Document:-
A/CN.4/SR.40

Summary record of the 40th meeting

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

Extract from the Yearbook of the International Law Commission:-
1950 , **vol. I**

as to the order in which items should be dealt with, it would always be possible to make alterations.

49. Mr. SANDSTRÖM thought there was a connexion between item 3 (a) and the preparation of a draft code under item 3 (b). These matters would require considerable study, and hence it would be a good thing to discuss item 4 before item 3.

50. Mr. SPIROPOULOS pointed out that it was impossible to discuss two subjects at once, and that item 3 (a) would have to be studied first, and then item 3 (b), which would thus become the fourth question on the agenda.

51. Mr. SANDSTRÖM was agreeable to this.

52. The CHAIRMAN thought that the Commission seemed to be unanimously in favour of considering the items in the following order: Items 8, 3 (a), 4 and 3 (b). It was not necessary at present to decide as to the other three larger issues: Arbitral Procedure, Regime of the High Seas, and the Law of Treaties.

It was so decided.

53. Mr. KERNO (Assistant Secretary-General) urged the Commission not to wait until the end of the session to deal with item 11 of the agenda, " Date and place of the Third Session ". For financial reasons this would have to be decided at the latest by the end of June. Two sessions had been proposed for next year so as to be on the safe side. But the Commission would have to decide whether it really wanted to hold two sessions in 1951.

54. In reply to a question by Mr. el-KHOURY, Mr. KERNO (Assistant Secretary-General) said that no definite date had been fixed for the end of the present session, but that the maximum period authorized by the budget was 8 to 10 weeks. Hence the present session would be due to close about the end of July.

The meeting rose at 5.20 p.m.

40th MEETING

Tuesday, 6 June 1950, at 10 a.m.

CONTENTS

Page

Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (article 24 of the Statute of the International Law Commission) and comments on Judge Hudson's working paper on article 24 of the Statute of the International Law Commission (item 8 of the Agenda) (A/CN.4/16 and Add. 1; A/CN.4/27) 4

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department); Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (article 24 of the Statute of the International Law Commission) and Comments on Judge Hudson's working paper on article 24 of the Statute of the International Law Commission (item 8 of the agenda) (A/CN.4/16 and Add.1; A/CN.4/27).

1. Mr. HUDSON, introducing the Working Paper (A/CN.4/16) he had prepared, said that his study was necessarily incomplete, since he could not know every foreign language. He asked Mr. el-Khoury to forgive him for not having mentioned the literature of Islam.

The Commission approved the manner in which its task was set forth in paragraph 5.

2. Referring to paragraph 7, Mr. HUDSON pointed out that in article 38 of the Statute of the International Court of Justice, the judicial decisions and the teaching were actually made subordinate to other sources of law, since subheading (d) stated that they were a " subsidiary means for the determination of rules of law ". He asked whether the Commission shared the view he had expressed in paragraph 8.

3. Mr. BRIERLY entirely agreed with Mr. Hudson.

4. The CHAIRMAN emphasized the importance of the connexion between conventional law and the customary law.

The Commission approved the substance of paragraph 8.

5. Mr. HUDSON thought that sub-heading (b) of article 38 of the Statute of the International Court of Justice was not very happily worded. It would be better to say " international practice, as evidence of a general custom etc." He had felt it would be useful to try to set down what should be understood by " customary international law ". After giving in paragraph 10 a list of works published in various countries other than the United States, he had set forth in paragraph 11 a few guiding principles.

6. In the French text of sub-heading (a) he would prefer " *de manière concordante* " to " *manière identique* ".

7. Nearly all the treatises on the subject were in agreement to accept the four elements enunciated in sub-headings (a), (b), (c) and (d).

8. The CHAIRMAN pointed out that practice was not enough. Some authors believed that the idea of international custom did not imply general acquiescence; he personally held the opposite view. He believed that *opinio juris necessitatis* was essential. He asked whether Mr. Hudson considered that the two sources

mentioned in sub-headings (c) and (d) corresponded to this *opinio juris necessitatis*.

9. Mr. HUDSON replied that they did, and explained that this " *opinio* " must be shared by the States establishing the practice. He thought sub-heading (d) was not well translated into French, and that they should understand "être généralement admis sans protestation de la part d'autres Etats ".

