

**Ways and means for making the evidence of customary
international law more readily available**

Report of the International Law Commission

1950

Adopted by the International Law Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 24). The report appears in *Yearbook of the International Law Commission, 1950*, vol. II.



Law Commission might proceed to initiate action on this problem; and

"Invites the Secretary-General to transmit this resolution to the International Law Commission together with the recommendation of the Commission on the Status of Women."

20. After consideration, the Commission adopted the following decision:

"The International Law Commission

"Deems it appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'nationality, including statelessness',

"Proposes to initiate that work as soon as possible."

It was understood that the Commission might initiate work on the subject at its session in 1951, if it were found possible to do so.

EMOLUMENTS FOR MEMBERS OF THE COMMISSION

21. In its report on the first session, the Commission suggested that the General Assembly might wish to reconsider the terms of article 13 of the Statute concerning the allowance paid to the members of the Commission, in order to make service in the Commission less onerous financially. The Commission remains convinced that such a reconsideration is necessary for the sake of the future efficiency of its work.

DATE AND PLACE OF THE THIRD SESSION

22. The Commission decided, after consultation with the Secretary-General, that it would hold its third session in Geneva, Switzerland. This session, which will last not longer than twelve weeks, will begin in May 1951, the exact date being left to the discretion of the Secretary-General in consultation with the Chairman of the Commission.

ACKNOWLEDGMENT OF THE WORK OF THE SECRETARIAT

23. The Commission wishes to acknowledge the important collaboration of the Secretary-General and the Legal Department of the Secretariat in its work, and expresses its appreciation for the numerous memoranda and documents placed at the disposal of the Commission and for the valuable assistance afforded to it.

Part II. WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE

I. INTRODUCTION

24. Article 24 of the Statute of the International Law Commission provides:

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the

La Commission examine les moyens susceptibles de rendre plus accessible la documentation relative au droit international coutumier, par exemple

collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

la compilation et la publication de documents établissant la pratique des Etats et des décisions de juridiction nationales et internationales sur des questions de droit international, et elle fait rapport à l'Assemblée générale sur ce sujet.

25. The history of the drafting of this text was set forth in the memorandum placed before the Commission at its first session by the Secretary-General of the United Nations (A/CN.4/6, pages 3-5). The Commission also had before it at its first session a working paper prepared by the Secretariat, based on the memorandum (A/CN.4/W.9). The question of the implementation of article 24 was considered by the Commission at its 31st and 32nd meetings. At the conclusion of the discussion, the Commission invited Mr. Manley O. Hudson to prepare a working paper on the subject, to be submitted to the Commission at its second session.

26. This working paper (A/CN.4/16 and A/CN.4/16/Add.1) was studied by the Commission during its second session at its 40th meeting. The results of this study are shown in the following paragraphs which are based on the contents of the working paper as harmonized with views expressed by the majority of the Commission.

27. The task assigned to the Commission was to consider and to report to the General Assembly on ways and means (*moyens*) for making the evidence (*documentation*) of customary international law more readily available (*plus accessible*). Two sources of customary international law are referred to in article 24: State practice, and decisions of national and international courts on questions of international law. The Commission was directed to consider (*par exemple*) such ways and means as the collection and publication of documents concerning these sources. The text of article 24 does not preclude consideration of other ways and means, nor does it exclude other sources.

2. SCOPE OF CUSTOMARY INTERNATIONAL LAW

28. Article 24 of the Statute of the Commission refers only to "customary international law" (*droit international coutumier*). Its emphasis is in line with the traditional distinction between customary international law and conventional international law. That distinction was followed in 1920 in the drafting of article 38 of the Statute of the Permanent Court of International Justice, the integrity of which is preserved in Article 38 of the Statute of the International Court of Justice, as revised in 1945. The Court is directed to "apply" four categories of sources of law, i.e., to resort to them in finding the law applicable to the case before it. Though the fourth category is denominated "subsidiary", Article 38 does not otherwise establish a general hierarchy among the following:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

29. Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. For present purposes, therefore, the Commission deems it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available.

30. Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts.

31. Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to "documents concerning State practice" (*documents établissant la pratique des Etats*) supplies no criteria for judging the nature of such "documents". Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations.

