void.

Rainy Lake River Boom Corpn. v. Rainy River Lumber Co., (1912) 27 O.L.R. 131, 6 D.L.R. 401.

2. *Canadian Treaties*

(a) *Applicability of the B.N.A. Act, s. 132 to Treaties Made by Dominion — The Statute of Westminster, 1931 — The International Radiotelegraph Convention, 1927.*

The Radio Convention of 1927, to which Canada is a party, illustrates the change which has taken place since the enactment of the B.N.A. Act. Per Lord Dunedin : " This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada *vis-à-vis* to the mother country Great Britain, which is found in these later days expressed in the *Statute of Westminster.* It is not therefore to be expected that such a matter should be dealt with in explicit words in either sec. 91 or sec. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by sec. 132. Being therefore not mentioned explicitly in either sec. 91 or 92, such legislation falls within the general words at the opening of sec. 91 which assign to the Government of the Dominion the power to make laws ' for the Peace, Order, and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces '. In fine, though agreeing that the Convention was not such a treaty as is defined in sec. 132, their Lordships think that it comes to the same thing. " It is Canada as a whole which is bound by the treaty, and it is necessary that the Dominion should pass legislation which can prevent any individual anywhere in Canada from infringing its provisions.

In re Regulation and Control of Radio Communication in Canada, (1932) A.C. 304, 101 L.J.P.C. 94, 146 L.T. 409, 48 T.L.R. 235, (1932) 1 W.W.R. 563, 39 C.R.C. 49, (1932) 2 D.L.R. 81, affirming (1931) S.C.R. 541, (1931) 4 D.L.R. 865.

(b) *Aeronautics — Peace Conference — Convention — The B.N.A. Act, s. 132.*

Under s. 132 of the B.N.A Act the Parliament and Government of Canada have exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the " Convention relating to the Regulation of Aerial Navigation ", which was drawn up by the Supreme Council of the Peace Conference of 1919 and was signed by the representatives of the Allied and Associated Powers, including Canada, and ratified by His Majesty on behalf of the British Empire.

In re Regulation and Control of Aeronautics in Canada, (1932) A.C. 54, 101 L.J.P.C. 1, 146 L.T. 76, 48 T.L.R. 18, (1931) 3 W.W.R. 625, 39 C.R.C. 108, (1932) 1 D.L.R. 58, reversing (1930) S.C.R. 663, (1931) 1 D.L.R. 13.

(c) *Treaty of Versailles — International Labour Conference — Draft Conventions — Duty of Dominion.*

This was a reference to the Supreme Court as to the nature of the obligation of the Dominion of Canada as a member of the International Labour Conference, under the provisions of the Labour Part of the Treaty of Versailles, with relation to draft conventions adopted by the Conference. *Held,* the obligation is simply in the nature of an undertaking to bring the draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

Re Legislative Jurisdiction over Hours of Labour, (1925) S.C.R. 505, (1925) 3 D.L.R. 1114.

(d) *Abrogation of Imperial Treaty — Effect of Joint Action of Canada and United States of America.*

Semble, the Parliament of Canada and the Government of the United States of America, acting together, have power to abrogate a treaty between His Majesty and the United States so far, at least, as it affects the citizens of Canada and the United States.

Smith v. Ont. & Minn. Power Co., (1918) 44 O.L.R. 43, 45 D.L.R. 266, reversing in part 42 O.L.R. 167 (C.A.).

(e) *Nature of Treaty-Making Power — Crown as Treaty-Maker and as Owner of Property — Disputes Between Dominion and Provinces.*

The Dominion Government, in making a treaty with an Indian tribe, is acting in pursuance of national interests, and for the benefit of the country as a whole. This position is not altered if, as a result of a treaty so made,

a substantial benefit is conferred upon one province in particular. " The Crown " which makes a treaty, is the Dominion Government, whereas the result of the treaty may be to vest lands in " the Crown " or the provincial government. Per Lord Loreburn, L. C. : " The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what, is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively."

Dominion of Canada v. Prov. of Ontario. (1910) A.C. 637, 80 L.J.P.C. 32, 103, L.T. 331, 26 T.L.R. 681, C.R. (1910) A.C. 301, affirming 42 S.C.R. 1, which reversed 10 Ex. C.R. 445, 27 C.L.T. 318.

(f) *" Sanctioning A Convention " — Effect — Validity of Provincial Legislation in Conflict with Convention.*

The Japanese Treaty Act, 1907, which sanctions a convention entered into by the United Kingdom respecting commercial relations between Canada and Japan, has given to the provisions of that convention the force and effect of a law of Canada. Being in harmony with existing federal legislation respecting immigration, it becomes a part of Canadian law on that subject. The British Columbia Immigration Act, 1908, being repugnant to the convention, is therefore invalid. Per Irving J. : " The word ' sanction ' ... signifies to ratify a decree or ordinance — in an extended sense to make anything binding. In itself, it conveys the idea of authority by the person sanctioning. It is the lending of a name, an authority, or an influence in order to strengthen and confirm a thing."

Re Nakane; Re Okasake, (1908) 8 W.L.R. 19, 13 B.C.R. 370 (C.A.).

(g) *Validity of Dominion Act Implementing Treaty — Conflicting Provincial Statute — The Migratory Birds Convention Act, 1917 (Dom.), C. 18 — The Game Protection Act, 1916 (Man.), C. 44.*

S. 6 of the Dominion Migratory Birds Convention Act, 1917, at least in so far as it provides that " no one, without lawful excuse, the proof whereof shall lie on him, shall ... have in his possession, any bird ... during the time when the capturing, killing or taking of such bird ... is prohibited by law ", is within the scope of the powers necessary to make effective The Migratory Birds Treaty with the United States, in pursuance of which treaty the Act was passed, and is therefore *intra vires* the Dominion Parliament. The permission given by s. 11 (*b*)of the Manitoba Game Protection Act, 1916, to have wild ducks in one's possession until March 31, is opposed to said Dominion Act, is therefore *ultra vires,* and does not constitute a " lawful excuse " within the meaning of s. 6. *Atty.-Gen. for Ont. v. Atty.-Gen. for Can., (1894) A.C. 189, 63 L.J.P.C. 59, C.R. (11) A.C. 13, 5 Cart. 266; G.T.R. v. Atty.-Gen. for Can., (1907) A.C. 65, 76 L.J. P.C. 23, C.R. (1907) A.C. 1, 7 C.R.C. 472, applied. Quaere,* whether the Dominion has the right to regulate the sale of migratory birds.

R. v. Stuart, (1924) 3 W.W.R. 648, 34 Man. R. 509, 43 C.C.C. 108, (1925) 1 D.L.R. 12 (C.A.).

CANADIAN CONSTITUTIONAL DECISIONS

Attorney-General for Canada v. Attorney-General for Ontario and Others (1937) A.C. 326

(LABOUR CONVENTIONS CASE)

On appeal from the Supreme Court of Canada

The Weekly Rest in Industrial Undertakings Act. 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, of the Parliament of Canada, which in substance gave effect to draft conventions adopted by the International Labour Organisation of the League of Nations in accordance with the Labour Part of the Treaty of Versailles, 1919, and ratified by the Dominion of Canada, were *ultra vires* of the Parliament of Canada and invalid in that the legislation related to matters coming within the class of subject " Property and civil rights in the Province " which was assigned exclusively to the Legislatures of the Provinces by head 13 of s.92 of the British North America Act, 1867.

In re Legislative Jurisdiction over Hours of Labour (1925) Can. S.C.R. 505, referred to.

The legislation could not be justified under s.132 of the British North America Act, which provided that the Parliament of Canada should have " all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries," because the obligations under the ratified conventions were not the obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international juristic person, and they did not therefore arise under a treaty between the British Empire and foreign countries.

In re The Regulation and Control of Radio Communication in Canada (1932) A.C. 304 (1), applied.

(327) Jurisdiction to legislate for the purpose of performing the obligations of a Canadian treaty does not reside exclusively in the Parliament of Canada : In re The Regulation and Control of Aeronautics in Canada (1932) A.C. 54 and In re The Regulation and Control of Radio Communication in Canada (1932) A.C. 304, do not afford a warrant for the contrary view.

For the purposes of the distribution of legislative powers between the Dominion and the Provinces under ss. 91 and 92 there is no such thing as treaty legislation as such. The distribution is based on classes of subjects, and as a treaty deals with a particular class of subject so would the legislative power of performing it be ascertained.

No further legislative competence was obtained by the Dominion from its accession to international status and the consequent increase in the scope of its executive functions. There was no existing constitutional ground for stretching the competence of the Dominion Parliament so that it became enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions

affected the classes of subjects enumerated in s.92 legislation to support the new functions was within the competence of the Provincial Legislatures only; if they did not, the competence of the Dominion Legislature was declared by s.91 and existed *ab origine.* The Dominion could not, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

Further, the present legislation was not concerned with matters of such general importance as to justify the overriding of the normal distinction of powers in ss. 91 and 92.

Dicta of Duff C. J. in *In re The Natural Products Marketing Act* (1936) Can. S.C.R. 398, at 414 *et seq.*, approved and applied.

Lastly, in totality of legislative powers, Dominion and Provincial together, Canada was fully equipped to legislate in performance of treaty obligations, but the legislative powers remained distributed, and if in the exercise of her new functions derived from her new international status Canada incurred obligations, they must so far as legislation was concerned, when they dealt with Provincial classes of subjects, be dealt with by the totality of powers — by co-operation between the Dominion and the Provinces.

1937. January 28. The judgment of their Lordships was delivered by Lord Atkin. This is one of a series of cases brought before this Board on appeal from the Supreme Court of Canada on references by the Governor General in Council to determine the validity of certain statutes of Canada passed in 1934 and 1935. Their Lordships will deal with all the appeals in due course, but they propose to begin with that involving The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act, both because of the exceptional importance of the issues involved and because it affords them an opportunity of stating their opinion upon some matters which also arise in the other cases. At the outset they desire to express their appreciation of the valuable assistance which they have received from counsel, both for the Dominion and for the respective Provinces. No pains have been spared to place before the Board all the material both as to the facts and the law which could assist the Board in their responsible task. The arguments were cogent and not diffuse. The statutes in question in the present case were passed, as their titles recite, in accordance with conventions adopted by the (342) International Labour Organisation of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of June 28, 1919. It was admitted at the bar that each statute affects property and civil rights within each Province; and that it was for the Dominion to establish that nevertheless the statute was validly enacted under the legislative powers given to the Dominion Parliament by the British North America Act, 1867. It was argued for the Dominion that the legislation could be justified either (1) under s. 132* of the British North America Act as being legislation "necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, toward foreign countries, arising under treaties between the Empire and such foreign countries," or (2) under the general powers, sometimes called the residuary powers, given by s. 91 to the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The Provinces contended :

As to (1) — (*a*) That the obligations, if any, of Canada under the labour conventions did not arise under a treaty or treaties made between the Empire and foreign countries : and that therefore s. 132 did not apply. (*b*) That the Canadian Government had no executive authority to make any such treaty as was alleged. (*c*) That the obligations said to have been incurred, and the legislative powers sought to be exercised, by the Dominion were not incurred and exercised in accordance with the terms of the Treaty of Versailles.

As to (2), that if the Dominion had to rely only upon the powers given by s. 91, the legislation was invalid, for it related to matters which came within the classes of subjects exclusively assigned to the Legislatures of the Provinces — namely, property and civil rights in the Province.