10. The CHAIRMAN pointed out the great danger involved in confusing practice and custom. Professor Guggenheim had endorsed a doctrine which made practice and custom analogous. He personally thought that a practice must have received general acquiescence, as was stated in the English text.

11. In reply to a question by Mr. Yepes, he said that regional custom was not excluded but that here, too, asquiescence was necessary, in this case by the regional community.

12. Mr. FRANÇOIS was afraid there were two different matters involved, since the Chairman had spoken of acquiescence, whereas Mr. Hudson had merely mentioned absence of protest.

13. The CHAIRMAN said that as acquiescence could be tacit, absence of protest was sufficient for acquiescence.

14. Mr. CÓRDOVA enquired whether " a number of States " in sub-heading (a) meant the most powerful states or those faced with a particular situation.

15. Mr. HUDSON said he had tried to avoid introducing the idea of power. But he did not think that practice by a single State was sufficient to establish custom.

16. Mr. CÓRDOVA said that international law was established by States with more frequent international relations, and hence primarily by the great powers. He thought that acquiescence by all States was necessary, not merely tacit assent.

17. Mr. FRANÇOIS enquired whether acquiescence must be universal.

18. The CHAIRMAN thought that implicit general acceptance was sufficient. This did not mean " universal ".

19. Mr. AMADO, referring to sub-heading (b), mentioned that a contemporary French author had stated that the element " *diuturnitas* " was not as important as had been thought hitherto, and that a single precedent could be sufficient to create international custom. He wondered whether that was the case.

20. Mr. el-KHOURY asked Mr. Hudson for an example of a concordant practice which had received the acquiescence of a number of countries. Absence of objection might amount to acquiescence, but if the new practice had not been applied to particular States, could the absence of protest on their part be considered as implying acquiescence?

21. Mr. HUDSON said that in regard to the continental shelf for example there was a concordant practice by a number of States since 1942, and he mentioned several treaties and laws.

22. He found it difficult to define what was meant by " over a considerable period of time " (sub-heading (b)). States with a practice in regard to the continental shelf considered that it was consistent with international law (sub-heading (c). In sub-heading (d) he preferred the wording in English: " acquiescence generally by other States in the practice ", with the French text altered accordingly, as " dans la pratique d'autres Etats ", was incorrect. What was involved was consensus of opinion proved by acquiescence.

23. Mr. el-Khoury had asked for an example of a rule of customary international law created by a practice receiving the acquiescence of other States. With regard to the continental shelf he must ask Mr. el-Khoury to wait 25 years. A nascent rule of international law was in the making. Personally he would hesitate to delete sub-heading (d), as he felt the repetition was necessary.

24. Mr. el-KHOURY asked for clarification as to when a principle could be regarded as receiving " general acquiescence ".

25. Mr. HUDSON said that absence of protest was the criterion.

26. Mr. el-KHOURY could not see why any particular State should protest against agreements which did not concern it, and he thought sub-heading (d) was unnecessary.

27. The CHAIRMAN thought it would be better not to spend time on exceptional cases, since the Commission's task was to give its opinion as to what constituted custom. The purpose of the working document before them was to define how it could be decided that a custom had been established.

28. Mr. AMADO asked whether sub-heading (c) was in keeping with *opinio juris necessitatis*.

29. Mr. HUDSON said that the stipulation referred to in sub-heading (c) was given by practically all the authorities he had consulted.

30. Mr. BRIERLY thought that some of the Members of the Commission might want to suggest alterations to Mr. Hudson's working paper. He himself was not convinced that sub-heading (b) was necessary; what was required was *opinio juris necessitatis*. It had been known for this to arise at a moment's notice. For example in regard to the air, the moment the 1914 war broke out, the principle of sovereignty, which had been a matter of opinion up to then, was settled at once. Generally speaking, *opinio juris necessitatis* did not arise for a considerable time, but there were exceptions to the rule.

31. Mr. el-KHOURY shared Mr. Brierly's view, and cited the example of the Nürnberg principles.

32. Mr. HUDSON wondered whether he should delete the word " considerable ".

33. Mr. LIANG (Secretary to the Commission) said that since Mr. Hudson's working paper was not intended as a draft of the Commission's report to the General Assembly, it was not necessary to scrutinise every word minutely. The document submitted by the Secretariat (A/CN.4/27) had studied Mr. Hudson's concrete proposals. He entirely agreed with Mr. Hud-

son as to the close relationship between conventional law and customary law; and, on this point he referred also to the publication, *Ways and means of making the evidence of customary international law more readily available.*[1]

34. Mr. SANDSTRÖM argued that *opinio juris necessitatis* was relative, and that particular circumstances —e.g., positive recognition by States—could shorten the period required. What the Commission had to do, without entering too closely into detail, was to establish a general conception of what constituted a rule of customary law.

