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**Article 24 of the Statute of the International Law Commission – Working Paper
by Manley O. Hudson.**

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

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ARTICLE 24 OF THE STATUTE OF THE INTERNATIONAL LAW COMMISSION

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Working Paper* by Manley O. Hudson, Special Rapporteur

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* While the writer has endeavoured to divest himself of national preoccupations, the scope and content of this paper are limited by the materials available to him, and by his command of languages.

I. INTRODUCTION

1. 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 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 Commission examine les moyens susceptibles de rendre plus accessible la documentation relative au droit international coutumier, par exemple la compilation et la publication de documents établissant la pratique des Etats et des décisions de juridictions nationales et internationales sur des questions de droit international, et elle fait rapport à l'Assemblée générale sur ce sujet.

2. 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 (United Nations Publications, sales No. 1949.V. 6., pp. 3-5).¹ 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).

3. The subject matter of Article 24 was considered by the Commission on 1 and 2 June 1949 (A/CN.4/SR.31 and 32). At the conclusion of the discussion, the writer was invited to prepare a working paper on the subject, to be submitted to the International Law Commission at its second session.

4. In the preparation of this working paper, the writer has been guided by the views expressed by members of the Commission at its first session, but he has attempted to go somewhat beyond the scope of that discussion.

5. The task assigned to the Commission is 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 law are referred to in Article 24: State practice, and decisions of national and international courts on questions of international law. The Commission is directed to consider such (*par exemple*) 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.

6. The *scheme* of this working paper includes a preliminary review of the sources of customary law, to be followed by a survey of existing evidence with an estimate of its availability, leading up to a list of topics to be considered in connexion with the Commission's report.

¹ "Ways and means of making the evidence of customary international law more readily available."

II. SCOPE OF CUSTOMARY INTERNATIONAL LAW

7. 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 Court's Statute 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. Article 38 creates no general hierarchy among the following categories:

(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.

8. Perhaps the differentiation between customary international law and conventional international law ought not to be too rigidly insisted upon, however. A principle or rule of customary 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 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 law. For present purposes, therefore, the Commission may deem 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.

9. 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 reports of 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 law. Moreover, the practice of a State may be indicated by the decisions of its national courts.

10. Before listing the various types of materials which serve as evidence of customary international law, the Commission may wish to consider the elements which must be present before a principle or rule of customary international law can be found to have become established. The writer has the impression that a good measure of agreement exists among authors of treatises as to what these elements are. Without making an exhaustive study of the views of treatise-writers, but taking a few authors at random, useful discussions have been found in: Accioly, *Manual de Direito Internacional Publico*, pp. 10-11; Anzilotti, *Corso di Diritto Internazionale*, I, pp. 68-72; Basdevant, in *Recueil des Cours*, Vol. 58, pp. 504-520; Bourquin, in *Recueil des Cours*, Vol. 35, pp. 61-67; Brierly, *Law of Nations*, 4th ed., pp. 60-63; Bustamante, *Derecho Internacional Publico*, I, p. 68; Cruchaga Tocornal, *Nociones de Derecho Internacional*, 3d ed., p. 61; François, *Handboek van het Volkenrecht*, I, pp. 370-371; Krylov, in *Mezhdunarodnoe Pravo*, pp. 23-24; Raestad, in *Nordisk Tidsskrift for International Ret*, Vol. 4, pp. 61-84; Ross, *Textbook on International Law*, General Part, pp. 86-90; Rousseau, *Principes Généraux du Droit International Public*, I, pp. 824-827; Scelle, *Précis de Droit des Gens*, Part II, pp. 304-312; Scelle, *Manuel de Droit International Public*, pp. 574-578; Séfériades, in *Revue Générale de Droit International Public*, 3d ser., Vol. 10, pp. 129-196; Spiropoulos, *Traité Théorique et Pratique de Droit International Public*, pp. 28-30; and Triepel, *Völkerrecht und Landesrecht*, pp. 102-103.

11. Seeking with Brierly (p. 62) "a general recognition among States of a certain practice as obligatory", the emergence of a principle or rule of customary international law would seem to require presence of the following elements:

(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;

(b) continuation or repetition of the practice over a considerable period of time;

(c) conception that the practice is required by, or consistent with, prevailing international law; and

(d) general acquiescence in the practice by other States.

Of course the presence of each of these elements is to be established (*doit être constaté*) as a fact by a competent international authority.