In order to indicate the opinion of the Board upon these contentions it will be necessary briefly to refer to the Treaty of Versailles, Part XIII, Labour : to the procedure prescribed by it for bringing into existence labour conventions : and to (343) the procedure adopted in Canada in respect thereto. The Treaty of Peace, signed at Versailles on June 28, 1919, was made between the Allied and Associated Powers of the one part and Germany of the other part. The British Empire was described as one of the Principal Allied and Associated Powers, and the High Contracting Party for the British Empire was His Majesty the King, represented generally by certain of his English Ministers, and represented for the Dominion of Canada by the Minister of Justice and the Minister of Customs, and for the other Dominions by their respective Ministers. The treaty began with Part I of the covenant of the League of Nations, by which the high contracting parties agreed to the covenant, the effect of which was that the signatories named in the annex to the convenant were to be the original members of the League of Nations. The Dominion of Canada was one of the signatories and so became an original member of the League. The treaty then proceeds in a succession of parts to deal with the agreed terms of peace, stipulations, of course, entered into not between members of the League, but between the high contracting parties, i.e., for the British Empire, His Majesty the King. Part XIII, entitled "Labour," after reciting that the object of the League of Nations is the establishment of universal peace, and that such a peace can only be established if it is based on social justice, and that social justice requires the improvement of conditions of labour throughout the world, provides that the high contracting parties agree to the establishment of a permanent organization for the promotion of the desired objects, and that the original and future members of the League of Nations shall be the members of this organization. The

* See p. 22 below.

organization is to consist of a general conference of representatives of the members and an International Labour Office. After providing for meetings of the conference and for its procedure the treaty contains articles 405 and 407:

Article 405

" (1) When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should [344] take the form : (*a*) of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or (*b*) of a draft international convention for ratification by the Members.

" (2) In either case a majority of two-thirds of the votes cast by the Delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

" (3) In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

" (4) A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention to each of the Members.

" (5) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

" (6) In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

" (7) In the case of a draft convention, the Members will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

" [345] (8) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

" (9) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

" (10) The above Article shall be interpreted in accordance with the following principle : In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned."

Article 407

" If any convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the Delegates present, it shall nevertheless be within the right of any of the Members of the Permanent Organization to agree to such convention among themselves.

" Any convention so agreed to shall be communicated by the Governments concerned to the Secretary-General of the League of Nations, who shall register it."

It will be observed that a draft convention is adopted by a majority of two-thirds of the delegates present : and that at the stage of adoption it has no binding effect on the members: nor do the delegates of members sign it or purport to enter into an obligation on behalf of the members whose delegates they are. " Ratification ", therefore, as used in para. 7 of art. 405 is not used in the ordinary sense in which it is used in respect of treaties, the formal adoption by the high contracting party of a previous assent conveyed by the signature of so-called plenipotentiaries. " Consent to " or " accession to " would perhaps better describe the transaction (346) which involves the creation for the first time of any obligation under the convention.

In accordance with the provisions of Part XIII draft conventions were adopted by general conferences of the International Labour Organisation as follows :

October 29-November 29, 1919, Conference. Draft Convention limiting the hours of work in industrial undertakings.

October 25-November 19, 1921, Conference. Draft Convention concerning the application of the weekly rest in industrial undertakings.

May 30-June 16, 1928, Conference. Draft Convention concerning the creation of minimum wage-fixing machinery.

Each of the conventions included stipulations purporting to bind members who ratified it to carry out its provisions, the first two conventions by named dates — namely, July 1, 1921, and January 1, 1924, respectively. These three conventions were in fact ratified by the Dominion of Canada, Hours of Work on March 1, 1935, Weekly Rest on March 1, 1935, and Minimum Wages on April 12, 1935.

In each case in February and March, 1935, there had been passed resolutions of the Senate and House of

Commons of Canada approving them. The ratification was approved by order of the Governor General in Council, was recorded in an instrument of ratification executed by the Secretary of State for External Affairs for Canada, Mr. Bennet, and was duly communicated to the Secretary-General of the League of Nations. The statutes, which in substance give effect to the draft conventions, were passed by the Parliament of Canada and received the Royal Assent, " Hours of Work ", on July 5, 1935, to come into force three months after assent; " Weekly Rest ", on April 4, 1935, to come into force three months after assent; " Minimum Wage ", on July 28, 1935, to come into force so far as the convention provisions are concerned, when proclaimed by the Governor in Council, an event which has not yet happened. In 1925 the Governor General in Council referred to the Supreme Court questions as to the obligations (347) of Canada under the provisions of Part XIII of the Treaty of Versailles, and as to whether the Legislatures of the Provinces were the authorities within whose competence the subject-matter of the conventions lay. The answers to the reference, which are to be found in In re Legislative Jurisdiction over Hours of Labour (1), were that the Legislatures of the Provinces were the competent authorities to deal with the subject-matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any Province : and that the obligation of Canada was to bring the convention before the Lieutenant-Governor of each Province to enable him to bring the appropriate subject-matter before the Legislature of his Province, and to bring the matter before the Dominion Parliament in respect of so much of the convention as was within their competence. This advice appears to have been accepted, and no further steps were taken until those which took place as stated above in 1935.

Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive of the government of the day decides to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it (348) has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive : but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the States as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.

Reverting again to the original analysis of the contentions of the parties, it will be seen that the Provincial contention 1 (*b*) relates only to the formation of the treaty obligation, while 1 (*c*) has reference to the alleged limitation of both executive and legislative action by the express terms of the treaty. If, however, the Dominion Parliament was never (349) vested with legislative authority to perform the obligation these questions do not arise. And, as their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in accordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the questions raised by the contentions 1 (*b*) and (*c*), which in that event become immaterial. Counsel did not suggest any doubt as to the international status which Canada had now attained, involving her competence to enter into international treaties as an international juristic person. Questions were raised both generally as to how the executive power was to be exercised to bind Canada, whether it must be exercised in the name of the King, and whether the prerogative right of making treaties in respect of Canada was now vested in the Governor General in Council, or his Ministers, whether by constitutional usage or otherwise, and specifically in relation to the draft conventions as to the interpretation of the various paragraphs in article 405 of the Treaty of Versailles, and as to the effect of the time limits expressed both in article 405 and in the conventions themselves. Their Lordships mention these points for the purpose of making it clear that they express no opinion upon them.

The first ground upon which counsel for the Dominion sought to base the validity of the legislation was section 132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the

British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the Radio case (1), and their Lordships do not think that the proposition admits of any doubt. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the (350) Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the Radio case (1), that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the uncontemplated event. A further attempt to apply the section was made by the suggestion that while it does not apply to the conventions, yet it clearly applies to the Treaty of Versailles itself, and the obligations to perform the conventions arise " under " that treaty because of the stipulations in Part XIII. It is impossible to accept this view. No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion, of their own volition acceded to the conventions, a *novus actus* not determined by the treaty. For the purposes of this legislation the obligation arose under the conventions alone. It appears that all the members of the Supreme Court rejected the contention based on section 132, and their Lordships are in full agreement with them.

If, therefore, section 132 is out of the way, the validity of the legislation can only depend upon section 91 and 92. Now it had to be admitted that normally this legislation came within the classes of subjects by section 92 assigned exclusively to the Legislatures of the Provinces, namely — property and civil rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court in 1925. How, then, can the legislation be within the legislative powers given by section 91 to the Dominion Parliament ? It is not within the enumerated classes of subjects in section 91 : and it appears to be expressly excluded from the general powers given by the first words of the section. It appears highly probable that none of the members of the Supreme Court would have departed from their decision in 1925 had it not been for the opinion of the Chief Justice that the judgments of the Judicial Committee in the Aeronautics case (2) and (351) the Radio case (1) constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides exclusively in the Parliament of Canada. Their Lordships cannot take this view of those decisions. The Aeronautics case (2) concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132, therefore, clearly applied, and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion. The judgment in the Radio case (1) appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in section 92, or even within the enumerated classes in section 91. Part of the subject-matter of the convention, namely — broadcasting, might come under an enumerated class, but if so it was under a heading " Interprovincial Telegraphs ", expressly excluded from section 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

For the purposes of sections 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect. If the position of lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters. Nor is (352) it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separate the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connexion with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in section 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by section 91 and existed *ab origine*. In other words, the Dominion cannot, merely by making promises to foreign

countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

But the validity of the legislation under the general words (353) of section 91 was sought to be established not in relation to the treaty-making power alone, but also as being concerned with matters of such general importance as to have attained " such dimensions as to affect the body politic ", and to have " ceased to be merely local or provincial," and to have " become matter of national concern ". It is interesting to notice how often the words used by Lord Watson in *Attorney-General for Ontario v. Attorney-General for the Dominion* (1) have unsuccessfully been used in attempts to support encroachments on the Provincial Legislative powers given by section 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act (2) dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice, naturally from his point of view, excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this, they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. It is only necessary to call attention to the phrases in the various cases, " abnormal circumstances," " exceptional conditions," " standard of necessity " (Board of Commerce case (1)), " some extraordinary peril to the national life of Canada," " highly exceptional," " epidemic of pestilence " (Snider's case (2)), to show how far the present case is from the conditions which may override the normal distribution of powers in sections 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point, and preclude further disputes.

It must not be thought that the result of this decision is (354) that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure. The Supreme Court was equally divided and therefore the formal judgment could only state the opinions of the three judges on either side. Their Lordships are of opinion that the answer to the three questions should be that the Act in each case is *ultra vires* of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

British North America Act

Section 132

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the empire and such foreign countries.

Resolution Passed by Canadian House of Commons June 21, 1926.

Whereas the Imperial conference of 1923 recommended for the acceptance of the governments of the empire represented that the following procedure should be observed in the negotiation, signature and ratification of international agreements :

The word " treaty " is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between heads of states, signed by plenipotentiaries provided with full powers issued by the heads of the states, and authorizing the holders to conclude a treaty.

I

1. *Negotiation.*

(*a*) It is desirable that no treaty should be negotiated by any of the governments of the empire without due consideration of its possible effect on other parts of the empire, or, if circumstances so demand, on the empire as a whole.

(*b*) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other governments of the empire likely to be interested are informed, so that, if any such government considers that its interests would be affected it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.

(*c*) In all cases where more than one of the governments of the empire participates in the negotiations, there should be the fullest possible exchange of views between those governments before and during the negotiations. In the case of treaties negotiated at international conferences, where there is a British Empire delegation, on which, in accordance with the now established practice the dominions and India are separately represented, such representation should also be utilized to attain this object.

(*d*) Steps should be taken to ensure that those governments of the empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

2. *Signature.*

(*a*) Bilateral treaties imposing obligations on one part of the empire only should be signed by a representative of the government of that part of the empire in respect of which the obligations are to be undertaken, and the

preamble and text of the treaty should be worded as to make its scope clear.

(*b*) Where a bilateral treaty imposes obligations on more than one part of the empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.

(*c*) As regards treaties negotiated at international conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the empire represented at the conference should be continued, and the full powers should be in the form employed at Paris and Washington.

3. *Ratification.*

The existing practice in connexion with the ratification of treaties should be maintained.

II

Apart from treaties made between heads of states it is not unusual for agreements to be made between governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments, who do not act under full powers issued by the heads of the states : they are not ratified by the head of the states, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued, but before entering on negotiations the governments of the empire should consider whether the interests of any other part of the empire may be affected, and, if so, steps should be taken to ensure that the government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views.

And whereas it was further agreed that the existing procedure in relation to ratification of treaties was as follows :

(*a*) The ratification of treaties imposing obligations on one part of the empire is effected at the instance of the government of that part;

(*b*) The ratification of treaties imposing obligations on more than one part of the empire is effected after consultation between the governments of those parts of the empire concerned. It is for each government to decide whether parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government.

This House approves of the procedure proposed for the negotiation, signature and ratification of treaties and conventions, and considers further that before His Majesty's Canadian ministers advise ratification of a treaty or convention affecting Canada, or signify acceptance of any treaty, convention or agreement involving military or economic sanctions, the approval of the parliament of Canada should be secured.

EXTRACTS FROM DEBATES OF THE HOUSE OF COMMONS OF CANADA 1928, Vol. II, p. 1974

Mr. Mackenzie King : "... I submit that the day has passed when any government or executive should feel that they should take it upon themselves without the approval of parliament, to commit a country to obligations involving any considerable financial outlays or active undertakings. In all cases where obligations of such a character are being assumed internationally, parliament itself should be assured of having the full right of approving what is done before binding commitments are made. I would not confine parliamentary approval only to those matters which involve military sanctions and the like. I feel parliamentary approval should apply where there are involved matters of large expenditure or political considerations of a far-reaching character."

