

Document:-
A/CN.4/W.9

**Working Paper based on Part III of the preparatory work done by the Secretariat upon ways
and means of making the evidence of customary international law more readily available**

(A/CN.4/6) - incorporated in document A/CN.4/SR.31, footnote 10

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1949, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

86. Mr. SPIROPOULOS drew attention to the fact that the Commission had already discussed the principles and that the Sub-Committee had only made certain minor drafting modifications.

87. Mr. YEPES asked why paragraph 1 of the Sub-Committee's original draft had been deleted from the new recommendations without explanation.⁹ If it was founded on the Nürnberg Charter and Judgment it should not be omitted, as it was a very important principle.

88. Mr. SPIROPOULOS replied that the Judgment contained that idea but not the Charter. It was included as a real principle of law, however, but merely as one of the Tribunal's considerations.

It was unanimously decided to refer the text presented by the Sub-Committee to the next session and to appoint a Rapporteur on that subject.

Ways and Means for Making the Evidence of Customary International Law more Readily Available (A/CN.4/6)

89. The CHAIRMAN felt that the preparation of a comprehensive collection of all the existing evidence of customary international law suggested in the working paper prepared by the secretariat¹⁰ would take many years and could never be complete.

90. With regard to the Secretariat's second

suggestion for a new publication containing a more limited amount of material, various official government publications containing much material

Law Cases, the *Fontes Juris Gentium* series, the *United Nations Reports of International Arbitrations*, Flournoy and Hudson, *Collection of Nationality Laws*, Morrison, *Collection of Piracy Laws*, Feller and Hudson, *Collection of Diplomatic and Consular Laws*, and Lapradelle and Politis, *Recueil des arbitrages internationaux*.

2. *The Organization of the Preparation of a Systematic and Comprehensive Compilation of Evidence of Customary International Law.*

(a) *Possible methods.* The following alternatives, or combinations of them, may be considered:

(i) All or part of the work to be undertaken and carried out by the Secretariat of the United Nations under the direction of the Commission; or

(ii) All or part of the work to be undertaken and carried out under the auspices of Governments; or

(iii) All or part of the work to be undertaken and carried out in existing unofficial scientific institutions in the different countries; or

(iv) All or part of the work to be undertaken and carried out by individual experts, pursuant to a plan laid down by the Commission and under the direction of the Secretariat.

(b) *The Secretariat as Central Organ.* In view of the evident need for centralization, there is a strong case to be made out for the entrusting of this task to the Secretariat, under the direction of the Commission. The Secretariat is equipped to provide for the translation of texts into the official and working languages of the United Nations, and for their publication.

The following is an indication as to what the method would involve when applied to different parts of the undertaking:

(i) *Digest of the Practice of States.* In connexion with the preparation of digests of State practice, the Governments would need to furnish relevant materials, which would be edited, translated and published by the Secretariat in accordance with instructions drawn up by the Commission.

(ii) *Collections of International Decisions.* For the making of collections of international decisions, Governments would supply to the Secretariat copies of all past arbitral awards and, possibly, furnish copies of all future awards in the same manner as, in conformity with Article 102 of the Charter, they now furnish copies of treaties.

(iii) *Decisions of National Courts.* In connexion with the collecting of national decisions, the Secretariat would collaborate with individual experts, national scientific institutions or correspondents, and, in the case of some countries, perhaps also with Governments, for the assembling of such decisions.

(iv) *National Legislation.* As respects the collection of national legislation, the Secretariat would collaborate with appropriate correspondents in the different countries, and Government might possibly agree to communicate relevant texts for the future.

(c) *Individual Undertakings by Governments.* The co-operation of Governments is clearly essential to the success of any undertaking for which the Secretariat is to be primarily responsible. An alternative would be to place the main responsibility upon Governments, and to limit the function of the Secretariat to the furnishing of such auxiliary services as translation and publication. There might be many advantages in such a scheme, particularly in so far as concerns the preparation of digests of State practice which will involve extensive consultation with national archives. And it is to be noted that not only has at least one Govern-

⁹ See A/CN.4/SR.28, para. 53.

¹⁰ That document read as follows:

1. *Possible Methods of Procuring the Publication of More Complete Collections of Evidence of Customary International Law.*

(a) *General.* The Commission could consider

(i) The preparation of a comprehensive collection of all the existing evidence of customary international law; or

(ii) A new publication containing a more limited amount of material; or

(iii) The continuation or elaboration of some existing publication or publications.

(b) *A comprehensive collection.* Some suggestions as to how an enterprise of this sort might be undertaken are contained in Section 2 of this paper.

(c) *Publications of a less comprehensive type.* Publications of this sort might contain either.

(i) Current material only. Cf. the *United Nations Treaty Series*.

(ii) Current material and also material dating from the relatively recent past. Cf. the *United Nations Reports of International Arbitrations*. Such a publication may be divided into

(a) Current series; and

(b) Earlier series; cf. Moore's *International Adjudications, Ancient and Modern Series*, and the *Annual Digest and Reports of Public International Law Cases, Supplementary Volume*.