32. Without any intended exclusion, certain rubrics may be listed for convenience. The following paragraphs will serve both as a list of such rubrics, and as a survey of the more important official and non-official collections with reference to each of them. Some of the materials referred to will evidence the formulation of customary or conventional international law, while others will evidence merely the practice of States. Commentaries to be found in treatises and monographs will not be included among the materials listed under the various rubrics.

3. EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

A. *Texts of international instruments*

33. Two important collections of the texts of treaties and conventions concluded by various States have long served a useful purpose:

(a) *British and Foreign State Papers*, published in 140 volumes from 1841 to 1948;

(b) de Martens, *Nouveau Recueil général de Traités*, published since 1843 in succession to the earlier *recueils* published from 1791: 1st series, twenty volumes; 2nd series, thirty-five volumes; 3rd series, forty volumes, down to 1943.

Mention may also be made of the thirty volumes of Hertslet's *Commercial Treaties*.

34. For present purposes, it is hardly necessary to refer to collections of the texts of earlier instruments, such as the seventeen volumes of Rymer's *Foedera*, and the thirteen volumes of Dumont's *Corps Universel Diplomatique du Droit des Gens*, both published in the eighteenth century.

35. The inauguration of a collection of texts of treaties and conventions to be published under official international auspices was considered at a diplomatic conference held in Berne in 1894, but no agreement was reached. Soon thereafter, however, publications of texts of international instruments in their respective fields were inaugurated by the international unions for the protection of industrial and literary property. In 1911, the International Bureau of the Permanent Court of Arbitration inaugurated the publication of the texts of arbitration treaties communicated to it under articles 22 and 43 respectively of the Hague Conventions on Pacific Settlement of International Disputes of 1899 and 1907.

36. In 1920, the publication of the texts of treaties registered under article 18 of the Covenant was begun by the League of Nations. When it was discontinued in 1946, the *League of Nations Treaty Series* consisted of 205 volumes, supplemented by nine volumes of indices. A consolidated index of the whole *Series* would serve a useful purpose.

37. Since 1946, the texts of treaties and agreements registered with, or filed and recorded by, the Secretariat of the United Nations are being published in the *United Nations Treaty Series*, of which thirty-three volumes have appeared up to this time. Index volumes are contemplated for the future.

38. It may be assumed that the texts of most of the treaties concluded since 1920 have been published, or are to be published in either the *League of Nations Treaty Series* or the *United Nations Treaty Series*. For the texts of treaties concluded before 1920, the *British and Foreign State Papers* and de Martens' *Nouveau Recueil général de Traités* are supplemented by various national collections.

39. Many States publish in serial or in collected form the texts of treaties and conventions to which they are parties; in some States, such texts are scattered in publications of various kinds. Collections of the

treaties of particular countries are often published privately, also.

The *Manual of Collections of Treaties and of Collections Relating to Treaties*, compiled by Denys P. Myers, and published in 1922, contains 3,468 entries.

40. Several useful *répertoires* of treaties have been published, notably:

(a) Tétot, *Répertoire des Traités de Paix*, etc., 1493-1866, in two parts; published 1866-1870.

(b) Ribier, *Répertoire de Traités de Paix*, etc., 1867-1895, two volumes; published 1895-1899.

(c) Institut intermédiaire international, *Répertoire général des Traités*, 1895-1920; published in 1926.

A Chronology (*Répertoire*) of International Treaties and Legislative Measures was published by the League of Nations Library from 1930 to 1940.

41. Mention may also be made of several collections of treaties, either regional or otherwise special. Extremely useful is the *Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries*, edited by C. U. Aitchison, published in five editions since 1862; the fifth edition, published by the Government of India, consists of fourteen volumes. Valuable, also, is Calvo's *Recueil des Traités* of the States of Latin America, 1493-1823, in six volumes, published 1862-1868. A collection of the texts of multipartite international instruments concluded between 1919 and 1945, edited by Hudson, was published in Washington by the Carnegie Endowment for International Peace in nine volumes, under the title *International Legislation*. In 1948, the United Nations published a valuable survey of treaties on pacific settlement.