2. Costa Rica

[*Texto original en español*]

Ministerio de Relaciones Exteriores
San José
29 de noviembre de 1949

. . .

En lo que respecta al punto primero [Derecho relativo a los tratados], no tenemos una legislación expresa. Unicamente existen disposiciones en nuestra nueva Constitución Política de 8 de noviembre de 1949, que son las siguentes :

" Artículo 7, Ninguna autoridad puede celebrar pactos, Tratados o Convenciones que se opongan a la soberanía e independencia de la República. Quien lo haga será juzgado por traición a la Patria.

" Cualquier Tratado o Convención que tramite el Poder Ejecutivo, referente a la integridad territorial o a la organización política del país, requerirá la aprobación de la Asamblea Legislativa por votación no menor de las tres cuartas partes de la totalidad de sus miembros y la de los dos tercios de votos de una Asamblea Constituyente convocada al efecto. " Además, un pacto, tratado o convención celebrado sin los requisitos anteriormente expuestos, sería nulo, de conformidad con lo establecido por el artículo 10, párrafo 1 de la misma Constitución que dice :

" Artículo 10. Las disposiciones del Poder Legislativo o del Poder Ejecutivo contrarias a la Constitución serán absolutamente nulas . . . Por otra parte, el artículo 121, incisos 4° y 6°., dice :

" Artículo 121. Además de las otras atribuciones que le confiera esta Constitución, corresponde exclusivamente a la Asamblea Legislativa :

. . .

" 4°. aprobar o improbar los convenios internacionales, tratados públicos y concordatos;

. . .

" 6°. autorizar al Poder Ejecutivo para declarar el estado de defensa nacional y para concertar la paz; "

Tiene atingencia con el punto en cuestión lo establecido por la Constitución Política en su artículo 140, incisos 10 y 12 :

" Artículo 140. Son deberes y atribuciones que corresponden conjuntamente al Presidente (de la República) y al respectivo Ministro de Gobierno :

. . .

" 10) Celebrar convenios, tratados públicos y concordatos, promulgarlos y ejecutarlos una vez aprobados y ratificados por la Asemblea Legislativa, o si fuere del caso por una Asamblea Constituyente, según lo dispuesto en esta Constitución;

. . .

" 12) Dirigir las relaciones internacionales de la República."

3. Denmark

[*Original text : English*]
Permanent Delegation of Denmark
to the United Nations
12 January 1950

In a note of 11 July 1949 — LEG 291/01/YLL — you have been good enough to ask the Government of Denmark, in order to enable the International Law Commission to implement its decision to undertake the codification of three topics of international law, namely the law of treaties, arbitral procedure and the regime of the high seas, to furnish the United Nations with materials from Danish sources relevant to each of the above-mentioned topics.

In this connexion I have the honour to inform you, on instructions just received from my Government, that the Danish authorities concerned, to their sincere regret, by reason of the comprehensive character of the topics concerned, have not deemed it possible within the period stipulated to furnish all the materials which have been asked for.

The Danish authorities, however, in view of the desirability of furnishing as soon as possible the information already available have prepared a preliminary statement with six annexes, which I hereby have the honour to transmit to you. As soon as I receive more detailed material from my Government I will take great pleasure in immediately forwarding same to you.

[Preliminary statement referred to above is reproduced hereinafter (*Translated from Danish*)]

Law of Treaties

Reference may here be made to Section 18 of the Danish Constitution which contains a provision reading as follows :

" The King may not, without the consent of the Parliament (Rigsdag), declare war or conclude peace, enter into or withdraw from alliances or treaties of commerce, cede any part of the country or undertake any obligation which would alter the existing constitutional situation. "

Annexed are two copies of articles published in the *Revue de Droit International et de Législation Comparée*, namely, (1) *L'Accord Dano-Norvégien sur le Groënland oriental et son historique,* by Gustav Rasmussen, and (2) *Statut juridique du Groënland oriental,* by G. Cohn, which deal with some problems of treaty law in connexion with Denmark's title to Greenland.*

* Not reproduced here.

4. France

[*Texte original en français*]
Ministère des affaires étrangères
Le 28 février 1950

Par lettre n° LEG 291/01/YLL, vous avez bien voulu, vous fondant sur l'article 19, paragraphe 2, du statut de la Commission du droit international, me demander de fournir à ladite Commission les textes des lois, décrets, décisions judiciaires, traités, correspondance diplomatique et autres documents relatifs : 1) aux traités; 2) à la procédure arbitrale; 3) au régime de la haute mer.

J'ai l'honneur de vous faire savoir que le Gouvernement français ne peut, à son regret, envisager l'envoi de toute la documentation parue sur ces trois problèmes classiques qui représente plusieurs tonnes de ses archives. Il est prêt cependant à communiquer à la Commission ceux de ces textes qu'il possède et qu'elle lui aura demandés dans les conditions prévues à l'article 19, paragraphe 2.

. . .

5. Israel

[*Original text : English*]
Ministry for Foreign Affairs
Hakirya
24 January 1950

1. The Minister for Foreign Affairs presents his compliments to the Assistant Secretary-General in charge of the Legal Department and, with reference to his Note No. LEG 291/01/YLL dated 11 July 1949, forwarding the requests of the International Law Commission regarding the codification of International Law, has the honour to submit the following information on behalf of the Government of Israel. In addition to the matters to which reference is made in the said Note, observations are also included on the question of territorial waters in accordance with the resolution adopted by the General Assembly on 6 December 1949 (A/1219).

2. By way of preface it is pointed out that the State of Israel came into existence only on 15 May 1948. It has not, therefore, had much experience of its own in the topics of international law which have been selected for codification. The Government has, however, thought that it would be convenient to survey the matters in the light of developments during the period in which Palestine was under mandate, so far as this in known from published materials, before describing some of the particular problems which arose after the termination of the Mandate. It adopts this approach in the belief that it would be useful for the International Law Commission to have information on these matters from this special viewpoint. There is, moreover, a practical reason for this, because the law hereinafter to be described, at all events to the extent that municipal law is involved, is for the greater part still in force in Israel. By Section 11 of the Law and Administration Ordinance, 5708 — 1948, (Official Gazette of the Provisional Government of Israel, No. 2, 21 May 1948, Supplement No. 1, page 1), the first ordinance enacted in Israel after the Declaration of Independence, it was provided that

the law which was in force in Palestine on 14 May 1948, would be in force to the extent that it was not inconsistent with that Ordinance or with other enactments made by or under the authority of the Provisional State Council and with the modifications resulting from the establishment of the State of Israel and its authorities. This means, broadly speaking, that the law which was in force during the Mandatory period, comprising not only enacted law but also judicial decisions which have the force of law by virtue of the English doctrine of *stare decisis*, (including, within certain limitations, the general principles of English common law and equity if there are no relevant Palestinian provisions in accordance with Article 46 of the Palestine Order-in-Council, 1922) has remained in force. The Supreme Court of Israel has given a restricted definition to the phrase "modifications resulting from the establishment of the State of Israel and its authorities" contained in Section 11 of the Law and Administration Ordinance, and that aspect need not detain us. At the same time, however, it has given an indication that it would not necessarily continue to regard itself as bound by a previous decision of the Palestinian Courts (and, indeed, the British Courts) if it should come to the conclusion that it was reached by the application of incorrect principles. Nevertheless, on the matters with which we are concerned the Supreme Court of Israel has not had occasion to pronounce its views, and it can therefore be assumed for our purposes that, unless specifically stated, the doctrines hereinafter to be enumerated, and based upon the practice of the mandatory period, have at least a considerable persuasive value today, even if they are not binding law.

3. While, therefore, in the main we shall concentrate upon legal developments in the period of the British Mandate over Palestine, we shall not exclude where necessary carrying the description a stage further to include on the basis of the experience and practice of this Government, certain aspects which have arisen since the termination of the British Mandate. The Government of Israel believes that by so doing it will assist in the development of international law, particularly in regard to the problems which arise when dependent territories (whether Trusteeship territories or Colonies, or other forms of non-self-governing territories) obtain their independence. The Secretary-General has recently written that the changes which have come about in the last few years in the status of a number of States have presented some delicate juridical and technical problems: see *Signatures, etc. concerning Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository*, 1949, page 3. It is possible that these delicate questions concern not only the law of treaties, in relation to which that statement was made, and the observations which follow have as their object to give some indication of the difficulties in connexion with the topics now selected for codification.

. . .

Law of Treaties

4. By way of introduction to this section it should be pointed out that the development of law of treaties, so far as concerned Palestine, was conditioned by two basic factors. The first was the provisions of the Mandate itself conferring a certain degree of treaty-making power upon the Mandatory Government, (i.e., the Government of the United Kingdom, as opposed to the local Administration of Palestine). The second is the English legal doctrine regarding the relations between treaty obligations and the municipal law of the country. This section of our remarks will be sub-divided as follows:

(*a*) Treaty-making power under the Mandate and the manner of its exercise (paragraphs 6 - 9);

(*b*) Relationship between treaty obligations and the internal law of the country (paragraphs 10 - 14);

(*c*) Judicial decisions (paragraphs 15 - 19);

(*d*) Particular problems arising out of the termination of the Mandate (paragraphs 20 - 29);

(*e*) Some developments since the termination of the British Mandate (paragraphs 30 - 32).

(a) *Treaty-making power under the Mandate and the manner of its exercise*

5. The Mandate for Palestine contained five separate Articles 10, 12, 18, 19, and 20, which together conferred treaty-making power opon the Mandatory Government. Thus, Article 10 of the Mandate provides:

> "Pending the making of special extradition agreements relating to Palestine and extradition treaties in force between the Mandatory and other foreign powers shall apply to Palestine."

In conformity with this Article Extradition Treaties between the United Kingdom and forty foreign States were made applicable to Palestine also. In addition, extradition agreements between Palestine and Egypt and Palestine and the Lebanon and Syria respectively were made in the early days of the civil administration (see the Second Schedule to the Extradition Ordinance — Drayton, *Laws of Palestine*, vol. 1, page 677, at page 687) and with what was then known as Transjordan in 1934 (amended in 1935), see Palestine Gazette No. 455 of 26 July 1934, Supplement No. 2, page 657, and No. 530 of 15 August 1935, *ibid.* page 759. It will be observed that if taken literally, pending the making of special extradition agreements relating to Palestine, the existing extradition treaties of the United Kingdom were to "apply" to Palestine. Two questions arise from this. The first is: can it be said that Palestine was a "party" to such treaties? The importance of this problem was to arise after the determination of the Mandate, and is discussed in paragraphs 20-25 below. The second is: were the other parties to the Extradition Treaties brought into a treaty relationship with Palestine as a consequence of Article 10 of the Mandate? In the circumstances this question did not arise for the Government of Israel after the termination of the Mandate, and the attitude of the Governments concerned during the subsistence of the Mandate is not known. It can be observed, however, that an automatic application of extradition treaties in this way may not be entirely satisfactory. If, for example, the original parties have expressly excluded the extradition of their own nationals, can it be said that the automatic application of the treaty to Palestine will imply that Palestinian citizens are not extraditable?

6. Article 12 of the Mandate provided as follows :

"The Mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue exequaturs to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits."

How the treaty-making power which this Article implies was exercised can be seen from the following facts. The more important conventions or agreements made in the name of Palestine in respect of matters other than those covered by extradition agreements and commercial agreements and treaties, were as follows :

Agreement with Egypt, dated 12 January 1929, regarding the reciprocal enforcement of judgments, Palestine Gazette No. 228 of 1929, page 96, L.N.T.S. 9;

Agreement with Egypt, dated 28 December 1933, regarding the transit of Palestinian pilgrims through Egyptian territory; Annual Report of H.M. Government to the Council of the League of Nations, 1944, at page 92;

Agreement of 2 February 1926, with France, the *bon voisinage* Agreement, covering a number of administrative matters arising out of the common frontiers between Palestine and Syria and the Lebanon respectively, amended 21 March 1927, (Palestine Gazette No. 101 of 1926, page 203, No. 185 of 1927, page 268, 56 L.N.T.S. 79 and 63 L.N.T.S. 426).

