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Summary record of the 49th meeting

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145. The CHAIRMAN ruled that Mr. Brierly's report (A/CN.4/23) should be examined at the next meeting, as soon as the Commission had completed its examination of Mr. Spiropoulos' report on the formulation of the Nürnberg principles.

The meeting rose at 1.10 p.m.

49th MEETING

Monday, 19 June 1950, at 3 p.m.

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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).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3 (a) of the agenda) (A/CN.4/22) *(continued)*

WAR CRIMES (*continued*)

1. The CHAIRMAN asked the Commission to excuse Mr. Spiropoulos, who was ill. As Mr. Spiropoulos had agreed, the study of his report might be completed before the Commission took up the examination of Mr. Brierly's report on the Law of Treaties (A/CN.4/23).

2. Mr. el-KHOURY said he had already asked that part IV, section B, paragraph (b), "War Crimes"[1] should include the phrase "the taking and killing of hostages".[2] He proposed that the report should mention that this addition had been made at the request of several members of the Commission. He also suggested that in addition to crimes committed by an aggressor, crimes committed by other States should constitute crimes under international law.

3. Mr. KERNO (Assistant Secretary-General) pointed out that the list in paragraph (b) was not restrictive. Hence, if the taking of hostages was in fact a crime under prevailing international law, it was unnecessary to state this specifically.

4. Mr. el-KHOURY admitted that there were war crimes other than those mentioned in the list; but he felt that if the Commission mentioned the killing of hostages, it should also mention the taking of hostages so as to make it quite clear that this was condemned also. If the Commission did not agree to the interpolation he suggested, he asked that the point should at least be mentioned in the Commission's report.

5. Mr. HUDSON thought it would not be correct to state that the Nürnberg Charter and Tribunal recognized the taking of hostages as a crime. The Commission was not attempting to recast the Charter.

6. Mr. FRANÇOIS agreed that the Nürnberg Charter and Tribunal had not recognized the taking of hostages as unlawful. On the other hand, the Diplomatic Conference of the Red Cross held in 1949 at Geneva had gone further and had admitted the principle that the taking of hostages was prohibited. The Nürnberg Tribunal had merely decided that it was unlawful to kill hostages. He would prefer the text to be kept as it stood, since the Commission's task was to formulate the principles of international law recognized at Nürnberg.

7. The CHAIRMAN recalled that the Commission seemed disposed to agree to the insertion of a note indicating that some members felt it would be desirable to lay down the principle that the taking of hostages was unlawful.

8. Mr. SANDSTRÖM asked whether the Commission would not have an opportunity of discussing the point again when the draft Code of offences referred to in item 3 (b) of the agenda came up for examination.

9. The CHAIRMAN said there would be such an opportunity; but he thought a note in the report would prevent readers from gaining the impression that the Nürnberg principles and the Code were at variance.

10. Mr. CÓRDOVA said that to include the taking of hostages among war crimes would be contrary to the Nürnberg principles; but the principles should be altered so as to enable them to be included in the Code.

11. Mr. SANDSTRÖM considered that the best plan would be to give an account of the present discussion in the general report, indicating the evolution that had taken place since Nürnberg; and to revert to the point when dealing with the Code of offences against the peace and security of mankind.

12. Mr. HUDSON thought that, on other issues also, the Commission might go further than the Nürnberg principles when drafting the Code.

13. The CHAIRMAN felt that the Commission had accepted the view that it should retain such of the Nürnberg principles as it regarded as principles of

[1] A/CN.4/22, p. 37.

[2] See Summary record of the 48th meeting, para. 75.

international law. It had already changed the Nürnberg wording in one or two instances. He was anxious not to re-open this discussion of pure principle; at the same time, he would like to meet Mr. el-Khoury's wishes by accepting the Nürnberg text with the proviso that an indication be given in the report that some of the members of the Commission felt that the taking and killing of hostages should be regarded as a war crime.