12. If this outline of the necessary elements is somewhat lacking in precision, it may serve nevertheless as a guide for determining the character of the evidence of customary international law which should be made more readily available.

13. 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". It is hardly practicable to list all of the numerous types of materials which reveal State practice on each of the many problems arising in international relations.

14. Without any intended exclusion, certain rubrics may be listed for possible consideration in drafting the Commission's report. 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 known to the writer 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 monographs and treatises will not be included among the materials listed under the various rubrics.

III. EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

A. TEXTS OF INTERNATIONAL INSTRUMENTS

15. Two admirable 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, 20 volumes; 2nd series, 35 volumes; 3rd series, 40 volumes, down to 1943. Mention may also be made of the 30 volumes of Hertslet's *Commercial Treaties*. 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.

16. 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 Article 22/43 of The Hague Conventions on Pacific Settlement of International Disputes of 1899 and 1907.

17. 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 9 volumes of indices.

18. Since 1946, the texts of treaties and agreements registered or filed with the Secretariat of the United Nations are being published in the *United Nations Treaty Series*, of which 26 volumes had appeared down to the end of 1949.

19. Of narrower scope but 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 14 volumes. Mention may be made, also, of Calvo's *Recueil des Traités* of the States of Latin America, 1493-1823, in six volumes, published 1862-1868.

20. A collection of the texts of multipartite international instruments concluded between 1919 and 1945, has been published in Washington by the Carnegie Endowment for International Peace in 9 volumes, under the title *International Legislation*. In 1948, the United Nations published a valuable survey of treaties on pacific settlement.

21. Many States publish in collected or in serial 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.

22. 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, 2 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.

23. 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.

24. 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*. The Commission may wish to suggest that the Secretariat should prepare and publish a digest of the *League of Nations Treaty Series*; perhaps the International Labour Code published by the International Labour Office would serve as a prototype for such a digest.

25. For the texts of treaties concluded before 1920, the *British and Foreign State Papers* and Martens' *Nouveau Recueil Général de Traités* are supplemented by the various national collections. The Commission may wish to suggest that the Secretariat of the United Nations should publish, and revise from time to time, a list of such national collections.

B. DECISIONS OF INTERNATIONAL COURTS

26. Though the awards of tribunals of the Permanent Court of Arbitration were usually published by the International Bureau as they were handed down, no official collection of them was issued. In 1934, a volume of *Analyses des Sentences* was published by the International Bureau. 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 digest of the awards down to 1928 was

published in *Fontes Juris Gentium*, Series A, Sectio I, Tomus 2.

27. Most of the decisions of the Central American Court of Justice were published in the 7 volumes of the *Annales 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 generally available.

28. The judgments and opinions 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 some 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 *Colección 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.

29. 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.

30. 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*. So far as known, no complete collection of the texts of such judgments and awards has been made.

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

32. 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. 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 52 cases arising between 1798 and 1872. John Bassett Moore's work on *International Adjudications, Ancient and Modern*, was planned as a comprehensive collection to run into many volumes; beginning in 1929, 6 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.

33. Two collections may be noted of awards in arbitrations to which particular States were parties. Moore's *History and Digest of the International Arbi-*

trations 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.

34. The recent inauguration by the United Nations of a series of *Reports of International Arbitral Awards (Recueil des Sentences Arbitrales)* is to be signalized. Three volumes, of continuous pagination, appeared in 1948 and 1949, reporting 59 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. The Commission may wish to express a *vœu* that the completion of the present series will promptly be followed by the inauguration of additional series covering other periods.

35. Current international decisions are generally reported in various periodicals; and 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 11 volumes of the *Annual Digest* cover the period from 1919 to 1945. The continuance of this valuable series may well be urged by the Commission. Schwarzenberger's *International Law*, Volume 1 (2d ed.), is a useful digest of international judicial decisions.

C. DECISIONS OF NATIONAL COURTS

36. 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. The Commission may wish to formulate its own view on this matter, if not a *caveat* as to the extent to which decisions of national courts supply evidence of customary international law.

37. In general, national courts apply the national law. Strictly speaking, their decisions "on questions of international law" are based on international law only in so far as its provisions have been incorporated into the national law. That incorporation is necessarily limited, for many of the provisions of international law can serve no 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 questions of international law, or questions of international concern, more often arise in national courts when no State is represented before the court, and 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 will 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.

38. If this view is shared by the Commission, it may be concluded that the decisions of the national courts of a State are of value as evidence of that State's practice, but that they do not otherwise serve as evidence of customary international law. No attempt need here be made to assess the relative value of national court decisions as compared with other types of evidence of customary international law.