Agreements dated 18 September 1935, with Syria, Palestine Gazette, No. 542 of 1935, Supplement No. 2, page 904, and 16 June 1938, with Transjordan, Palestine Gazette No. 790 of 1930, Supplement No. 2, page 665, regarding inter-territorial motor traffic.

In addition, Agreements between the United Kingdom and nineteen other foreign countries respecting legal proceedings in civil and commercial matters, and with two foreigu countries regarding travel facilities, were made applicable to Palestine.

7. Article 18 of the Mandate provided as follows :

"The Mandatory shall see that there is no discrimination in Palestine against the nationals of any State Member of the League of Nations (including companies incorporated under its laws) as compared with those of the Mandatory or of any foreign State in matters concerning taxation, commerce or navigation, the exercise of industries or professions, or in the treatment of merchant vessels or civil aircraft. Similarly, there shall be no discrimination in Palestine against goods originating in or destined for any of the said States, and there shall be freedom of transit under equitable conditions across the mandated area.

"Subject as aforesaid and to the other provisions of this Mandate, the Administration of Palestine may, on the advice of the Mandatory, impose such taxes and customs duties, as it may consider necessary, and take such steps as it may think best to promote the development of the natural resources of the country and to safeguard the interests of the population. It may also, on the advice of the Mandatory, conclude a special customs agreement with any State the territory of which in 1914 was wholly included in Asiatic Turkey or Arabia."

The commercial agreements and treaties of the Mandatory Government can be divided into two categories. The first category contains the agreements of general character. Thus, the treaties of commerce and navigation between the United Kingdom and ten foreign countries were made applicable to Palestine; trade or commercial agreements between the United Kingdom and five foreign countries were made applicable to Palestine; and agreements on particular aspects of commercial relations with six foreign countries were made applicable to Palestine. The second category relates to the agreements concerning the particular problem of the relations between Palestine and the other Middle Eastern States which formed part of the Asiatic Turkey or Arabia prior to the First World War, in accordance with the last sentence of Article 18. Thus :

Customs Agreement between Palestine and Syria and the Lebanon, of 27 November 1939, Palestine Gazette, No. 966 of 1939, Supplement No. 2, page 1339;

Trade Agreement between Palestine and Egypt of 18 August 1936, Palestine Gazette No. 642 of 1936, Supplement No. 2, page 1210, 176 L.N.T.S. 177;

Customs Agreement between Palestine and Iraq of 14 December 1936, Palestine Gazette No. 668 of 1937, Supplement No. 2, page 668, 177 L.N.T.S. 221;

Agreement with Transjordan of 26 September 1928, Palestine Gazette, No. 220, of 1928, page 591, concerning the transit of goods.

It can here be noted, in parenthesis, that no uniform policy seems to have been followed regarding the registration of all these treaties or agreements with the Secretariat of the League of Nations in accordance with the terms of Article 18 of the Covenant of the League.

8. Article 19 of the Mandate was the only Article which imposed a positive duty upon the Mandatory Government "to adhere on behalf of the Administration of Palestine" to certain international conventions. The terms of Article 19 are as follows :

"The Mandatory shall adhere on behalf of the Administration of Palestine to any general international conventions, already existing, or which may be concluded hereafter with the approval of the League of Nations, respecting the Slave Traffic, the traffic in arms and ammunitions, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property."

At the same time Article 20 required the Mandatory to co-operate on behalf of the Administration of Palestine so far as religious, social and other conditions may permit, in the execution of any common policy adopted by the League of Nations for preventing and combating disease, including diseases of plants and animals. The following list of general international conventions which were extended to Palestine is taken from "A Survey of Palestine" prepared in December 1945 — January 1946 by the Government of Palestine, volume 2, pages 963-6.

Subject	Title of convention	Date of accession
UNDER ARTICLE 19 :		
Slave trade	International Convention with the object of securing the Abolition of Slavery and the Slave Trade (Geneva, 1926)	1927 ratification
	International Agreement for the Suppression of the White Slave Traffic (Paris, 1904)	1932
	International Convention for the Suppression of the White Slave Traffic (Paris, 1910)	1932
	International Convention for the Suppression of the Traffic in Women and Children (Geneva, 1921-1922)	1932
Traffic in drugs	International Opium Convention and subsequent relevant papers (The Hague, 1912)	1924
	International Convention relating to Dangerous Drugs (Geneva, 1925)	1928
Commercial equality	Protocol on Arbitration Clauses (In commercial matters) (Geneva, 1923)	1926
	International Convention relating to the simplification of Customs Formalities (Geneva, 1923)	1924
	International Convention for the unification of certain rules relating to Bills of Lading (Brussels, 1924)	1931
	International Convention relating to International Exhibitions (Paris, 1928)	1930
	International Convention for the Execution of Foreign Arbitral Awards (Geneva, 1927)	1931
	International Agreement regarding False Indications of Origin on Goods (1925)	1933
	International Convention relating to Stamp Laws in connexion with Bills of Exchange and Promissory Notes (Geneva, 1930)	1936
	International Convention relating to Stamp Laws in connexion with cheques (Geneva, 1931)	1936
Freedom of transit and navigation	Convention and Statute on Freedom of Transit (Barcelona, 1921)	1924
	Convention and Statute on the Regime of Navigable Waterways of International Concern and Additional Protocol (Barcelona, 1921)	1924
	Declaration recognizing the Right to a Flag of States having no Sea Coast (Barcelona, 1921)	1922
	Convention and Statute of the International Regime of Railways (Geneva, 1923)	1925
	Convention and Statute of the International Regime of Maritime Ports (Geneva, 1923)	1925
	Convention relating to the Transmission in Transit of Electric Power (Geneva, 1923)	1925
	Convention relating to the International Circulation of Motor Vehicles (Paris, 1926)	1930
	International Convention relating to Taxation of Foreign Motor Cars (1931)	1936
Aerial Navigation	Convention relating to the Regulation of Aerial Navigation and Additional Protocol (1919-1920)	1922
	International Convention for Sanitary Control of Aerial Navigation (The Hague, 1933)	1935
	International Sanitary Convention for Aerial Navigation, 1944 (Washington, 1945)	1945
	Convention for the Unification of certain rules relating to International Carriage by Air (Warsaw, 1929)	1935
Postal, telegraphic and wireless communication	Universal Postal Convention (Cairo, 1934)	1935
	International Telecommunications Convention (Madrid, 1932)	1935
	European Broadcasting Convention (Lucerne, 1933)	1935
	Agreement concerning Insured Letters and Boxes (Cairo, 1934)	1935

Subject	Title of convention	Date of accession
Literary, artistic and industrial property	International Convention relative to the Protection of Literary and Artistic Works (Berlin, 1908)	1924
	Additional Protocol to the International Copyright Convention (Berne, 1914)	1924
	International Convention relative to the Protection of Literary and Artistic Works (Rome, 1928)	1931
	International Convention for the Protection of Industrial Property (The Hague, 1925)	1933
UNDER ARTICLE 20 :		
Diseases	International Sanitary Convention (Paris, 1926)	1928
	International Sanitary Convention, 1944 (Washington, 1945) (See also under "Aerial Navigation" above)	1945
	International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Geneva, 1929)	1931
	International Convention for Mutual Protection against Dengue Fever (Athens, 1934)	1935
	International Convention prohibiting the Use of White (Yellow) Phosphorous in the Manufacture of Matches (Berne, 1906)	1925
	International Agreement as to Contagious Disease of Animals (Paris, 1924)	1927

In addition, Palestine acceded to the convention for the suppression of the circulation of, and traffic in, obscene publications (Geneva, 1923); the convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923); the convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923); and the international convention for the regulation of whaling (Geneva, 1931). In addition, twenty-four of the international conventions affecting labour were applied in Palestine in one form or another. Details can be found in the above quoted Survey of Palestine, at pages 751 ff.

(b) *Relationship between Treaty Obligations and the Internal Law of the Country*

9. In accordance with British constitutional theory, and in contradiction to the constitution position in many other States, it can be said that the terms of an international treaty did not, by the mere fact of ratification of the treaty or its coming into force, become part of the internal law of the country, save to the extent that its terms were actually incorporated into municipal legislation. During the period of the Mandate, the Administration and the municipal courts of Palestine acted in accordance with this doctrine, and, following the general remarks contained in paragraph 2 above, in the absence of any new legislation regulating the subject, the Government of Israel has continued to act upon it. The practice during the period of the Mandate, a practice which referred to all the types of treaties referred to in the Mandate itself, was that the Mandatory Government performed all that was internationally necessary in order to establish treaty relations for Palestine, including the act of ratification, where necessary, except in the few cases in which the Government of Palestine concluded treaties directly itself. The extension of treaties to Palestine was effected in one of two ways: either by exchange of Notes with the third State concerned, extending the application of the relevant Treaty to Palestine with or without modification, or, in the case of the multilateral Treaties, by notification to the depository Government (including the Secretary-General of the League of Nations or of the United Nations, as the case may be) in accordance with the terms of the Convention. Notice of the extension of treaties to Palestine was usually given in the Palestine Gazette, but no attempt at any systematic publication in Palestine of the texts of such treaties was carried out, interested persons having to refer either to the official texts published in London or to the League of Nations Treaty Series. This was so even in the few cases in which international treaties were made solely for Palestine. In addition to this information on the treaty relations of Palestine was regularly included in the annual reports submitted by the Mandatory Government to the Council of the League of Nations on the administration of Palestine and Transjordan, but it is not certain if this information is complete, even up to the year 1939 when the last of these Annual Reports was made. This source of information does not exist for the last nine years of the Mandatory regime. Recently the Government of Israel has commenced the regular publication of treaties of which Israel is a party in Reshumot, Kitvei Amana (Israel Gazette, Treaty Series).

10. Such notification was not, however, of legislative effect in Palestine. If the treaty necessitated changes in the municipal law in order to bring it into full effect internally, specific legislation had to be enacted. Broadly speaking, it can be said that here, too, a double procedure was followed. In many cases the necessary legislation was in effect enacted as an Imperial Statute by the Imperial Parliament at Westminster. Such legislation, which in many instances was merely of an enabling

character, usually contained a standard-form section enabling its provisions to be extended to British Colonies and other foreign territories over which His Britannic Majesty exercised jurisdiction. Usually, but not invariably, the text of any such legislation, as well as the text of the Orders extending it to Palestine, was published locally in Palestine in the three official languages of the country. Whether so published or not it thus became part of the law of Palestine, the Courts having held that so far as concerns Orders of the King in Council, publication in Palestine was not an essential ingredient to their validity : *Benjamin v. Commissioner for Migration and others* 8 P.L.R. (1941) 327. Following are examples of this type of legislation :

Title	*Reference*
Air Navigation Act, 1920	Drayton, *The Laws of Palestine,* Vol. III, p. 2401
The Arbitration (Foreign Awards) No. 2 Order, 1931	*Ibid,* p. 2457
Copyright Act 1911 (Extension to Palestine) Order, 1924	*Ibid,* p. 2499
The Copyright (Rome Convention) Order, 1933	*Ibid,* p. 2501
The Copyright (United States of America) Order, 1915 (Extension to Palestine) Order, 1933	*Ibid,* p. 2511
Carriage by Air (Colonies, Protectorates and Mandated Territories) Order, 1934	*Palestine Gazette* No. 511 of 1935, Vol. II, Supplement No. 2, p. 425
Treaty of Peace (Covenant of the League of Nations) Order, 1935	*Ibid,* p, 1069
The Carriage by Air (Parties to Convention) Order, 1937	*Ibid.* No. 722, Supplement No. 2 of 1937, Vol. III, p. 872
Air Navigation (Colonies, Protected and Mandated Territories) (Amendment) Order, 1937.	*Ibid.* No. 748, Supplement No. 2 of 1938, Vol. II, p. 1
Air Navigation (Colonies, Protected and Mandated Territories) (Amendment) (2) Order, 1937	*Ibid.* No. 756, Supplement No. 2 of 1938, Vol. II, p. 238
International Convention on the Stamp Law, in connexion with cheques. Extension to Palestine Notice	*Ibid.* No. 764, Supplement No. 2 of 1938, Vol. II, p. 319
The Geneva Conventions, 1906 and 1929 (Mandated Territories) Order-in-Council, 1937, Extension to Palestine Notice	*Palestine Gazette* No. 774 Supplement No. 2 of 1938, Vol. II, p. 447
The Carriage by Air (Parties to Convention) Order, 1938	*Ibid.* No. 779, Supplement No. 2, of 1938, Vol. II, p. 517