14. Mr. HUDSON saw no reason for inserting even a note in the report concerning the Nürnberg principles, for no one maintained that the taking of hostages was a crime under those principles.

15. Mr. el-KHOURY remarked that the Nürnberg Charter had in mind the judgment of specific questions. Moreover, hostages could not be killed unless they had been taken. If the Commission stated that the taking of hostages was unlawful, it would still be dealing with the same crime. Moreover, it was a well known principle in criminal trials for the prosecution to concentrate on the most serious crime. Where hostages had been killed, the crime of taking hostages would be disregarded. The elimination of the crime should involve the elimination of its cause.

16. Mr. HSU supported Mr. el-Khoury's proposal. Undoubtedly, it was not illegal to take hostages during the last war, and the Nürnberg Charter and Tribunal were justified in so deciding. Nevertheless, the taking of hostages was a barbaric survival, and was not in harmony with the spirit of the principles recognized in the Charter and the Tribunal. Furthermore, the taking of hostages had now been condemned by the Geneva Convention of 1949. The Commission must not, even by implication, sanction the survival of this practice.

16a. He referred to article 34 of the Geneva Convention of 12 August 1949, relative to the protection of civilian persons in time of war, where the taking of hostages was prohibited.[3] He went on to quote part I, article 3, of the "General Provisions":

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as the minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely. . . .
>
> To this end the following acts shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) . . . . . ;
>
> (b) taking of hostages."

16 b. This article appeared not only in Convention IV, but also in the three others. The preliminary work on the 1949 Conventions began as early as 1945. The final stage was the discussion of draft conventions by the Diplomatic Conference which met at Geneva in 1949 and was attended by representatives of 63 governments. At the closing meeting, 58 delegations signed the final Act, and 17 of them also signed the Conventions. On 8 December 1949, 43 other States signed them at a special meeting. Since then, two States had deposited instruments of ratification, thus bringing the Conventions into force.

16 c. With the development of democratic government and the liberalization of social structure in the world, the taking of hostages has lost its value and what remained of the practice was the discredited theory of collective responsibility. It was right to prohibit the killing of hostages, but it was not sufficient. No one—even an enemy civilian—should be deprived of liberty, without just cause, and the taking of hostages was a practice which must be abandoned. Moreover, as 60 States had already proscribed it, he suggested that it should not be countenanced, even implicitly, in the formulation of the principles recognized by the Nürnberg Charter and Tribunal.

16 d. He had set out from the assumption that like the Charter and Tribunal, the Commission recognized that the principles to be formulated were principles of international law. But even if they regarded themselves as mere draftsmen, engaged in formulating the principles without necessarily passing judgment on them, they should accept the proposed changes, in order to bring harmony into the formulated principles. The survival of a barbarous practice did not look well in the company of principles which declared certain acts against peace and crimes against humanity to be in the same category as war crimes, and made individuals responsible for such crimes, irrespective of domestic law, official status or superior order.

16 e. Whether the Commission accepted the principles recognized in the Nürnberg Charter and judgment or not, it should put an end to the practice of taking hostages. If it were objected that the taking of hostages was not included among the principles which the Commission was instructed to formulate, the answer was that the Commission had already altered Principles III and IV, thereby weakening them; whereas, in the case in point, the principle would be strengthened. The outlawing of the taking of hostages was in harmony with the purpose which the General Assembly had in mind when it decided to formulate the principles recognized in the Nürnberg Charter and Tribunal, the purpose of formally registering progress in international law. If the Commission had worked in 1945, it could have properly declined to consider the proposal under discussion. But today, after 60 States had signed the Geneva Convention relative to the protection of civilian persons, it could not very well turn its attention away from the question.

17. Mr. YEPES also supported Mr. el-Khoury's proposal. There was no reason why the text of the Charter should not be altered in the present instance, as had been done twice already. If a hostage was taken, the threat to kill him was implied. Hence, to outlaw even the taking of hostages would be a decided step forward. He urged the members of the Commission not to be too conservative.