39. It would be a herculean task to assemble the decisions on questions of international law of the national courts of all States, or even of all Members of the United Nations. Assuming that most such decisions are published in each country, the selection, collection and editing of the texts would involve a great deal of time of many persons, and a considerable expense. So far as the writer knows, no attempt has been made to do such a job.

40. 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 72 volumes. Since 1907, the *American Journal of International Law* has regularly published texts of national court decisions.

41. Most valuable in this connexion are the 11 volumes of the *Annual Digest of Public International Law Cases* inaugurated in 1932, and 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. This publication requires much organization and financial support. The Commission may wish to urge its continuance.

42. A significant collection of decisions of national courts concerning private international law is *Giurisprudenza Comparata di Diritto Internazionale Privato*, published in 8 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 were published.

43. Various collections of decisions of prize courts of some countries have been published. Reference is made to the Secretary-General's Memorandum, p. 61.

D. NATIONAL LEGISLATION

44. 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.

45. In most States, legislative texts are regularly published in systematic form. The publications are sometimes very voluminous, and expensive. Obviously they serve as a storehouse of evidence of state practice. Yet it seems probable that in many countries the

published legislation of other States is not readily available.

46. Several attempts have been made to publish the texts of the constitutions of the various States of the world, but of course any such collection soon becomes out of date. The most extensive collection known to the writer is Dareste's *Les Constitutions Modernes*, inaugurated in 1883; 6 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 Soviet Government's auspices. An ambitious collection of *The Constitutions of All Countries* was projected by the Foreign Office of the United Kingdom in 1938, but so far as the writer is informed only one volume containing British Empire constitutions was published. Several collections of Latin American constitutions have been made, notably by Altamira (1930), Lazano y Mazón (1942), and Pasquel (1943); Fitzgibbon's *Constitutions of the Americas* (1948) contains English 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.

47. The *Yearbook on Human Rights* for 1946, published by the United Nations, collects the relevant provisions in the constitutions of Members of the United Nations.

48. The Commission may wish to recommend that the Secretariat of the United Nations should publish, and keep up to date, a collection of the constitutions of all Members of the United Nations, or perhaps of all States.

49. So far as the writer is informed, 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 Instituto 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 *Repertorio della Legislazione Mondiale* was launched in 1933, but only a few volumes are available to the writer.

50. Four volumes of an *International Digest of Laws and Ordinances* were published by the International Legislative Information Center of Geneva in 1938, but the series was soon discontinued.

51. A *Boletín Analítico de los Principales Documentos Parlamentarios Extranjeros*, published in Madrid from 1910 to 1927, was succeeded in 1930 by a *Boletín de Legislación y Documentos Parlamentarios Extranjeros*, of which 12 volumes were published between 1930 and 1935. The French Société de Législation Comparée published an *Annuaire de Législation Etrangère* from 1872 to 1939.

52. Various 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 British edition consisting of thirty-two volumes. Possibly mention may also be made of the collections of *Nationality Laws, Diplomatic and Consular Laws and Regulations, Neutrality Laws and Regulations*, and *Piracy Laws*, published by the Harvard Research in International Law. The Legal Committee of the International Civil Aviation Organization is now planning for the publication of national laws and regulations on aviation. The Commission on Narcotic Drugs has inaugurated the publication of an *Annual Summary of Laws and Regulations relating to the Control of Narcotic Drugs*.

53. The Commission may wish to recommend that the Secretariat be asked to assemble and to publish from time to time the laws and regulations of all Members of the United Nations concerning specific topics, whether or not such topics are set down for codification. At the present time, there would seem to be need for a collection of national laws on such topics as nationality, territorial sea, and exploitation of the natural resources of submarine areas of the high sea. The *Legislative Series* published by the International Labour Office supplies an admirable prototype for such publications.

54. Various reviews of the 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 by the Commission.

E. DIPLOMATIC CORRESPONDENCE

55. 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 remote year of the past.

56. Perhaps 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 Internationale des Archives - Europe*, published by the Institute of Intellectual Cooperation in 1934. The Memorandum placed before the Commission by the Secretary-General lists (pp. 10-12) the periodical publications issued by the States of Latin America, and refers (pp. 13-20) to the principal publications of France, Germany, the Soviet Union, the United Kingdom and the United States. Meyer's *Official Publications of European Governments* (1929) lists the current publications of eight other

Governments. The Soviet Union has recently published a valuable collection of diplomatic documents on the eve of the Second World War. A vast library would be required to house all of such publications, and for the most part they are of interest only to historians. If reproduction were contemplated, it seems questionable whether new processes of reproduction, such as micro-filming, would offer much relief.