11. The alternative form was for the necessary legislation to be enacted by the local legislative body, in accordance with the terms of the prevailing constitutional arrangements. Such legislation differed in no way from any other legislation. The following examples are given :

Title of Ordinance	*Reference*
Treaty of Peace (Turkey), Ordinance	Drayton, *The Laws of Palestine,* Vol. II, p. 1497
Carriage of Goods by Sea Ordinance, 1926	*Ibid.* Vol. I, p. 103
An Ordinance relating to Copyright, 1924	*Ibid.* Vol. I, p. 389
Extradition Ordinance, 1926	*Ibid.* p. 677
Road Transport Ordinance, 1937	*Palestine Gazette,* No. 672, Supplement No. 2 of 1937, Vol. III, p. 1049
United Nations Immunities and Privileges Ordinance, No. 27, of 1947	*Palestine Gazette* No. 1588, Supplement No. 1 of 1947, Vol. I, p. 164

12. In accordance with the provisions of Section 11 of the Law and Administration Ordinance 5708 — 1948, the municipal legislation described in the preceding paragraphs still remains on the statute book. The Supreme Court of Israel has not however yet had occasion to decide on the problem of the actual effect of such legislative provisions in the event that Israel is not a party to the international treaties to which the legislation refers.

However, it might by convenient to indicate the attitude which has been adopted by the Government of Israel and by other interested Governments (so far as it is known to the Government of Israel) in connexion with various aspects of this particular problem. The easiest example, from a juridical point of view, is that which arises out of the extradition treaties and the Extradition Ordinance. Under the terms of Section 5 of the Extradition Ordinance (Drayton, *Laws of Palestine,* Vol. 1, p. 677) extradition of criminals from Palestine to a foreign state was made dependent upon the prior existence of an arrangement between His Majesty and that foreign State with respect to the extradition from Palestine of fugitive criminals to the territory of such State. The operation of the Ordinance in regard to any particular foreign State required a proclamation to that effect from the High Commissioner, and a number of such proclamations were in due course made. However, in the view of the Government of Israel, as is described more particularly in paragraphs 20-24 below, generally speaking Israel is not bound by the treaties to which Palestine was a party prior to the termination of the Mandate, and in consequence the international arrangements on the basis of which the High Commissioner was enabled to issue the various proclamations have lapsed.

13. Another aspect is that which has arisen in connexion with the various international copyright conventions. The substantive law of Palestine was brought into conformity with the substantive provisions of the various international conventions regulating copyright which the Mandatory Government had made applicable to Palestine. Included in these conventions were some special arrangements between the Government of the United Kingdom and the Government of the United States, which latter Government was not a party to the all said general international conventions to which the Government of the United Kingdom was a party. Upon the termination of the British Mandate over Palestine, it is understood that the United States authorities took the view that the arrangements which they had made with the Government of the United Kingdom in relation to Palestine did not apply to Israel, and that it was therefore necessary for Israel to make new arrangements with the Government of the United States. In other words, in the example of extradition we have an enabling muncipal statute temporarily deprived of real consequence in the absence of subsisting international treaties in the implementation of which it was designed to enable, whereas in the copyright example the municipal law conforms entirely to certain international obligations previously applicable to Palestine by virtue of international conventions but not now applicable in the changed circumstances. The same situation exists, for example, in connexion with the legislation designed to adapt the municipal law to the terms of the Warsaw Convention for the Unification of Certain Rules regarding Air Transport of 12 October 1929, (137 L.N.T.S. 11). The Government of Israel in drawing this type of problem to the attention of the International Law Commission, does not consider that it is really one which would be susceptible of adequate treatment in a process of codification today. It is of opinion, however, that this information might be of use to the International Law Commission in considering the wider problem both of the application of treaties to dependent territories, and, what is probably more ripe for codification, the problem of what should happen to those treaty obligations when the dependent territories concerned attain independence.

(c) *Judicial decisions*

14. Here it will be convenient to give a brief synopsis of the decisions of the courts of Palestine upon matters connected with international treaties during the period of the Mandatory regime. No relevant judgments have yet been delivered by the Supreme Court of Israel. The synopses are taken from the Law Reports of Palestine, covering the period 1920-1947, in 14 volumes, published officially (hereinafter abbreviated P.L.R.) Where applicable, references have also been given to the " Annual Digest of Public International Law Cases " (hereinafter abbreviated A.D.).

EFFECT OF TREATIES ON THE INTERNAL LAW OF PALESTINE

15. The position of the Palestine Mandate in the internal law of Palestine was considered by the Supreme Court of Palestine in the case of *Jamal Effendi Husseini v. Government of Palestine* (1 P.L.R. 50). In that case the Court heard a petition asking for the withdrawal of certain stamps from circulation on the ground that the Hebrew lettering appearing on the stamps was not a literal translation of the English, and therefore contrary, *inter alia,* to Article 22 of the Palestine Mandate (laying down that English, Arabic and Hebrew will be the official languages of Palestine and providing that any statement or inscription in Arabic shall be translated into Hebrew, and vice versa). In its judgment the Court said :

> " The terms of the Mandate are enforceable in the Courts only as far as they are incorporated by the Palestine Order-in-Council, 1922, or any amendment thereof. Now, although as regards legislation the Palestine Order-in-Council, 1922, and the amendment Order-in-Council of 1923, both contain a provision prohibiting the passing of an Ordinance inconsistent with the Mandate, there is no similar provision with regard to executive acts either in general or with special reference to the terms of Article 22. In so far as the Mandate is not incorporated into the law of Palestine by Order-in-Council, its provisions have only the force of treaty obligations and cannot be enforced by the Courts. It is therefore unnecessary to consider whether the lettering on the postage stamps is in accordance with Article 22 or not."

The " leading case " on the legislative powers of the High Commissioner in relation to the terms of the Palestine Mandate was *Jerusalem-Jaffa District Governor and another v. Suleiman Murra and others* decided by the Judicial Committee of the Privy Council in London (1 P.L.R. 71; A.D. 1925-26, Case No. 32). Here the owners of certain springs in Palestine contested the validity of an ordinance made by the High Commissioner expropriating their springs for the purpose of supplying water to Jerusalem. It was contended by the owners that the ordinance was *ultra vires,* on the ground that it was inconsistent with the Palestine Mandate (Article 2 thereof providing that Great Britain should be responsible for

"safeguarding the civil and religious rights of the inhabitants of Palestine, irrespective of race and religion"). The Privy Council found that by the Mandate for Palestine, the Council of the League of Nations, acting under Article 22 of the Covenant, entrusted to Great Britain the administration of the territory of Palestine which formerly belonged to the Turkish Empire. By the Palestine Order-in-Council dated 10 August 1922, provision was made for the administration of Palestine by the High Commissioner with full executive powers. On 4 May 1923, an amending Order-in-Council was made by which the legislative authority was transferred from a legislative Council which was not set up, to the High Commissioner, who was thereby authorized to promulgate such ordinances as might be necessary for the peace, order and good government of Palestine, subject to the condition that no ordinance should be promulgated which should be in any way repugnant to or inconsistent with the Mandate. It was under the authority conferred by that Order-in-Council that the Springs Ordinance was promulgated. The Judicial Committee had therefore to examine the provisions of the Ordinance in order to determine whether it contained anything which was in any way repugnant to the terms of the Mandate and in particular to Article 2 of that instrument. The Privy Council held that it was the right and duty of the Court in Palestine to consider whether the Ordinance was in any way repugnant to the terms of the Mandate. In the words of the judgment:

> "In their Lordships' opinion the Supreme Court was fully justified in entertaining an argument as to the validity of the Ordinance. The Ordinance was made under the authority of the Order-in-Council of 4 May 1923, and if and so far as it infringed the conditions of that Order-in-Council the local court was entitled, and indeed bound to treat it as void. Among those conditions was the stipulation that no Ordinance should be promulgated which was repugnant to, or inconsistent with the provisions of the Mandate, and in view of this stipulation it was the right and duty of the Court to examine the terms of the Mandate and to consider whether the Ordinance was in any way repugnant to those terms."

The principle thus established continued until the end of the Mandate, and is in force even today if a question should arise as to the validity of a Mandatory ordinance. There have been a number of cases since 1926 in which the validity of legislation has been tested in this manner, but it has not been thought necessary to abstract them here. In the case of *Lubnani v. Superintendant of Prisons, Jerusalem, and the Attorney-General* (2 P.L.R. (1935) page 310), the petitioner in a petition for *habeas corpus* contended that the provisional agreement between Syria and Palestine for extradition of offenders of 11 July 1921, as amended on 23 September 1933, had no legal validity and that it was not an arrangement in force between His Majesty and a foreign State as contemplated by section 5 (1) of the Extradition Ordinance, 1926. The Supreme Court of Palestine, in rejecting that contention, pointed out that the authority for the surrender of a fugitive criminal was not the Agreement, but section 6 (2) of the Palestine Extradition Ordinance; and it was therefore immaterial whether the extradition agreement itself had any legal validity or not.

Effect of Treaties on Third Parties

16. In the case of *Nadeen Markoff v. Habib George Daoud Hussein* (9 P.L.R. (1945) page 272) the Supreme Court of Palestine had to deal with the effect of treaties on States not parties to them. In an application to set aside certain entries in the Land Registry, the appellant, a Russian subject relied *inter alia* on certain provisions of the Treaty of Peace with Turkey, 1923. The Court held that though the Article in question had become part of the law of Palestine by virtue of the Treaty of Peace (Turkey) Ordinance, 1924, there was an inference that it was the intention of the Legislator to apply certain provisions of the Treaty to Palestine in order that the parties to the Treaty could derive their benefits and fulfil their obligations under the Treaty in this territory. As Russia was not a party to the Treaty, Russian subjects could not claim the shelter afforded by the Article in question.

Construction of Treaties

17. In the case of *Ameneh Maninka Sultan on behalf of the late Prince Muhammed Salem v. Attorney-General* (14 P.L.R. (1947) page 115; see also for earlier proceedings A.D. 1935-37 page 123) the Court had to construe certain provisions of the Treaty of Lausanne, 1923. In that case the appellant claimed on behalf of the late Prince Muhammed Salem, one of the heirs of the late Sultan Abdul Hamid II of Turkey, certain lands held by the High Commissioner in trust for the Government of Palestine. The basis of the claim was that the lands in question were registered in the name of the late Sultan since about 1886. The Court had to consider whether a certain transfer of properties to the Ottoman State by virtue of Ottoman municipal legislation was invalid, having regard to the wording of Article 60 of the Treaty of Lausanne, 1923, which provided that such property, when situated in territory detached from the Ottoman Empire, should be acquired without payment by States in favour of which such territory was detached. The question had also arisen whether under the terms of Article 60 the properties were being taken over subject to private claims. The Court held that by virtue of the Treaty of Peace (Turkey) Ordinance, 1924, the Treaty of Lausanne was part of the law of Palestine:

> "... The Treaty is undoubtedly an act of State and no Court of Palestine can question its provisions . . . in construing the terms of the Treaty . . . . The first point to be decided is whether the meaning of a term is clear as it stands. If it is clear in its context, we must not for the purpose of construing it, refer to the discussions which led to the final text of the Treaty."