B. Decisions of international courts

42. The awards of tribunals of the Permanent Court of Arbitration were published by the International Bureau as they were handed down, but no official collection of them was issued. An unofficial collection of the texts of the awards, with English translations, was compiled by James Brown Scott and published in his *Hague Court Reports* (1916) and *Hague Court Reports*, second series (1932). A volume of *Analyses des Sentences* was published by the International Bureau in 1934. A digest of the awards down to 1928 was published in *Fontes Juris Gentium*, Series A, Sectio I, Tomus 2.

43. Most of the decisions of the Central American Court of Justice were published in the seven volumes of the *Anales de la Corte*, issued from 1911 to 1917. The editing of these volumes left much to be desired, and it seems probable that they are not now generally available. There is need for a new and complete collection of the jurisprudence of this Court.

44. The judgments, advisory opinions and orders of the Permanent Court of International Justice, in French and English, were published in serial form in Series A, Series B and Series A/B of its publications; documents and records of proceedings concerning them were published in Series C; and digests were published in Series E. The English texts of the judgments and

opinions were reproduced in the four volumes of Hudson's *World Court Reports*. A German translation of the judgments and opinions down to 1935 was published in the twelve volumes of *Entscheidungen des Ständigen Internationalen Gerichtshofs*. A Spanish translation of the earlier judgments and opinions was published in the two volumes of *Collección de Decisiones del Tribunal Permanente de Justicia Internacional*. A digest of the Court's jurisprudence from 1922 to 1934 was published in *Fontes Juris Gentium*, Series A, Sectio I, Tomus 1 and Tomus 3.

45. The judgments, orders and opinions of the International Court of Justice are published in the annual volumes of *I. C. J. Reports*. Documents and records of the proceedings in each case are published by the Court in *Pleadings, Oral Arguments and Documents*; these volumes are not serially numbered. Decisions taken by the Court in application of its Statute and Rules are recorded in the Yearbook published by the Registry.

46. Few of the judgments and awards of the many temporary and *ad hoc* tribunals which have functioned over the past 150 years have been published in systematic form. A useful list of them is to be found in Stuyt's *Survey of International Arbitrations, 1791-1938*. No complete collection of the texts of such judgments and awards has been made.

47. In 1902, La Fontaine published in his *Pasicrisie Internationale* a documentary history of international arbitrations from 1794 to 1900, dealing with 177 cases.

48. Two notable efforts have been inaugurated to compile general collections of international jurisprudence, but both of them were discontinued before completion of the original design. De La Pradelle and Politis edited two volumes of the *Recueil des Arbitrages internationaux*, published in 1905 and 1923, reprinted in 1932; these volumes report and comment on fifty-two cases arising between 1798 and 1872. John Bassett Moore's work on *International Adjudications, Ancient and Modern*, was planned as a comprehensive collection of many volumes; beginning in 1929, six volumes of the *Modern Series* were published, dealing with relatively few cases but in great detail; the one volume of the *Ancient Series*, published in 1936, dealt with a single arbitration.

49. Two collections may be noted of awards in arbitrations to which particular States were parties. Moore's *History and Digest of the International Arbitrations to which the United States has been a Party* was published in six volumes in 1898. Van Boetzelaar's volume, *Les Arbitrages néerlandais de 1581 à 1794*, published in 1930, is supplemented by van Hamel's volume, *Les Arbitrages néerlandais de 1813 à nos jours*, published in 1939.

50. The recent inauguration by the United Nations of a series of *Reports of International Arbitral Awards (Recueil des Sentences Arbitrales)* is to be signaled. Three volumes, of continuous pagination, appeared in 1948 and 1949, reporting fifty-nine awards handed down during the period from 1920 to 1941; edited by the staff of the

Registry of the International Court of Justice, these volumes were issued as publications of the United Nations. An additional series is now contemplated by the Secretariat of the United Nations.

51. Most of the current international decisions are reported in various periodicals; summaries and digests of them appear in the valuable *Annual Digest and Reports of Public International Law Cases*, published under varying titles since 1932 and now edited by Lauterpacht; the eleven volumes of the *Annual Digest* cover the period from 1919 to 1945. Schwarzenberger's *International Law*, volume I (2nd ed.), is a useful digest of international judicial decisions.