35. Mr. KERNO (Assistant Secretary-General) said that he had listened with the greatest interest to the discussion of paragraph 11. The exchange of views had been most helpful, and had shown that there was a considerable measure of agreement. Perhaps it was unnecessary to define custom. All that was required at present was agreement in general terms, and if this could be reached, it would be a constructive achievement.

36. Mr. YEPES felt that the word " required " in sub-heading (c) could not stand. Moreover, if, as was stated in sub-heading (c), a custom must be consistent with international law, it ceased to be a source for that law. With regard to the continental shelf, the custom was contrary to the prevailing international law. That point would have to be cleared up. He wondered how a custom could be invoked before the International Court of Justice at The Hague if it must first " be established as a fact by a competent international authority " (end of paragraph 11). Did a rule of customary law not exist until it was so established?

37. Mr. HUDSON said his view had been that a single State could not decide of its own accord that the constituents of a custom were present.

38. The CHAIRMAN thought that public opinion in the various States should be regarded as an international authority. What was required was a consensus of opinion expressed by the authorities which in any given State had the power to establish custom.

39. Mr. HUDSON said that what he had had in mind was the International Court of Justice.

40. The CHAIRMAN felt that national courts of justice were equally competent, since any court could establish the existence of a custom.

The Members of the Commission as a whole shared Mr. Hudson's views, with some slight shades of difference.

41. Mr. HUDSON suggested that a sub-committee be set up to revise the document he had prepared.

42. The CHAIRMAN thought it would be sufficient for Mr. Hudson himself to make slight alterations to his text to satisfy the Commission.

43. Mr. AMADO wondered whether it would not be preferable to cut out the part of the document giving the author's personal opinions. To bring these into line with the opinions of all the other members, changes would have to be made on which it would be difficult to reach agreement.

44. Sub-heading (c) used the word " required ". Did that mean that there must be a law prior to the custom? Custom was the primordial source of law; but to judge from sub-heading (c) it had ceased to be so. It would be preferable to seek practical conclusions.

45. Mr. HUDSON suggested for sub-heading (c) the wording: " conception that the practice is not inconsistent with prevailing international law . . . " He pointed out that the authors of article 38 of the statute of the International Court, and of article 24 of the statute of the Commission, had no very clear idea as to what constituted international custom. Hence it would be useful to lay down general principles so as to be able to comply with the provisions of article 24.

46. The CHAIRMAN thought it was somewhat contradictory to state on the one hand that custom is the basis of law, and on the other that it must be consistent with law. He did not agree that this part of the report should be suppressed. The Commission might ask Mr. Hudson to alter some of the expressions he had used, in the light of the discussion which had just taken place.

47. Mr. YEPES supported the suggestion that the task be left to Mr. Hudson. He thought that custom could depart from prevailing international law; otherwise it had no raison d'être. He mentioned that custom had tacitly discarded article 18 of the League of Nations Covenant, relating to the registration of treaties.

48. Mr. HUDSON suggested inserting paragraph 12 at the beginning of paragraph 11.

The Commission approved this suggestion.

Paragraphs 13 and 14 called for no comment, and the Commission turned to Part 1 of the Report.

49. Mr. KERNO (Assistant Secretary-General), referring to Section A, paragraph 18, explained that at present an attempt was being made to speed up the publication of the Treaty Series. Thirty volumes had now been published.

50. On a proposal by Mr. FRANÇOIS, it was decided that the *Recueil international des traités du XIX^e siècle* and the *Recueil international des traités du XX^e siècle* of Descamps and Renault would be mentioned in the report.

51. Mr. HSU thought that a number of Chinese works might also be mentioned.

52. The CHAIRMAN, taking up a remark made by Mr. Hudson, pointed out that treaties were only important in the establishment of custom to the extent that they were effectively in force, and or course it was often difficult to tell whether a particular treaty was still in force. He wondered whether the Secretariat coul try to draw up a list of treaties in force, and keep it up to date.