57. In some countries, digests of national correspondence have been compiled, which have a certain usefulness generally. Yet some reserve may be required in the use of such digests; a well-known compiler, Moore, was careful to point out in a preface that

“Mere extracts from state papers or judicial decisions can not 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.”

58. 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 1, Tomus 1 (in two parts) and Tomus 2 (in three parts), covering the period from 1856 to 1878.

59. A series of digests relating especially to United States 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.

F. OPINIONS OF NATIONAL LEGAL ADVISERS

60. So far as the writer is informed, 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 is a presentation of such opinions of much value unless it can be accompanied by an adequate analysis of the history leading up to the occasions with reference to which they were given.

61. 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 law. Admirable use of the 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. Similarly, the single volume of *Jurisprudencia de la Concilleri a Chilena*, by Cruchaga Ossa, covers the period down to 1865.

G. PRACTICE OF INTERNATIONAL ORGANIZATIONS

62. Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States'

relations of the organizations. A useful *Répertoire of Questions of General International Law before the League of Nations, 1920-1940*, was published by the Geneva Research Centre in 1942. It is understood that a *répertoire* along somewhat similar lines is planned by the Secretariat of the United Nations.

IV. AVAILABILITY OF EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

63. In preparing the foregoing catalogue of various types of evidence of customary international law, little attention has been paid to the availability of the published materials. It may be desirable to attempt some analysis of the concept of availability, before discussing “ways and means for making the evidence of customary international law more readily available”.

64. Availability will be considered here in three aspects. *First*, availability for meeting the needs of whom? *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.

65. In the first aspect, availability ought to take account of the needs of private individuals engaged in the exploration of problems of international law, as well as of the needs of governmental and of international authorities. The needs of the three groups are not necessarily the same. An individual may wish 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.

66. The published materials mentioned in the foregoing survey are to be found for the most part only in great libraries of international law. Unfortunately, such libraries are few and far between. The admirable 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, in some capitals—particularly those of some of the newer States—it seems possible that no 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 world-wide materials which serve as evidence of customary international law would require much labour and expense, as well as time. The problem of creating such libraries seems to lie beyond the scope of the present inquiry; attention is probably being given to it by UNESCO.

67. As to the second aspect of availability, it would be extremely difficult to estimate the present availability of many of the principal published collections of evidence of customary international law. In many cases, stocks probably do not exist to be drawn upon for meeting present or future demands. For example, the writer does not know where the complete set of the *League of*

Nations Treaty Series could now be obtained, or a complete set of Martens' *Nouveau Recueil Général de Traités*. It might be possible for one to buy the publications of the Permanent Court of International Justice containing its judgments and opinions, but more difficulty might be encountered in finding an available set of the awards of tribunals of the Permanent Court of Arbitration.

68. The Commission might wish to consider the possibility of an inquiry as to the present availability of materials of exceptional value as evidence of customary international law. While the results of such an inquiry might be of some value to Governments and to libraries, this may be deemed to lie outside of the Commission's function under Article 24 of its Statute.

69. As to the third aspect of availability, it may be possible for the Commission to 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 hardly 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; for example, a digest of the *League of Nations Treaty Series*. It might also publish from time to time collections of Constitutions of States; it might be asked to prepare and publish collections of the laws of various States on some of the subjects included in the Commission's provisional list of topics selected for codification. The Secretariat might also be asked to publish a Juridical Yearbook; a first volume of the *Inter-American Juridical Yearbook* has recently appeared. A United Nations Juridical Yearbook could assemble, for example, the published current diplomatic correspondence of Governments relating to questions of international law, and it might reproduce the relevant current decisions of national courts. The Registry of the International Court of Justice might be asked to publish from time to time digests of that Court's judgments and opinions.

70. The Commission may wish to suggest means by which the publications currently issued by Governments could be made more widely available. Possibly a general 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 on the International Exchange of Official Documents, and some thirteen American States are parties to the 1936 Inter-American Convention on the subject. Some fifty bi-partite treaties on the subject are known by the writer to exist, also. If the Commission should wish to deal with this subject, it might take account of the current programme of the United Nations Educational, Scientific and Cultural Organization which planned in 1948 a meeting of experts to deal with it; the writer is not informed as to any meeting which may have been held, but a "book coupon" system has been inaugurated by UNESCO to enable certain countries to finance the purchase of books in other countries.