C. Decisions of national courts

52. Article 24 of the Commission's Statute refers to "the collection and publication . . . of the decisions of national and international courts on questions of international law". The text seems to set off national court decisions from State practice.

53. In general, national courts apply the national law. Their decisions "on questions of international law" are frequently based on international law only in so far as provisions of the latter have been incorporated into the national law. That incorporation is necessarily limited, for many of the provisions of international law serve little purpose in national law; at most, it is only the national view of international law which is incorporated into national law so as to be applicable by national courts. Suits are sometimes brought in the courts of one State by the Government of another State, but as questions of international law, or questions of international concern, more often arise in national courts when no State is represented before the court, decisions may be taken on them without the court's having opportunity to hear the views of any Government. Even where the theory prevails that international law is a part of the national law, a national court may base its decision on principles of international law only in the absence of a controlling national statute or regulation or precedent; for example, in some States which purport to incorporate their treaties into the national law, a statute enacted after the conclusion of a treaty will prevail over the provisions of the treaty itself.

54. It may be concluded that the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law. The Commission is of the opinion that it is unnecessary to assess the relative value of national court decisions as compared with other types of evidence of customary international law.

55. It would be a herculean task to assemble the decisions, on questions of international law, of the national courts of all States. Assuming that most of such decisions are published in each country, the selection, collection and editing of the texts would involve a great deal of time and a considerable expense.

56. In some of the international law periodicals, reports or digests of national judicial decisions are regularly published. Particular mention should be made

in this connexion of the *Journal de Droit International Privé*, founded in 1874 and continued since 1915 as the *Journal de Droit International*, with a total of some seventy-two volumes. Since 1907, the *American Journal of International Law* has regularly published texts of national court decisions.

57. Most valuable in this connexion are the eleven volumes of the *Annual Digest of Public International Law Cases* inaugurated in 1932, covering both national and international jurisprudence for the years since 1919. Significantly, the term *Reports* has been added to the title of the more recent volumes.

58. A significant collection of decisions of national courts concerning private international law is *Giurisprudenza Comparata di Diritto Internazionale Privato*, published in eight volumes by the Istituto di Studi Legislativi at Rome (1937-1942). In 1925, the International Labour Office inaugurated as an annual publication an *International Survey of Legal Decisions on Labour Law*, of which at least thirteen volumes have been published.

59. Various collections of decisions of prize courts of some countries have been published.

D. National legislation

60. The term legislation is here employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded.

61. In most States, legislative texts are regularly published in systematic form. The publications in some countries are voluminous and expensive. Obviously, they serve as an important storehouse of evidence of State practice. Yet it seems probable that in many countries the published legislation of other States is not readily available.

62. Several attempts have been made to publish the texts of the constitutions of the various States of the world, but any such collection soon becomes out of date. The most extensive collection is Dareste's *Les Constitutions modernes*, inaugurated in 1883; six volumes of a fourth edition were published in 1928. In 1935 and 1936, a four-volume collection of constitutions of various States was published in Moscow under the auspices of the Government of the Soviet Union. An ambitious collection of *The Constitutions of All Countries* was projected by the Foreign Office of the United Kingdom in 1938, but only one volume containing British Empire constitutions was published. Reference may also be made to the collection of constitutions recently published by Peaslee in three volumes. A tenth edition of a collection of European constitutions edited by Mirkine-Guetzévitch was published in 1938.

63. Several collections of Latin-American constitutions have been made, notably by Altamira (1930), Mirkine-Guetzévitch (1932), Lozano y Mazon (1942), and Pasquel (1943). Fitzgibbon's *Constitutions of the Americas* (1948) contains English texts and translations. Giannini's collection of *Le Costituzioni degli Stati dell' Europa Orientale*

appeared in two volumes in 1930. The collection of *Constitutions, Electoral Laws, Treaties of the States in the Near and Middle East* (1947), by Davis, has also served a useful purpose.

64. The *Yearbook on Human Rights* for 1946, published by the United Nations, collects provisions in the constitutions of Members of the United Nations relating to human rights.