53. Mr. HUDSON feared that it would be an impossible task, since it involved ticklish questions; and the various contracting parties concerned often hesitated to commit themselves.

[1] United Nations publication, Sales No.: 1949.V.6.

54. Mr. KERNO (Assistant Secretary-General) was of the same opinion. He regretted that the General Assembly's ruling on the registration of treaties, under which contracting parties should also register certified statements regarding any subsequent action which involves a change in the parties thereto, etc. was not applied more strictly by Member States.

55. Mr. LIANG (Secretary to the Commission) said that the point raised by the Chairman was not new in the experience of the United Nations. As early as 1946, efforts had been made to seek information in that direction. With regard to multilateral treaties, the task was fairly simple. But he was extremely doubtful as to the possibility of such a survey in the case of bilateral treaties.

56. Mr. YEPES wondered whether multilateral treaties not ratified by all signatory states did nevertheless constitute evidence of established custom. He himself was inclined to believe that they did. In his opinion, a multilateral treaty signed but not ratified by a given State, but ratified by a large number of other signatory States, constituted evidence of the existence of custom; in virtue of that custom, such a treaty could be invoked even against States which had not yet ratified it, not as a treaty but as evidence of established custom. He asked that these remarks be included in the Report.

57. Mr. HUDSON agreed that conventions, even when not ratified, could constitute valuable material for establishing the existence of custom. This opinion would be recorded in his report.

58. Turning to Section B, Mr. Hudson regretted that, generally speaking, the works containing the decisions of international courts were not more widely distrubuted. This applied for example to the " Analyses of Decisions " published by the International Bureau of the Permanent Court of Arbitration.

59. In Section C, Mr. FRANÇOIS suggested modification of the second sentence of paragraph 37, as being rather too narrow in meaning. Actually, according to another theory, the judge must apply international law as being higher in the hierarchy than national law.

60. The CHAIRMAN asked Mr. Hudson to embody a reservation on this subject in his report.

Sections D and E did not give rise to any discussion.

61. Mr. HUDSON proposed adding to paragraph 46 the Mirkine Guetzevitch and Peaslee collections; [1] and he regretted that material on diplomatic correspondence was lacking.

61a. Mr. KERNO (Assistant Secretary-General) referring to paragraph 60, said that the Secretariat was often asked to publish its legal opinions. Since these were based exclusively on international law, the reserve recommended by Mr. Hudson in regard to opinions given by legal advisers to governments would not be necessary. However, an account of the historical background of the subjects involved in the opinions would be required; and this would make the publication too bulky.

62. Turning to Part IV, Mr. HUDSON laid special emphasis on the following sentence in paragraph 66 as being especially important: " Indeed, in some capitals —particularly those of some of the newer States—it seems possible that no library of international law exists. "

63. Part V, he explained, dealt with questions on which the International Law Commission would have to make recommendations. The Secretariat might study the question raised in paragraph 74 and report to the Commission.

64. Mr. LIANG (Secretary to the Commission) thought that in regard to paragraph 74, the Commission should confine its discussion to the question of publishing documents not yet printed, rather than consider the problem of distribution. It was extremely difficult to expand distribution of the *Treaty Series* for budgetary reasons, since the General Assembly would have to allocate more money for the purpose.

65. Mr. HUDSON considered that the budgetary aspect of the question need not concern the Commission, which would merely note that the distribution of certain documents was inadequate and report to that effect. That was as far as its duty went. The General Assembly could then take whatever action it thought fit on the recommendation.

66. The CHAIRMAN agreed, and regretted that international law was treated in the budget as a poor relation.

67. Mr. KERNO (Assistant Secretary-General) added that actually the budgetary question did present great difficulty, but that the Commission's task was to carry out the principle stated in article 24 of its statute. If it made any recommendation involving expenditure, it was for the Fifth Committee to decide as to the budgetary aspect. In point of fact, the present mailing list of the *Treaty Series* was under revision, and the arrangement might be made more efficacious even within the present budgetary allocation.

68. Mr. el-KHOURY thought it would be well to make a concrete recommendation to the General Assembly, giving a list of documents for distribution and a mailing list. A request in this form would have more chance of acceptance. On the other hand, it would have to be stated whether any given volume should be printed by the United Nations or bought from the publisher. Also, the mailing list should be drawn up carefully, as a number of States received from the United Nations whole boxes of documents which they did not even open.