71. 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. While it would be possible for the Commission to renew the suggestion, artificial stimulus of such arduous enterprises does not promise much in the way of results.

72. In the discussions at the first session of the Commission, there appeared to be some disposition to say that reliance should be placed on the work of scientific bodies, such as international and national law institutes or lawyers' organizations. The fruitful activities of such organizations have appeared in the numerous reviews, some of which were not continued during the war years; and recent years have seen the launching of new Yearbooks of International Law in a number of countries—notably in Czechoslovakia, Italy, Palestine, Switzerland and Yugoslavia.

73. Despite these manifestations of zeal, it seems doubtful that many national or international institutes exist which could be counted on for the sustained research 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 often inadequate.

V. RECAPITULATION OF MATTERS TO BE DISCUSSED IN CONNEXION WITH THE COMMISSION'S REPORT

A. TEXTS OF INTERNATIONAL INSTRUMENTS

74. It may be assumed that sufficient distribution is being made of the *United Nations Treaty Series*, to Governments, to libraries and to individuals; but a report by the Secretariat might reveal that the distribution could usefully be expanded.

75. The Secretariat might be asked to report on the availability of the volumes of the *League of Nations Treaty Series* for distribution, especially, in countries which were not Members of the League of Nations. The Commission may also wish to recommend the publication of a digest of the *League of Nations Treaty Series*.

76. It is hardly practicable to offer any suggestion for making available the great collections of international treaties which ante-date the League of Nations treaties, or the collections of the treaties of single States. A list of such national collections might be published by the Secretariat, and revised from time to time. The Secretariat might also publish a *répertoire* of treaties, modelled on that published by the League of Nations Library from 1930 to 1940.

77. The current publications of treaty texts issued by each State might be exchanged under a general plan for the international exchange of publications.

B. DECISIONS OF INTERNATIONAL COURTS

78. It may be assumed that sufficient distribution is being made of the *I. C. J. Reports*, to Governments, to libraries and to individuals; but a report by the Secretariat might reveal that the distribution could usefully be expanded. The Commission may wish to suggest that the Registry of the Court should publish occasional digests of its judgments and opinions.

79. The Secretariat might be asked to report on the availability of the published texts of the judgments and opinions of the Permanent Court of International Justice for distribution.

80. As to reports of the awards of tribunals of the Permanent Court of Arbitration, the Secretariat might inquire as to the stocks held by its Secretary-General at The Hague, and if possible arrange for their distribution.

81. The Commission might wish to suggest that there is need for an adequate collection of the judgments of the Central American Court of Justice.

82. As to the awards of *ad hoc* tribunals, the Commission may wish to express appreciation of the new series of *Reports of International Arbitral Awards*, published by the United Nations, and to suggest that series covering other periods of time be undertaken as soon as possible. The Secretariat might also be asked to report on the distribution of the three volumes already published.

C. DECISIONS OF NATIONAL COURTS

83. As the practice of States is reflected in the decisions of their national courts, such decisions on questions of international law, or a digest of them, might be included in a United Nations *Juridical Yearbook*. Even if the Commission wishes to suggest such a publication, however, it may also wish to take note of the valuable service being rendered by the publication of summaries and extracts of current national court decisions in the *Annual Digest and Reports of Public International Law Cases*, edited by Professor Lauterpacht, and to urge its continuance.

84. The Commission may not deem practicable to suggest the preparation of a global digest of past decisions of national courts. It might, however, formulate a suggestion that digests of the decisions of the national courts of the various States would be useful.

D. NATIONAL LEGISLATION

85. The Commission may wish to suggest that the United Nations Secretariat should publish in several languages a collection of the texts of the constitutions of all Members of the United Nations, possibly of all States, together with supplementary volumes for keeping it up to date.

86. The Commission may wish to suggest that various collections of the national legislation of Members

of the United Nations relating to particular topics of international law be prepared and published by the Secretariat. Such collections are needed on several of the topics selected by the Commission for codification.

87. The Commission may wish to suggest the preparation and publication by the Secretariat of a *Legislative Series*, modelled on that of the International Labour Office, to contain texts of current national legislation on matters of international interest. The inclusion of national legislation for giving effect to the provisions of multipartite conventions drawn up by the United Nations might be a valuable feature of such a series.