As to the question as to whether the properties were being taken over subject to private claims, the Court found that if there had been any such intention it would have been clearly expressed:

> "Had there been any intention to give effect to private claims there would have been similar specific provisions to this effect . . . ."

For a case in which the terms of municipal legislation

were interpreted by reference to an international treaty see *Kattaneh v. Chief Immigration Officer*, 1 P.L.R. (1920-1933) 215. The Petitioner here, on the facts, claimed to have been habitually resident in the territory of Palestine on 1 August 1925, and thus automotically to have become a Palestinian citizen by operation of law on that date. In construing the relevant provision of the Palestine Citizeship Order-in-Council, the Court said :

" The provisions of the Palestine Citizenship Order, 1925, are based upon the Treaty of Lausanne, and on the authority of R. *v.* Wilson (1877) 3 Q.B.D., page 42 in construing legislation the terms of a treaty which such legislation is intended to carry into effect should be considered, as the two documents ought not to conflict. In order to understand the Order-in-Council, therefore, we may turn to the terms of the Treaty of Lausanne and it will be observed that the English text is described as 'Translation' and it is therefore the French text from which we must get the intention of the signatory powers. The reason why this is important is that whereas in the English text there is a variation between the term 'habitually resident' which occurs in Articles 30 and 34, and 'ordinarily resident' which occurs in Article 21, in the French text one and the same term is used, namely 'établis', so that it is impossible to make any distinction between the words 'habitually resident' and 'ordinarily resident'."

Effect of change of form of governments on treaties

18. In the case of *Al Shehadeh and another v. Commissioner of Prisons, Jerusalem and Superintendent of Central Prisons, Acre* (14 P.L.R. (1947) page 461) the Supreme Court of Palestine had to deal with an application for *habeas corpus* of a person whose extradition to the Lebanon was requested. The applicant based his case on the ground that the provisional agreement for the extradition of offenders between Syria and Palestine, 1921, had lapsed because of a change in the form of Government in Lebanon, i.e., from a Mandatory to a Republic. The Court, in refusing the application, held that :

" It is a well recognized principle of international law that changes in the government or in the constitution of a state have as such no effect upon the continued validity of the State's international obligations ... we are unable to agree that the form of government that prevailed in the previous State is a relevant consideration in applying the principle of international law we have quoted. It seems to us immaterial whether that form of government was despotic or democratic, monarchical or republican or even that recent innovation known as Mandatory. The important question is whether legal sovereignty to enable it to enter into treaty negotiations was vested in the previous State. It cannot be doubted that the sovereignty, in so far as it affected treaty-making power, vested in the French Republic in the case of the Lebanon and in the Mandatory in the case of Palestine. ... That treaty unless it is abrogated binds the successor government. It is therefore still effective between the Lebanese Republic and Palestine."

(d) *Particular problems arising out the termination of the Mandate.*

19. The first problem arising out of the termination of the Mandate was of a technical nature, namely to establish precisely the exact treaty relationship of Palestine with third States. This was done by collating all the information contained in the various sources mentioned in paragraphs 10 and 11, above. Later, the British Foreign Office furnished two lists of its own compilation contained in all 140 items. These were a list by countries of bilateral agreements extended to Palestine and a chronological list of multilateral agreements extended to Palestine. Neither of them included those treaties which the Government of Palestine concluded directly on its own behalf. At an even later stage, the British Government kindly supplied the actual texts of those treaties which were contained in its own lists. It is interesting to note that the earliest in date of these treaties was the Treaty between the United Kingdom and the Kingdom of Sweden and Norway, dated 26 June 1873 on the subject of Extradition. This treaty itself had been amended in respect to Norway, by the treaty of 18 February 1907. This is an illustration of the technical problems involved in determining precisely the treaty relations of Palestine.

20. A particular difficulty which arose in this connexion concerned the status of the pre-war bilateral treaties which had been concluded by the Mandatory Power on behalf of Palestine, or extended or otherwise made applicable by the Mandatory Power to Palestine, and made with States with which the Mandatory Power, subsequent to 3 September 1939, became in a state of war. Of the two major problems here, the first, which is not among the topics with which the International Law Commission is directly concerned at the present moment, relates to the whole question of sovereignty over mandated territories and is, in a word, whether the fact that the Mandatory Power was in a state of war automatically implied that the mandated territory was in a juridical state of war. The second problem concerns the effect of the Mandatory's being in a state of war upon these treaties, having regard to Article 12 of the Mandate, under which the Mandatory was entrusted with the control of the foreign relations of Palestine. So long as the war was in progress the question of the juridical status of these treaties was of little moment. But after the war, as is known, the Treaties of Peace with Italy (Article 44), Bulgaria (Article 8), Finland (Article 12), Romania (Article 10) and Hungary (Article 10), each proceeding on a doctrine of revival such as found expression in Article 259 of the Treaty of Versailles of 1919, enabled the Allies to notify each one of those States which of its pre-war bilateral treaties with that State it desired to keep in force or revive. On 12 and 13 March 1948, the British Government gave the necessary notifications to the States in question, adding that the revival of the bilateral treaties also covered those other territories for which His Majesty's Government in the United Kingdom were internationally responsible and to which the bilateral treaties and agreements concerned applied at the time of the outbreak of the war : see British Command Paper 7395 of 1948. No notification of the Treaties thus affected was included

in the *Palestine Gazette*, despite the usual practice as described in paragraph 10 above. Furthermore, so far as is known, the Palestine Commission to which reference is made in paragraph 29 below, was not consulted or informed of this matter (in so far as Palestine was concerned) despite the existence of resolution 181 (II) adopted by the General Assembly on 29 November 1947, and despite the procedure adopted by the Mandatory Government in connexion with the provisional application to Palestine of the General Agreement on Trade and Tariffs, as described in paragraph 29 below. In considering the problem of the effect of war on treaties, it would thus appear necessary for special attention to be devoted to the particular aspect of the effect on the treaties of a dependent State or territory of the outbreak of war involving the State responsible for the international relations of that dependent territory.

21. The next stage was to establish precisely to which of these treaties Palestine was actually a party. Resolution 181 (II), adopted by the General Assembly on 29 November 1947 and referring to the Future Government of Palestine, in recommending the adoption of a Plan of Partition with Economic Union, contained a declaration which was to be made to the United Nations by the provisional government of each proposed State before independence. Included in this declaration was a clause providing that " the State should be bound by all international agreements and conventions, both general and special, to which Palestine had become a party. Subject to any right of denunciation provided for therein, such agreements and conventions were to be respected by the State throughout the period for which they had been concluded. Disputes about the applicability and continued validity of international conventions or treaties signed or adhered to by the mandatory Power on behalf of Palestine were to be referred to the International Court of Justice in accordance with the provisions of the Statute of the Court." (See *Official Records of the Second Session of the General Assembly, Resolutions*, page 138.)

22. Examination of the treaty position in Palestine, having regard to the provisions of the Mandate and the terms of resolution 181 (II) disclosed the following situation. Firsty, there were a number of general international conventions to which the mandatory government had adhered on behalf of Palestine in accordance with Articles 19 and 20 of the Mandate. Secondly, there were a few international treaties, mainly bilateral, which were concluded either by the mandatory government with third States, or by the Government of Palestine itself, and which referred solely to Palestine. This was presumably in accordance with Articles 12 and 18 of the Mandate. Thirdly, there were the extradition treaties and a number of other treaties whose provisions were extended to Palestine. As far as extradition treaties are concerned this was based upon Article 10 of the Mandate. Sometimes these treaties contained a clause providing for their extension to the various non-self-governing portions of the British Empire. Sometimes the extension to Palestine was as the result of an *ad hoc* arrangement, which might or might not have contained appropriate modifications in the terms of the Treaty. Fourthly, it was discovered that there were some treaties concluded by the British Government in its own behalf with foreign governments, which treaties contained provisions which were applicable to Palestine by virtue of its being under British jurisdiction. The most interesting of the treaties of this character was that signed at London on 22 March 1946, between His Majesty in respect of the United Kingdom and His Highness the Amir of Transjordan (6 U.N.T.S. page 143), which itself replaced an agreement between the United Kingdom and Transjordan signed at Jerusalem on 20 February 1928 (British & Foreign State Papers, vol. 128, page 273), and which was itself replaced by the Treaty between H.M. in respect of the United Kingdom of Great Britain and Northern Ireland, and H.M. the King of the Hashemite Kingdom of Transjordan, signed at Amman on 15 March 1948. This particular complex of treaties provided for the maintenance of certain commercial and customs arrangements between the territories of the two high contracting parties.

23. After this thorough (although inconclusive) examination of the treaty position of Palestine had been completed, the Government of Israel reached the conclusion that it could be said that on the basis of the generally recognized principles of international law, Israel which was a new international personality, was not automatically bound by the treaties to which Palestine had been a party and that its future treaty relations with foreign Powers were to be regulated directly between Israel and the foreign Powers concerned. An important factor in reaching this decision was that despite Israel's offer to make the Declaration, (see Security Council document S/747 of 16 May 1948) she was not asked to do so, and, in accordance with General Assembly resolution 273 (III) of 11 May 1949, was admitted as a Member of the United Nations without the said Declaration having been made. Diplomatic correspondence with various foreing governments, including the former Mandatory Government, has, accordingly, during the year 1949, been conducted on this basis.

24. In drawing attention to this situation, the Government of Israel suggests that two particular problems require consideration. The first is : what is the exact meaning of the expression " the parties to a treaty " ? As to this, reference can be made to the decision of the House of Lords in the case of *Philipson v. Imperial Airways, Ltd.* published in A.D. 1938-40, case No. 178. The Government of Israel inclines to the view that there can be no automatic elevation of a dependent territory to the status of a party to a treaty simply because the terms of a treaty may have been made applicable to that territory by the Power in whose hands was entrusted the control of the foreign relations of that dependent territory.

25. The second of these problems is the whole matter of the extension of international treaties to dependent territories. It is suggested that the starting point for such an examination should be the classification adopted by Professor Rousseau in his *Principes Généraux de Droit International Public*, Vol. 1, page 386. This question is one of considerable importance. The paragraph quoted above from resolution 181 (II) is itself based upon precedents of which two may be cited — the Declaration of the Kingdom of Iraq of 30 May 1932, in connexion with

the termination of the Mandate over Iraq, and Article 8 of the above quoted Treaty of 22 March 1946, between the United Kingdom and Transjordan — and it may possibly form a precedent in future instances of peaceful change leading to the independence of dependent States. It seems that a distinction should be drawn between such independence which is, from the point of view of international law, no more than a change of Government, and independence which in fact involves the creation of new international personalities.

26. In conformity with its basic approach, the Government of Israel has acceeded *de novo* to a number of international conventions regardless of whether previously Palestine was formally party to them or whether in some other way their provisions had been made applicable to Palestine. Included in these are the two Geneva Conventions of 27 July 1929, regarding the amelioration of the condition of the wounded and sick in armies in the field, and regarding the treatment of prisoners of war (118 L.N.T.S. 303 and 343); the International Load Line Convention, signed at London on 5 July 1930 (135 L.N.T.S. 301); the International Convention for the Unification of Certain Rules regarding Air Transport, signed at Warsaw on 12 October 1929 (137 L.N.T.S. page 11); the Convention regarding the Privileges and Immunities of the United Nations, adopted by the General Assembly in London on 13 February, 1946 (1 U.N.T.S. page 15); the International Telecommunication Convention, signed at Atlantic City on 2 October 1947; the Universal Postal Convention, signed at Paris on 5 July 1947; the Constitution of the Food and Agriculture Organization, signed at Quebec on 16 October 1945; the International Convention relative to the Protection of Literary and Artistic Works, signed at Berne on 9 September 1886, revised 1908, 1914, 1928 and 1948, 123 L.N.T.S. page 233; the International Convention for the Protection of Industrial Property, signed at Paris on 20 March 1883, revised 1900, 1911, 1925 and 1934, 74 L.N.T.S. page 289; the Agreement for the prevention of false indication of origin on goods, signed at Madrid on 14 April 1891, revised 1911, 1925 and 1934, 74 L.N.T.S. page 319; the Agreement for the Preservation or Restoration of Rights of Industrial Property affected by the Second World War, signed at Neuchatel on 8 February 1947. The Secretary-General, in his compilation on *Signatures . . . etc. concerning multilateral conventions and agreements in respect of which the Secretary-General acts as Depository*, has remarked (page 4) that " admittedly the treaties or instruments establishing the independence of a new State usually deal with the problem of that State's succession to international rights and obligations. Nevertheless, it had to be determined whether the new State had to notify the Contracting Parties expreslly in writing that it considered itself bound by the conventions covering those rights and obligations ". In other words, it is possible that detailed analysis might show that the type of blanket-undertaking to which reference is made in paragraphs 22 and 26 might not, from a juridical and technical point of view, be adequate for the purposes for which it is intended.