69. The CHAIRMAN pointed out that at the moment the Commission had only to deal with the question of distribution of the *Treaty Series*. There seemed to be no difference of opinion on this, and paragraph 74 could be approved, especially as it merely called on the Secretariat to submit a report on the matter.

70. In reply to a question by Mr. François, Mr. KERNO (Assistant Secretary-General) thought he could submit a brief report during the present session. In-

[1] Boris Mirkine-Guetzevitch, *Les Constitutions Européennes*, Paris, Presses Universitaires de France, 1951. 2 Vols; Amos J. Peaslee, *Constitutions of Nations*. The Rumford Press, Concord, N.H. 1950, 3 Vols.

cidentally, United Nations publications were available for sale to the general public and could thus be acquired by any one who did not receive them free of charge. In any case, it was impossible to distribute the *Treaty Series* to every law professor in the world.

Paragraph 74 did not give rise to any comment. The Commission approved the Secretariat's suggestion (A/CN.4/27 end of paragraph 4) that a complete index of the League of Nations Treaty Series be prepared.

71. Mr. HUDSON turned to paragraph 76, wich contained two suggestions he felt to be very useful.

72. Mr. LIANG (Secretary to the Commission) argued that these suggestions would also involve budgetary and administrative considerations, since the divisional staff was insufficient for such a task. But obviously only the United Nations library was competent to carry it out.

Paragraph 76 was approved.

73. In reply to Mr. Hudson, Mr. KERNO (Assistant Secretary-General) said that on the subject of paragraph 78 the Secretariat might get in touch with the International Court of Justice to enquire as to the distribution of the Court's publications.

Paragraphs 79, 80, 81 and 82 were approved.

74. Mr. LIANG (Secretary to the Commission) asked Mr. Hudson whether, when stating, as recorded in paragraph 83, that the Commission might wish to urge that the publication of Professor Lauterpacht's *Annual Digest* be continued, he had taken into consideration the financial difficulties involved in printing this collection.

75. Mr. HUDSON replied that it was no part of the Commission's duty to deal with financial considerations, but that if the report mentioned the Commission's wish, it could be quoted in support of any application for possible financial assistance to that publication.

76. Mr. SANDSTRÖM was afraid that the action suggested in paragraph 83 would overlap with Professor Lauterpacht's *Annual Digest.*

77. A similar objection was raised by Mr. KERNO (Assistant Secretary-General) in respect of paragraph 85 and the Peaslee collection. It was agreed that such a collection should include the Constitutions of all States Members and non-members of the United Nations.

78. Referring to paragraph 86, Mr. LIANG (Secretary to the Commission) pointed out that the Secretariat was at present making a collection covering national legislation on the regime of the high seas and on treaties.

79. Mr. KERNO (Assistant Secretary-General) said on the subject of paragraph 91 that the Secretariat already had in hand such a *répertoire*, in the form of a commentary on the Charter.

80. With regard to paragraph 92, Mr. HUDSON considered the reply from UNESCO on the subject of a possible revision of the Brussels Convention of 1886 for the Exchange of Official Documents (See A/CN.4/16/Add.1) as unsatisfactory. He felt that a world convention on the subject would be most valuable.

Paragraphs 83, 84, 85, 86, 87, 88, 89, 90, 91, 92 and 93 were approved.

81. The CHAIRMAN declared that the Commission had now dealt with all the recommendations, and thanked Mr. Hudson for the working paper he had submitted.

The meeting rose at 1.10 p.m.

41st MEETING

Wednesday, 7 June 1950, at 10 a.m.

CONTENTS

	Page
Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions (item 4 of the agenda) (A/CN.4/15; A/CN.4/20)	8

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department); Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 (III) B of 9 December 1948) (item 4 of the agenda) (A/CN.4/15; A/CN.4/20)

1. The CHAIRMAN thought, as did the Rapporteurs, that the more negative view, that of Mr. Sandström (A/CN.4/20), should be taken first.

2. Mr. SANDSTRÖM said that the question before the Commission admitted of some diversity of opinion. One of the chief factors, to his mind, was the present political situation.

Mr. SANDSTRÖM began the reading of his report.

3. After paragraph 2 of the report had been read, Mr. CÓRDOVA pointed out that Article 2, paragraph 6, of the Charter extended the provisions of the Charter