65. No attempt has been made to assemble a global collection of the legislation of all States bearing on matters of international concern. An ambitious project was launched by the Istituto de Studi Legislativi of Rome about 1936; its *Legislazione Internazionale* was designed to present texts of or information concerning the laws, decrees, and projects of laws of most of the countries of Europe; the seven volumes published covered the years from 1932 to 1938. Under the same auspices, a *Reperitorio della Legislazione Mondiale* was launched in 1933, but only a few volumes were published.

66. Four volumes of an *International Digest of Laws and Ordinances* were published by the International Legislative Information Centre of Geneva in 1938, but the series was not continued.

67. The *Boletín Analítico de los Principales Documentos Parlamentarios Extranjeros*, published in Madrid from 1910 to 1927, was succeeded in 1930 by the *Boletín de Legislación y Documentos Parlamentarios Extranjeros*, of which twelve volumes were published between 1930 and 1935. The French *Société de Législation Comparée* published an *Annuaire de Législation étrangère* from 1872 to 1939.

68. Some attempts have been made to collect and publish the laws of various countries relating to particular topics of international interest. Notable is the *Sammlung Ausserdeutscher Strafgesetzbücher*, of which fifty-four numbers were published between 1881 and 1942. In the early part of the twentieth century, a great collection of the commercial laws of many States was published in four editions in different languages, the English edition consisting of thirty-two volumes. Mention may also be made of the collections of *Nationality Laws, Diplomatic and Consular Laws and Regulations, Neutrality Laws Regulations*, and *Piracy Laws*, published by the Harvard Research in International Law. The United Nations Commission on Narcotic Drugs has inaugurated the publication of an *Annual Summary of Laws and Regulations relating to the Control of Narcotic Drugs*. The Legal Committee of the International Civil Aviation Organization is now planning a publication of national laws and regulations on aviation.

69. At the present time, there would seem to be need for a collection of national laws on many topics, such as nationality, territorial sea, and exploitation of the natural resources of submarine areas of the high seas. The *Legislative Series* published by the International Labour Office supplies prototype for such publications.

70. Various reviews of the current legislation of particular countries are regularly published. The British Society of Comparative Legislation has long published in its *Journal of Comparative Legislation and International*

Law valuable reviews of the legislation of various parts of the British Empire. From 1930 to 1940, the League of Nations Library published a *Chronology (Répertoire) of International Treaties and Legislative Measures*; a continuance of that *Chronology* by the United Nations Secretariat might be envisaged.

E. Diplomatic correspondence

71. The diplomatic correspondence between Governments must supply abundant evidence of customary international law. For various reasons, however, much of the correspondence is not published. Within the limits set by propriety, some Governments publish selected texts of diplomatic exchanges, but frequently only after a lapse of years. Archives of foreign offices are in some cases opened to access by qualified scholars engaged in research, but usually only up to a particular time.

72. It is unnecessary to attempt to list the publications of their diplomatic correspondence issued by various Governments. Of the bibliographical aids in this connexion, mention may be made of *Guide International des Archives—Europe*, published by the Institute of Intellectual Cooperation in 1934. The memorandum placed before the Commission by the Secretary-General lists (A/C.N.4/6, pages 10-12) the periodical publications issued by the States of Latin America, and refers (pages 13-20) to the principal publications of France, Germany, the Soviet Union, the United Kingdom and the United States of America. Meyer's *Official Publications of European Governments* (1929) lists the current publications of eight other Governments. The Union of Soviet Socialist Republics has recently published a collection of diplomatic correspondence on the eve of the war of 1939. A vast library would be required to house all such publications, and for the most part they are of interest chiefly to historians. If reproduction were contemplated, it seems questionable whether new processes, such as microfilming, would offer much relief.

73. In some countries, digests of their diplomatic correspondence have been compiled, which have a certain usefulness generally. An outstanding example of such a digest is the digest of the diplomatic correspondence of European States, published in *Fontes Juris Gentium*, Series B, Sectio I, Tomus 1 (in two parts) and Tomus 2 (in three parts), covering the period from 1856 to 1878.