27. It is true, of course, that the texts of the various Trusteeship Agreements concluded under the auspices of the United Nations differ considerably, in regard to the treaty-making power of the Administering Authority, in comparison with the treaty-making power of the mandatory Power, under, for example, the Mandate for Palestine. On the other hand, there are similarities. For example, a provision such as that contained in Article 7 of the Trusteeship Agreement for the territory of Western Samoa (8 U.N.T.S. 71) is very similar to Article 19 of the Mandate for Palestine, and the same can be said of a provision such as that found in Article 6 of the Trusteeship Agreement for the French Cameroons (*ibid.*, page 135), or of Article 14 of the Trusteeship Agreement for the former Japanese Mandated islands (*ibid.*, page 189) despite their somewhat wider formulation. Having regard to the general objectives of the Trusteeship System it would appear to be extremely desirable to clarify the whole of this particular branch of the law, which clarification should be of benefit not only to the Trust Territories themselves but also to other States which might enter into treaty relationships with the Trust Territories.

28. In connexion with the problem of transition from a regime of dependence to one of independence and its effect upon the law of treaties, one further example taken from the experience of Palestine is brought to the attention of the International Law Commission. The above quoted resolution 181 (II), in its section entitled, " Steps Preparatory to Independence " set up what came to be known as the United Nations Palestine Commission (AC/21) to which it was intended that the administration of Palestine was to be progressively turned over as the Mandatory Power withdrew its armed forces (see *Official Records of the Second Session of the General Assembly, Resolutions*, page 133). While this Commission was functioning, the question arose of the provisional extension to Palestine of the General Agreement on Tariffs and Trade concluded at Geneva on 30 October 1947. During February, 1948, the United Kingdom delegation at Lake Success, in informing the United Nations Palestine Commission that this was proposed, suggested that the Agreement be applied to Palestine. The Commission, deciding that it had no objection, informed the United Kingdom delegation accordingly, and the provisional application of Parts I, II and III of the Agreement was carried out: see Document UK/105, dated 13 April 1948 of the Documents of the Palestine Commission (AC/21). In due course an amendment was made to the Customs Tariff and Exemption Ordinance, No. 24 of 1937 in order to bring the Schedule thereof into conformity with the new arrangement : see *Palestine Gazette* No. 1655 of 25 March 1948, Supplement No. 2, page 471. In accordance with its general view as to the binding force or treaties previously concluded by the Mandatory Power, the Government of Israel did not consider that the fact that the United Nations Palestine Commission had been informed of the extension of the General Agreement on Tariffs and Trade to Palestine, and had raised no objection thereto was a matter of legal consequence. The Contracting Parties in due course took a similar attitude, as appears in the following *communiqué* issued at Annecy during May 1949 :

" At the 1947 Geneva negociations the United Kingdom, acting as the mandatory Power, negotiated on behalf of Palestine. The United Kingdom applied GATT provisionally in respect of Palestine as from

19 April 1948. But the United Kingdom ceased to be responsible for the Government of Palestine on 15 May 1948 when the League of Nations mandate ended.

" Under the declaration adopted today it was agreed that the United Kingdom should be regarded as having ceased to be a contracting party with respect to the customs territory formerly included in the Palestine Mandate. Any contracting party, therefore, would be free to withhold or withdraw in whole or in part, any concession included in the appropriate GATT schedule which was negotiated with the United Kingdom, in respect of the territory of the Palestine Mandate. A contracting party proposing to take such action will, under the terms of the declaration, notify all the other contracting parties and, if requested, will consult with contracting parties which have a substantial interest in any product concerned."

This was followed by the action of the Government of Israel in raising some of the customs tariffs which had been reduced in March 1948; see for example the order of the Minister of Finance of 9 June 1949, published in Reshumot (Israel Gazette), *Kovetz ha Takkanot* (Subsidiary Legislation) page 237.

(e) *Some developments since the termination of the British Mandate.*

29. As previously described, the Government of Israel adopted a completely independent policy in regard to its treaty obligations. A particular difficulty which arose during its early months concerned the technical question of the manner of accession to multilateral conventions of which the depositary governments had not recognized the State of Israel. It was discovered that depositary governments in these circumstances were unable to accept communications directly from the Government of Israel but that communications of this nature had to be submitted to them through he intermediary of a third government which had recognized Israel and which, at the same time, maintained diplomatic relations with the depositary government. This cannot be regarded as a satisfactory state of affairs. The delays which such a procedure can occasion might lead to serious consequences. For example, if the new State is involved in hostilities from the day of its creation, it might find it necessary to accede formally to those international conventions which regulate hostilities. Having regard to the whole development of international organization since 1919, it is possible that a depositary government, which in the ultimate analysis performs functions which are primarily administrative and organizational in relation to the treaty of which it is depositary, is not juridically entitled to refuse communications appertaining thereto merely because they emanate from a government which it does not recognize. The same question of course arises in respect to those international conventions for which the Secretary-General acts as depositary.

30. An interesting technical problem seems to arise out of the four conventions signed at Geneva on 12 August 1949. As is known, a Diplomatic Conference met in Geneva during the summer of 1949 for the purpose of revising the Geneva Conventions regarding the amelioration of the condition of the wounded and sick in armies in the field, and regarding the treatment of prisoners of war. This Diplomatic Conference completed its work on 12 August 1949, upon which date the four new Conventions which it produced were open for signature. They remained open for signature by the States which participated in the Diplomatic Conference for a period of six months. Many States signed the Convention on 12 August 1949. However, the formal ceremony of signature was actually held on 8 December 1949, that is to say, in the middle of the six months' period during which the Conventions were open for signature. At this formal ceremony in December, many States, including Israel, signed with reservations. The resultant position is that those States which signed in August did so without knowledge of the precise reservations which were made at the formal ceremony of signature in December. From a theoretical point of view, it is not impossible that before the termination of the six-months' period in which the Conventions are open for signature, other States may sign subject to further reservations. As the Government of Israel understands the position, reservations have the effect of altering the treaty obligations in respect to the State making the reservations, and therefore the other signatories to the Convention have to agree thereto, at least by implication. The practice of having a multilateral Convention open to signature for a period of six months and of having two signing ceremonies might lead to juridical difficulties in this regard, the more so if by chance any State should deposit its act of ratification prior to the end of the period during which the Convention is open to signature.

31. Attention is drawn to some of the juridical aspects of the Armistice Agreements* concluded between Israel and its four neighbours during the early part of 1949. These Armistice Agreements were provisional measures within the terms of Article 40 of the Charter of the United Nations and were concluded pursuant to the resolution adopted by the Security Council at its 381st meeting on 16 November 1948 (S/1080), and in the case of Egypt, the resolution adopted by the Security Council at its 377th meeting on 4 November 1948 (S/1070). Apart from the fact that these Armistice Agreements form an important precedent for the Security Council in its general task of preserving peace, they may contain several interesting juridical and technical aspects of the law of treaties.

(*a*) Except in the case of the Egyptian-Israeli General Armistice Agreement, the representatives of the contracting Governments exchanged their full powers. The Preamble to the Egyptian-Israeli General Armistice Agreement, mentions that the representatives signed the Agreement " in the full authority entrusted to them by their respective Governments ".

(*b*) The parties to the Agreements established special machinery in order to supervise the execution of the provisions of each of the Agreements (Israeli-Egyptian

* For the texts of the Armistice Agreements, see S/1264/Rev.1 (Israeli-Egyptian General Armistice Agreement); S/1296/Rev.1 (Israeli-Lebanese General Armistice Agreement); S/1302/Rev.1 (Israeli-Jordan General Armistice Agreement); and S/1353/Rev.1 (Israeli-Syrian General Armistice Agreement), reproduced respectively in *Official Records of the Security Council,* Fourth Year, Special Supplements Nos. 3, 4, 1 and 2.

Agreement, Article 10; Israeli-Lebanese Agreement, Article 7; Israeli-Syrian Agreement, Article 7; Israeli-Jordan Agreement, Article 11). The basic pattern was for the establishment of a Mixed Armistice Commission composed of an equal number of representatives of the two parties, under United Nations chairmanship, such Mixed Armistice Commission having power to deal not only with claims or complaints presented by either party relating to the application of the Agreement, but also to interpret the meaning of particular provisions of the agreement, with certain limited exceptions. The Mixed Armistice Commission was given authority to submit reports to both parties on its activities with a copy to the Secretary-General of he United Nations. The Egyptian-Israeli Armistice Agreement made provision for appeals on questions of principle to a Special Committee, composed of the United Nations Chief of Staff of the Truce Supervision Organization himself and one member each of the Egyptian and Israeli delegations to the actual Armistice Conference, or some other senior officer. The decisions of this Special Committee were to be final. This particular composition of the Special Committee has the advantage that, where difficult questions of interpretation or of principle arise, the persons who actually participated in the drafting of the Agreement have authority to interpret it.

(*c*) All of the Armistice Agreements specifically state that they are not subject to ratification and that they shall come into force immediately upon being signed.

(*d*) By their terms, the Armistice Agreements are of indefinite duration until a final settlement between the parties is reached.

(*e*) The Agreements, while permitting the revision of any of their provisions at any time, by mutual consent, expressly exclude from the possibility of revision those articles which relate to the actual cessation of hostilities. They also provide that, one year after their coming into force, either of the parties may call upon the Secretary-General of the United Nations to convoke a conference of representatives of the two parties for the purpose of reviewing, revising or suspending any of the provisions of the agreement other than those relating to the actual cessation of hostilities, and that participation in such a conference shall be obligatory.

(*f*) Two of the Armistice Agreements were signed in the English language only, while the other two, those with the Lebanon and Syria, were signed in English and French. The Agreement with Syria alone provides that both the English and French texts are equally authentic.

(*g*) In due course the four Armistice Agreements were registered by the Permanent Representative of Israel to the United Nations with the Secretary-General in accordance with the provisions of Article 102 of the Charter, under registration numbers 654, 655, 656 and 657.

6. Netherlands

[*Original text : English*]

Netherlands Delegation
to the United Nations
26 January 1950

Acting upon instructions received and with reference to your letter of 11 July 1949, LEG 209/01/YLL, I have the honour to submit to you short commentaries and some data as required, relevant to topics of "The Law of Treaties" and "Arbitral Procedure", as of force in the Netherlands.

THE NETHERLANDS LAW OF TREATIES

The Law of Treaties is regulated in article 60 of the Constitution (as amended in 1948) which reads as follows :

"The King shall conclude and ratify all treaties with foreign Powers.

"Unless the King shall have reserved to himself by law the right to ratify a treaty, that treaty shall not be ratified until it shall have received the approval of the States General.

"Adherence to and denunciation of treaties shall be done by the King solely by virtue of law.

"Other agreements with foreign Powers shall be communicated to the States General as soon as possible."