E. DIPLOMATIC CORRESPONDENCE

88. The Commission may wish to suggest that, in so far as it is found to be practicable, each Member of the United Nations should arrange for the preparation and publication of a digest of its published diplomatic correspondence.

89. The formulation of a plan for the general exchange of their publications between Governments, as later suggested in this working paper, might provide for the exchange of published documents of diplomatic correspondence.

F. OPINIONS OF NATIONAL LEGAL ADVISERS

90. No suggestion is made under this rubric.

G. PRACTICE IN INTERNATIONAL ORGANIZATIONS

91. The Commission may wish to suggest that the Secretariat should publish from time to time a *répertoire* of United Nations practice under the Charter.

H. GENERAL

92. As a general approach to making the evidence of customary international law more readily available, the Commission may wish to suggest that early attention be given to the possibility of concluding a new multipartite convention providing for a comprehensive exchange of Government publications on questions of international law and international relations. This matter is mentioned vaguely in Article 1 of the Constitution of the United Nations Educational, Scientific and Cultural Organization.

93. The Commission may also wish to suggest that a recommendation be made to Governments that, in order to enable it to carry out the programme of publication which it may undertake, the Secretariat should be regularly supplied with copies of all official publications bearing upon any phase of international law. To this end, the Secretariat might consider the appointment of a permanent legal correspondent in each Member country.

DOCUMENT A/CN.4/16/Add. 1

Addendum to the Working Paper by Manley O. Hudson
on Article 24 of the Statute of the International Law Commission[Original Text: English]
[15 March 1950]

EXCHANGE OF OFFICIAL PUBLICATIONS

1. Inquiry concerning the progress of UNESCO's work on this subject resulted in a memorandum [LBC Memo 1421, 3 March 1950] and a dispatch of documents, both received after this working paper was revised.

2. The subject was considered at a "meeting of experts," not named, in July 1948. The conclusion seems to have been reached that it was not feasible to revise the Brussels Convention of 1886, and that effort

should be concentrated on the promotion of bilateral agreements.

3. A handbook on international exchange of publications is soon to appear. The UNESCO Clearing House for Publications does not distinguish between official, scientific and literary publications.

4. The documents leave the impression that the subject has not been exhaustively explored.

DOCUMENT A/CN.4/27

Comments on Judge Hudson's Working Paper on Article 24
of the Statute of the International Law Commission

(presented by the Secretariat)

[Original Text: English]
[6 June 1950]

1. The following comments refer chiefly to Judge Hudson's conclusions set forth in Section V of his working paper (A/CN.4/16, paras. 74-93). In this section the author suggests, for the consideration of the Commission, a number of measures which might be taken with a view to making the evidence of customary international law more readily available.

2. It is noteworthy that Judge Hudson among the various types of evidence of customary international law includes also "texts of international instruments", meaning treaties and other international agreements. There seems to be much force in his argument (para. 8) that "the differentiation between customary international law and conventional international law ought not to be too rigidly insisted upon", as "a principle or rule of customary law may be embodied in a bipartite or multipartite agreement", and "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 law". It may be recalled, in this connexion, that the Secretariat, in its memorandum to the Committee on the progressive Development of International Law and its Codification entitled "Methods for Encouraging the Progressive Development of International Law and its Eventual Codification" (A/AC.10/7), proposed that measures should be taken not only to render the evidence of customary international law more accessible but also to facilitate the development of conventional international law, *inter alia*, through technical improvements relating to the compilation of international legislative materials.

In the latter respect it was suggested that although there already existed systematic compilations treaties and conventions, the Committee "might find it useful to consider such technical improvements as the preparation of a subject index or classification of the contents of multipartite instruments; a multilingual glossary to be used in the preparation of translations of multipartite instruments; and a list of short titles of multipartite instruments" (p. 3 of the memorandum). No decision was taken by the Committee on this suggestion, and Article 24 of the Statute refers only to evidence of customary international law. It is gratifying that Judge Hudson has now made out a strong case for considering, under Article 24, also conventions as, to some extent, evidence of customary international law. For practical purposes, it makes no difference whether action to facilitate the development of conventional international law through such technical means as mentioned above is taken separately or in connexion with steps to improve the accessibility of customary international law. The Secretariat has therefore every reason to support Judge Hudson's suggestion that "the Commission may deem 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" (para. 8).

3. Several of the proposals submitted by Judge Hudson with a view to making the various types of evidence dealt with in his paper more readily available are concerned with the distribution of published materials.