74. A series of digests relating especially to United States of America materials included diplomatic correspondence—the three volumes of Wharton's *Digest* (1886), the eight volumes of Moore's *Digest* (1906), and the eight volumes of Hackworth's *Digest* (1940). Suggestions have emanated from various quarters that other such digests are needed.

75. Some reserve may be required in the use of such digests; a well-known compiler, John Bassett Moore, was careful to point out in a preface that:

“ Mere extracts from State papers or judicial decisions cannot be safely relied on as guides to the law. They may indeed be positively misleading. Especially is this true of State papers, in which arguments are often contentiously put forth which by no means

represent the eventual view of the government in whose behalf they were employed”.

F. *Opinions of national legal advisers*

76. The opinions on questions of international law given by legal advisers to Governments are published in few countries. Reserve may be needed in assessing the value of such opinions as evidence of customary international law, for the efforts of legal advisers are necessarily directed to the implementation of policy. Nor would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasions with reference to which they were given.

77. The two volumes of *Great Britain and the Law of Nations*, published by H. A. Smith in 1932 and 1935, exemplify the use of such opinions as illustrations of the development of customary international law. Admirable use of British opinions was made also in McNair's *Law of Treaties* (1938). The regularly published *Opinions of the Attorney-General of the United States* may also be mentioned in this connexion; a digest of such opinions, published in three volumes, covers the period 1789-1921. The single volume of *Jurisprudencia de la Cancillería Chilena*, by Cruchaga Ossa, covers the period down to 1865.

G. *Practice of international organizations*

78. Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations. The *Répertoire of Questions of General International Law before the League of Nations, 1920-1940*, published by the Geneva Research Centre in 1942, contained chiefly statements in the *Official Journal* of the League of Nations concerning questions of international law. It is understood that a *répertoire* of its practice is planned by the Secretariat of the United Nations.

4. AVAILABILITY OF EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

79. In the foregoing survey of various types of evidence of customary international law, little attention has been given to the availability of published materials. It may be desirable to attempt some analysis of the concept of availability, before suggesting specific “ways and means for making the evidence of customary international law more readily available”.

80. Availability may be considered in three aspects. First, availability for meeting the needs of particular groups of persons. Second, the extent to which materials already published are available throughout the world. Third, the extent to which materials not yet published may be made available throughout the world. Article 24 of the Commission's Statute seems to envisage the third aspect in its reference to “collection and publication of documents” (*la compilation et la publication de documents*); it does not expressly envisage the first and second aspects.

81. In the first aspect of availability, account should be taken of the needs of private individuals engaged in the exploration of problems of international law, as well as of the needs of governmental and international officials. The needs of the three groups are not necessarily the same. An individual may be able to undertake wider investigations than those which government officials ordinarily have time to pursue. Access to extensive libraries is desirable for all three groups, but officials must often rely on works of ready reference.

82. For the most part, the published materials mentioned in the foregoing survey are to be found only in great libraries of international law. Unfortunately, such libraries are few and far between. The Library of the Peace Palace at The Hague, which serves the needs of the International Court of Justice, has few counterparts in the capitals of States. Indeed, it seems possible that in some capitals no working library of international law exists. This situation has a bearing on the general outlook for international law. The establishment of libraries containing the principal collections of published materials which serve as evidence of customary international law would require much labour and expense, as well as time. The problem of creating new libraries seems to lie beyond the scope of the inquiry undertaken by the Commission, but attention might be given to it by other organs of the United Nations.

83. As to the second aspect of availability, it is extremely difficult to estimate the present availability of many of the principal collections of evidence of customary international law, which have been published. In many instances, stocks probably do not exist to be drawn upon for meeting present or future demands. For example, it would probably be difficult to obtain a complete set of de Martens' *Nouveau Recueil général de Traités*.

84. The Commission invited the Secretariat of the United Nations to undertake an inquiry as to the present availability of the *League of Nations Treaty Series*, the publications of the Permanent Court of International Justice, and the awards of tribunals of the Permanent Court of Arbitration. The inquiry revealed that the European Office of the United Nations has on hand for distribution stocks of the *League of Nations Treaty Series*, and that the Registry of the International Court of Justice is similarly possessed of stocks of the publications of the Permanent Court; it was revealed also, that the Secretary-General of the Permanent Court of Arbitration holds, for distribution on demand, stocks (in some cases few copies) of the awards of tribunals of that Court.