(d) *Continuation of Existing Publications.* It would be within the scope of Article 24 of its Statute for the Commission to recommend the continuation, and possibly the expansion, of such well-known existing works as the *Annual Digest and Reports of Public International*

on the subject were available. He was particularly indebted to the annual volumes published by the Central and South American States, a list

ment, that of the United States, already prepared and published digests of its State practice, but numerous others regularly publish extensive collections of material relevant in this connexion. Mention may be made in particular of the periodical *Boletins* and like publications of the various South American Governments. But the method would not be free from drawbacks unless a minimum of uniformity were assured, for instance by the issue by the Commission of detailed suggestions for compilation.

(d) *Division of Labour between Governments and the Secretariat.* Another possibility which clearly exists is a combination of the two methods last treated.

(e) *Utilization of National Institutions or Committees.* Governments favourable to the idea of such a comprehensive undertaking as is here suggested but not willing to assume responsibility for the work might be willing to entrust their share thereof to national commissions, which would be either official or unofficial as national practice and tradition would dictate. The creation *de novo* of official national research bodies, for which there are ample precedents, might also be considered. Co-ordination between bodies of this sort might be achieved either by means of instructions issued by the Commission or by the formation of an international co-ordinating committee.

(f) *Enlistment of Individual Experts.* The contribution which individual experts can make to such a comprehensive undertaking as in contemplated here is large, but there are clear limits to that contribution. Thus a Government might think it desirable to entrust the compilation of a digest of its State practice to an individual scholar. But, though the earlier United States digests and notably that of Moore, were prepared in that way, it is now generally agreed that the task of digesting the extensive materials in national archives is beyond the power of any one man, although a team directed by a qualified individual may effectively discharge it. In so far as concerns the compilation of digests of international decisions, national decisions, or national legislation, there would appear to be ample scope for individual effort, as such works as Moore's *International Adjudications*, the *Fontes Juris Gentium* collection of the decisions of the German Supreme Court, and Flournoy and Hudson's *Collection of Nationality Laws* sufficiently demonstrate. The employment of individual experts is not, however, an alternative method of carrying out the whole undertaking and presupposes the adoption of one or other of the methods discussed already. Such experts may be entrusted with specific tasks by Governments in the same manner as it has been suggested in the case of national scientific bodies. Likewise their co-operation may be enlisted in connexion with any task entrusted to the Secretariat.

3. Some Secondary Suggestions.

Other matters worthy of the attention of the Commission in connexion with Article 24 of its Statute might include:

(i) Possibility of consultation with Governments for the granting of more easy access to national archives.

(ii) Methods of promoting wider distribution of existing collections of evidence of international law, e.g. the ascertainment of the exact contents of existing libraries, the provision of nuclear collections in appropriate places, the provision of photostatic copies of works now out of print, and the enlistment of the co-operation of Governments and private foundations with a view to the establishment and maintenance of standard libraries of international law in different parts of the world.

of which was contained in document A/CN.4/6 (p. 10 to 12). Some of those "Memoria" had been published for a very long time. He also drew attention to a comparable United States Government publication, "Foreign Relations".

91. Mr. SPIROPOULOS felt that the question was a very complicated one though it had nothing to do with the codification of international law as such and need not necessarily be done by a legal expert. The Secretariat study (A/CN.4/6) was extremely valuable but it would necessitate serious consideration. The Commission could consider the Secretariat working paper paragraph by paragraph or it could appoint a Rapporteur to draw up proposals for the Commission's consideration. He felt that the latter course might be more advisable, since the Commission had not given the subject sufficient thought or preparation to be able to consider its substance.

92. Mr. KORETSKY agreed with Mr. Spiropoulos that the Commission was not in a position to take a decision on that item; the documents involved were too numerous for one individual to study, even in a whole life-time. The Secretariat's study, however, so highly praised by Mr. Spiropoulos, would not enable the Commission to decide the direction in which it should work. He did not wish to indulge in mere criticism of the Secretariat but he felt that it was impossible to follow the Secretariat's suggestions.

93. The data given did not cover all countries, though the study purported to deal with the whole world; with regard to certain countries the information was inadequate or inaccurate; hardly any reference was made to developments in the Arab countries, Sweden or China, which were included under the heading of "Other Countries". The development of international customary law in the People's Democracies was almost entirely neglected although a great deal of information was available to those who wished to find it; for example, there was a three-volume bibliography on the subject in the Moscow Library. Judging from pages 18 and 19 of the Secretariat's study, however, the author of that document seemed unduly interested in pre-revolutionary Russia but displayed utter ignorance with regard to the situation in the USSR. It was unpardonable that the Secretary-General should sanction such a display of ignorance.

94. The USSR and the other People's Democracies had a substantial contribution to make and were parties to numerous international treaties. Information was available but the Legal Department did not seem to wish to give the International Law Commission objective information; it had made no attempt to find the available documentation but had resorted to the consultation of experts who did not possess the necessary authority, but were ignorant and displayed anti-democratic tendencies. Proof that