It appears from this article that the Netherlands Constitution distinguishes between "treaties" (in the narrow sense) and "agreements". Practically this distinction has only a formal character : according to Dutch law a treaty is an international instrument which has to be ratified in virtue of a ratification clause; an international instrument without such a clause is considered an "agreement".

In fact, the King does not conclude a treaty or agreement himself : it is done by his plenipotentiaries appointed for that purpose. However, the King himself ratifies a treaty and this is countersigned by his Minister of Foreign Affairs.

It has long been practice, that the approval of the States General is drawn up in the form of a law. This law, containing the text and eventually the Netherlands translation of the approved treaty, is promulgated in the "Staatsblad van het Koninkrijk der Nederlanden". The King does not ratify the treaty before the coming into force of the law. When the instruments of ratification have been exchanged or deposited and the treaty has come into force, the latter is promulgated by Royal Decree in the aforementioned "Staatsblad".

It may be observed that by law the King can reserve to himself the right to ratify a special category of treaties (e.g., postal conventions). He will also reserve to himself by law the right to ratify a treaty, in case the Netherlands legislation has to be adapted to the provisions of that treaty. Ratification, then, follows after the adaptation of the legislation concerned.

As soon as adherence to or denunciation of a treaty has been approved by a law and this law has come into force, the Minister of Foreign Affairs gives notice of this adherence or denunciation to the competent authorities after having been authorized thereto by the King.

If a treaty provides "acceptance" the ratification or adherence procedure is followed, owing to a lack of constitutional provisions with respect to the new term "acceptance".

The text and, eventually, a Netherlands translation of agreements are communicated as soon as possible to the States General and promulgated by Royal Decree in the "Staatsbland". Agreements having a confidential character are not published.

All treaties and agreements which have come into force and which have been promulgated by Royal Decree in the "Staatsblad", are registered with the Secretariat of the United Nations.

From the jurisprudence of the Supreme Court of the Netherlands (since a judgment of June 25, 1841), it appears that a treaty concluded by the King in conformity with the provisions of the Constitution, has the force of law in the Kingdom and, consequently, becomes immediately binding, not only for the High Contracting Parties, but also — in so far as the treaty so provides — for the citizens. If, however, a treaty has been concluded by the King contrary to the provisions of the Constitution, it does not have force of law and shall not be applied by the judge (judgment November 18, 1901).

The Ministry of Foreign Affairs has published, in 1948, a concise treatise, with formulas, on the Netherlands law of treaties, only for the use of ministerial Departments.

In order to further uniformity in the wording of treaties and agreements concluded by the Kingdom of the Netherlands, the Ministry of Foreign Affairs has adopted, in 1949, a uniform Netherlands, French and English text of the preambles and the final provisions of both treaties and agreements. An English copy of these texts is added to this report.

Annex

Text No. 1

TREATY

Her Majesty the Queen of the Netherlands, on the one hand, and His Majesty. . ., on the other hand,

Desiring. . .

Have resolved to conclude a Treaty concerning. . .

And have appointed as their Plenipotentiaries :

Her Majesty the Queen of the Netherlands :

. . .

His Majesty. . .:

. . .

Who, having produced their full powers, found in good and due form,

Have agreed on the following provisions :

Article 1.

The High Contracting Parties. . .

Article. . .

The present Treaty is subject to ratification and the instruments of ratification shall be exchanged at. . . as soon as possible.

The Treaty shall come into force on the date of exchange of the instruments of ratification.

In faith whereof the undersigned plenipotentiaries duly authorized for that purpose have signed the present Treaty and have affixed their seal thereto. Done at. . ., this. . . day of. . . 1949, in two copies, in the Dutch (and. . .) language(s), (both texts being equally authentic.)

Text No. 2

AGREEMENT

The Government of the Kingdom of the Netherlands and the Government of. . .

Having resolved to conclude an agreement concerning. . .

Have agreed on the following provisions :

Article 1 :

The contracting Parties

Article. . .

The present agreement shall come into force on the date of its signature.[1]

In faith whereof the undersigned representatives duly authorized for that purpose have signed the present agreement.

Done at. . ., this. . . day of. . . 1949, in the Dutch (and. . .) language(s), (both. texts being equally authentic.)

[1] In the event of unilateral ratification:
"The present agreement shall come into force (provisionally on the date of its signature and definitely) on the date of the communication of the Government of . . . to the Government of . . . that the agreement has been ratified."

7. Philippines

[*Original text : English*]

Department of Foreign Affairs
Manila
12 December 1949

In partial compliance with the requests of the International Law Commission contained in your letter of July 11, 1949 (Ref. : LEG 291/01/YLL), I have the honour to submit herewith some Philippine materials which might be of interest to the Commission in its study of the codification of three topics of international law, namely, (1) the law of treaties, (2) arbitral procedure and (3) the regime of the high seas.

. . .

THE LAW OF TREATIES

(*a*) Laws

"The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as a part of the law of the Nations." (Section 3, Article II, Constitution of the Philippines.)

"The President shall have the power, with the concurrence of two-thirds of all the members of the Senate, to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers, and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines." (Section 10 (7), Article VII, Constitution of the Philippines.)

"The National Assembly (now Congress) shall have the power to define, prescribe, and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its original jurisdiction over cases affectings ambassadors, other public ministers, and

consuls, nor of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in —

" (1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question. . . . " (Section 2, Article VIII, Constitution of the Philippines).

" All cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court in banc, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the Court ". (Section 10, Article VIII, Constitution of the Philippines).

Commonwealth Act No. 732. An act to create the Department of Foreign Affairs and to authorize the President of the Philippines to organize said Department as well as the foreign service of the Republic of the Philippines. (Appendix " A ")*

Republic Act No. 75, approved October 21, 1946. An Act to penalize acts which would impair the proper observance by the Republic and inhabitants of the Philippines of the immunities, rights, and privileges of duly accredited foreign diplomatic and consular agents in the Philippines. (Appendix " B ")*

(*b*) Decrees

Executive Order No. 18 (September 16, 1946), promulgated by virtue of Commonwealth Act No. 732, provides that the Secretary of Foreign Affairs shall be responsible to the President for formulating and carrying into effect the foreign policy of the Republic of the Philippines; for the conduct of its foreign relations; for the the negotiation of treaties, conventions, and other agreements of similar force, etc.

(*c*) Judicial decisions

" The rules and regulations of The Hague and Geneva Conventions form part and are wholly based on the generally accepted principles of international law. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our governments may have been or shall be a signatory." (*Shigenori Kuroda v. Major General Rafael Jalandoni, et al.,* Supreme Court Decision, No. L-2662, March 28, 1949.)

" Ordinance No. 3051 offends neither the constitutional clause guaranteeing the obligation of contracts nor the guarantees of due process of law and equal protection of the laws. Neither does it violate any principle of international law nor any of the provisions of the Charter of the United Nations Organization. It does not impair any treaty commitment, as the treaties mentioned by the petitioners have no binding effect upon the Republic of the Philippines, which is not a party to said treaties. The Philippines is bound only by the treaties concluded and ratified in accordance with our Constitution. Ordinance No. 3051 of the City of Manila is valid." (*Co Chiong et al., v. The Mayor of Manila et al.,* Supreme Court Decision, No. L-1891, March 31, 1949.)

" A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."

" The Philippines, being a sovereign nation, has jurisdiction over all offenses committed within its territory, but it may, by treaty or by agreement consent that the United States or any other foreign nation, shall exercise jurisdiction over certain offenses committed within certain portions of said territory." (*Godofredo Dizon v. The Commanding General of the Phil-Ryukus Command,* Supreme Court Decision, L-2110, July 22, 1948.)

(*d*) Treaties

NOTE : The Philippines has concluded several treaties, agreements, conventions *modi vivendi,* etc. with foreign countries bearing on general relations, on commerce and trade, on consular matters, on air navigation, and has also adhered to several international agreements. Some of these agreements have been registered with the Secretariat of the United Nations. Since these agreements generally follow the conventional forms, the Department is furnishing the Commission with the text of only a few of each type, herewith enclosed as Appendices " C " to " L ".*

The Supreme Court of the Philippines has not yet been called upon to decide on important questions involving the nature, form and effect of treaties, the effect of war on treaties, perfections, terminations and suspensions of treaties, and other related subjects. It has therefore not evolved a substantial set of rulings dealing on the law of treaties. It has only passed upon the interpretation of the Military Bases Agreement of the Philippines with the United States. Thus, in *Dizon v. The Commanding General, Phil-Ryukus Command,* L-2110, the Supreme Court decided that " under that agreement concerning military bases of March 14, 1947, the jurisdiction of the United States over certain offenses committed within any base extends to offenses committed within temporary installations located outside of the present limits of the City of Manila ". In *Miquiades v. The Commanding General, Ryukus Command,* L-1988, the same Court interpreted said agreement to the effect that " the Port of Manila Area is not one of the bases of the United States under the agreement of March 14, 1947 ".

(*e*) Diplomatic correspondence

(*f*) Other related documents.

* Not reproduced here.

* Not reproduced here.

8. Poland

[*Original text : English*]
Delegation of Poland
to the United Nations
7 January 1950

First communication

In connexion with your note of 11 July 1949 (LEG 291/01/YLL), the Delegation of Poland to the United Nations submits the enclosed texts of laws, decrees, treaties and other documents relating to (1) the law of treaties, (2) arbitral procedure and (3) the regime of the high seas.

. . .

Delegation of Poland
to the United Nations
20 January 1950

Second communication

In connexion with your letter of 16 January 1950 (LEG 292/5/01(1)/YLL), I wish to inform you that I am writing at the same time to my home authorities about the translations into one of the working languages of the texts of laws, decrees, treaties and other documents relating to the law of treaties, arbitral procedure and the regime of the high seas, together with laws and decrees concerning the proposed draft code of offences against the peace and security of mankind.

I wish also to acknowledge the receipt of all the documents returned by you . . . .

. . .

9. Union of South Africa

[*Original text : English*]
Permanent Delegation
of the Union of South Africa
to the United Nations
13 March 1950

The Deputy Permanent Representative of the Union of South Africa to the United Nations presents his compliments to the Assistant Secretary-General in charge of the Legal Department, and with reference to his letter LEG 291/01/YLL of 11 July 1949, concerning information requested by the International Law Commission on the law of treaties, arbitral procedure and the regime of the high seas, has the honour to state that the Union Law Advisers are not aware of any laws, decrees or judicial decisions in South Africa which deal with the subjects mentioned in the Assistant Secretary-General's inquiry . . . .

10. United Kingdom of Great Britain and Northern Ireland

[*Original text : English*]
United Kingdom
Delegation to the United Nations
6 September 1949

. . .

While the Government of the United Kingdom will be ready and willing to furnish detailed material which the International Law Commission finds to be necessary in the course of its study in the topics it has chosen, it does not consider that it would be practicable at this stage to supply the material requested in your communication, owing to its quantity and to the fact that the criteria of selection can only be decided by the International Law Commission itself.

. . .

11. United States of America

[*Original text : English*]
United States Mission
to the United Nations
6 January 1950

. . .

Transmitted herewith, for the information of the International Law Commission are three memoranda, with attachments,* entitled respectively " The Law of Treaties " " Arbitral Procedure" and " The Regime of the High Seas ". Although necessarily not exhaustive of the subject-matter, these memoranda, it is hoped, may assist the Commission in its work of codification in the fields referred to. In most instances where texts of relevant documents are readily available in libraries, citations, rather than copies of such texts, have been furnished.

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Memorandum on Law of Treaties

A considerable amount of material with respect to the law of treaties so far as the United States is concerned is presently available in published form. Material on the subject for the period generally from 1789 to 1906 is published in Chapter XVII of John Bassett Moore's *International Law Digest*, volume V, pages 155-387 (Washington, Government Printing Office, 1906). For the period 1906 to 1943, material on the subject is published in Chapter XVI of Green Haywood Hackworth's *Digest of International Law*, volume V, pages 1-433 (Washington, Government Printing Office, 1943).

Material for the ensuing period will be transmitted to the International Law Commission at an early date.

* Printed material not reproduced here.