85. The Commission also inquired of the Secretariat concerning the current distribution of the *United Nations Treaty Series* and the publications of the International Court of Justice, emphasizing the need for constant attention to such distribution. It appears that a generally satisfactory system for distribution is maintained and that, with the exception of volumes 18-23 of the *Treaty Series*, adequate stocks are being kept on hand.

86. As to the third aspect of availability, the Commission could draw up a list of certain types of evidence

of customary international law which are not adequately covered by existing publications. The foregoing survey mentions some of the *lacunae*, but it is a difficult task to say what procedure should be followed in attempting to fill them. The Commission itself is not in a position to launch any new series of publications; it can, however, suggest that the Secretariat of the United Nations should undertake certain types of publications.

87. It seems doubtful that much can be done to stimulate the publication by Governments of materials on international law. The suggestion has been advanced from time to time that more Governments should issue digests of their international practice, along the lines of some of the well-known digests issued in the past under government sponsorship. It would serve little purpose for the Commission to renew the suggestion, for artificial stimulus of such arduous enterprises does not promise much in the way of results.

88. The Commission has considered means by which the publications currently issued by Governments could be made more widely available. It seems possible that a plan could be worked out for a general exchange between Governments of such of their publications as relate to customary international law. Some eighteen States are now parties to the 1886 Brussels Convention for the International Exchange of Official Documents, and some thirteen American States are parties to the 1936 Inter-American Convention on the subject; some fifty bipartite treaties on the subject have been concluded, also. The possibility of a new convention in a broader framework than that now contemplated was recently considered by the United Nations Educational, Scientific and Cultural Organization.

89. Results of the fruitful activities of non-official scientific bodies have appeared in the numerous reviews, and recent years have seen the launching of yearbooks or journals of international law in a number of countries. Despite these manifestations of zeal, it seems doubtful that many national or international institutes exist which may be relied upon for the sustained effort involved in the publication of useful compendiums of the evidence of customary international law. Few of them can undertake and continue a long-range programme of solid work; their personnel changes rapidly, their interest is easily deflected, and their funds are seldom adequate.

5. SPECIFIC WAYS AND MEANS SUGGESTED BY THE COMMISSION

90. The Commission recommends that the widest possible distribution be made of publications relating to international law issued by organs of the United Nations, particularly the *Reports* and other publications of the International Court of Justice, the *United Nations Treaty Series*, and the *Reports of International Arbitral Awards*. To this end, the price at which such publications are sold should be kept as low as is consistent with budgetary limitations, and considerations of economy should not preclude the maintenance of the stocks necessary for meeting future demands. The Commission attaches special importance to the continuance of the present language system of the *United Nations Treaty Series*, i.e., reproduction of the original text with

translations—as essential to the general usefulness of the Series. It expresses the *voeu*, also, that the texts of international instruments registered with, or filed and recorded by, the Secretariat should be published with the greatest possible promptness.

91. The Commission recommends that, in so far as it has not already done so, the General Assembly of the United Nations should authorize the Secretariat to prepare and issue, with as wide a distribution as possible, the following publications:

(a) A Juridical Yearbook, setting forth, *inter alia*, significant legislative developments in various countries; current arbitral awards by *ad hoc* international tribunals; significant decisions of national courts relating to problems of international law and particularly those concerning multipartite international conventions. The need for such a publication is especially urgent because of the great difficulty long encountered by interested persons in their efforts to keep abreast of current developments. The Commission now has before it a topic—the continental shelf under the high seas—which affords an example of both the need and the difficulty.

(b) A Legislative Series containing the texts of current national legislation on matters of international interest, and particularly legislation implementing multipartite, international instruments. In connexion with this series, the Secretariat should assemble and publish from time to time collections of the texts of national legislation on special topics of general interest; for example, on such topics as nationality, territorial sea, and submarine areas of the high seas.

(c) A collection of the constitutions of all States, with supplementary volumes to be issued from time to time for keeping it up to date. Precise knowledge of constitutional provisions of other countries is essential to those who in any country are engaged in negotiating treaties.

(d) A list of the publications issued by the Governments of all States containing the texts of treaties concluded by them, supplemented by a list of the principal collections of treaty texts published under private auspices.

(e) A consolidated index of the *League of Nations Treaty Series*. This publication is essential to the wider use of the Series.

(f) Occasional index volumes of the *United Nations Treaty Series*.

(g) A *répertoire* of the practice of the organization of the United Nations with regard to questions of international law.

(h) Additional series of the *Reports of International Arbitral Awards*, of which a first series has already been published in three volumes.

92. The Commission recommends that the Registry of the International Court of Justice should publish occasional digests of the Court's *Reports*.

93. The Commission recommends that the General Assembly call to the attention of Governments the desirability of their publishing digests of their diplomatic correspondence and other materials relating to international law.

94. The Commission recommends that the General Assembly give consideration to the desirability of an international convention concerning the general exchange of official publications relating to international law and international relations.

Part III. FORMULATION OF THE NÜRNBERG PRINCIPLES³

95. Under General Assembly resolution 177 (II), paragraph (a), the International Law Commission was directed to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal".

96. In pursuance of this resolution of the General Assembly, the Commission undertook a preliminary consideration of the subject at its first session. In the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation of these principles as principles of international law but merely to formulate them. This conclusion was set forth in paragraph 26 of the report of the Commission on its first session, which report was approved by the General Assembly in 1949. Mr. Jean Spiropoulos was appointed special rapporteur to continue

³ Mr. Ricardo J. Alfaro declared that he voted in favour of part III of the report with a reservation as to paragraph 96, because he believed that the reference therein contained regarding the task of formulating the Nürnberg principles should have been inserted in the report together with a quotation of the passage in the judgment of the Nürnberg Tribunal in which the Tribunal asserted that the Charter "is the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law".

In abstaining from the vote on this part of the report, Mr. Manley O. Hudson stated that some uncertainty had existed as to the precise nature of the task entrusted to the Commission. In the report of the Commission covering its first session, which was approved by the General Assembly, the view was put forward that "the task of the Commission was not to express any appreciation of these principles [namely the Nürnberg principles] as principles of international law but merely to formulate them". In his opinion, however, the Commission had not altogether adhered to that view in its later work, with the result that doubt subsisted as to the juridical character of the formulation adopted. Moreover, the formulation had not sufficiently taken into account the special character of the Charter and judgment of the International Military Tribunal and the *ad hoc* purpose which they served.

Mr. Georges Scelle said that he regretted that he could not accept the view taken by the Commission of its task in this part of the report, for the same reasons as those which he had stated the previous year. The report did not enunciate the general principles of law on which the provisions of the Charter and the decisions of the Tribunal were based, but merely summarized some of them, whereas the Tribunal itself had stated that the principles it had adopted were already a part of positive international law at the time when it was established. Moreover, he considered that the final text of the report did not seem to reflect accurately the conclusions reached by the Commission during its preliminary discussions, and restricted their scope.

the work of the Commission on the subject and to present a report at its second session.

97. At the session under review, Mr. Spiropoulos presented his report (A/CN.4/22) which the Commission considered at its 44th to 49th and 54th meetings. On the basis of this report, the Commission adopted a formulation of the principles of international law which were recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. The formulation by the Commission, together with comments thereon, is set out below.

PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NÜRNBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL

PRINCIPLE I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

98. This principle is based on the first paragraph of article 6 of the Charter of the Nürnberg Tribunal which established the competence of the Tribunal to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes defined in sub-paragraphs (a), (b) and (c) of article 6. The text of the Charter declared punishable only persons "acting in the interests of the European Axis countries" but, as a matter of course, Principle I is now formulated in general terms.

99. The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the Tribunal were very definite on the question whether rules of international law may apply to individuals. "That international law imposes duties and liabilities upon individuals as well as upon States", said the judgment of the Tribunal, "has long been recognized".⁴ It added: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."⁵

PRINCIPLE II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

100. This principle is a corollary to Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country.

⁴ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, page 223.

⁵ *Ibid.*