[3] First Section: "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories". Part III: "Status and Treatment of Persons".

18. Mr. BRIERLY pointed out that the Geneva Conventions of 1949 were nothing more than proposals—drafts awaiting confirmation or rejection by the States concerned. It could not be contended that the Nürnberg Charter and Tribunal prohibited the taking of hostages. So long as the Commission was merely formulating the Nürnberg principles, it could not formulate a principle which did not appear in the Charter. If the Commission's purpose was to make suitable alterations to the Nürnberg principles, there were plenty of changes to be made; but that was not the Commission's task.

19. Mr. ALFARO thought he could support Mr. el-Khoury's proposal. For logical and textual reasons, he was convinced that the judgment had assumed that the taking of hostages was prohibited by international law. Previously, the Commission had decided to leave the text as it stood, on the grounds that once the killing of hostages was prohibited, the taking of hostages was likewise prohibited. General Assembly resolution 177 (II) called on the Commission to formulate the principles recognized in the Charter and judgment of the Tribunal. In support of his thesis, he referred to the section of the Nürnberg Judgment entitled " War Crimes against Humanity ", and read the following passages from the last paragraph: " The Tribunal proposes, therefore, to deal quite generally with the question of War Crimes " ... " Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the Germans purposes." [4] He also read the following passage from the section entitled " *Murder and Ill-treatment of Civilian Populations* ": " The practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans." [5] In the view of the Tribunal, it was forbidden and regarded as a war crime to take and kill hostages. He could not agree that the taking of hostages was permissible because the Charter had specifically forbidden only the killing of hostages.

20. Mr. el-KHOURY assumed that Mr. Brierly's opinion was that it was permissible to take hostages provided they were not killed.

21. Mr. BRIERLY and Mr. FRANÇOIS said that that was the position in international law at the time of the Nürnberg trial.

22. The CHAIRMAN shared the view of Mr. Brierly and Mr. François.

23. Mr. AMADO referred the Commission to paragraph 79 of the report of Mr. Spiropoulos: " Draft Code of offences against the peace and security of mankind " (A/CN.4/25), and quoted the final paragraph: " Article 6 (b) of the Nürnberg Charter and paragraph 1 (b) of article 2 of the Control Council Law No. 10 declare without any qualification the ' killing of hostages ' as a ' war crime '. In consideration of this the tribunal of the *Hostages Trial* held that, subject to a number of conditions, the killing of reprisal victims or hostages, in order to guarantee the peaceful conduct in the future of the population of occupied territories, was *legal.*" With due respect to the views expressed by most of his colleagues, he felt obliged to abide by the text.

24. The CHAIRMAN put to the vote Mr. el-Khoury's proposal to add the taking of hostages to the list of war crimes.

Five votes were cast for Mr. el-Khoury's proposal, 5 against, and there was one abstention. The proposal accordingly was not adopted.

25. The CHAIRMAN said the reason why he had abstained was that, although he felt that the taking of hostages should be outlawed, it could not be argued that the Charter and judgment of the Nürnberg Tribunal had declared the act a war crime.

26. Mr. YEPES thought the question at issue was whether the Commission regarded the taking of hostages as a war crime or not. It was unfortunate that the majority had voted against the adoption of this new principle.

27. The CHAIRMAN asked whether the Commission would like the Rapporteur to insert in the general report a note to the effect that there had been five votes on each side, and that it would deal with the question again when it came to define war crimes in its draft Code of offences against the peace and security of mankind.

28. On a point of order, Mr. YEPES thought that in the case of an equality of votes, the Chairman had to give the casting vote.

29. The CHAIRMAN disagreed; indeed such a requirement would be unfortunate, as it would be unfair on a chairman wishing to abstain.

30. Mr. KERNO (Assistant Secretary-General) read rule 132 of the General Assembly Rules of Procedure, showing that the Chairman was not obliged to vote.

The Commission decided, by 9 votes to 0, that its general rapporteur should insert in his report the note suggested by the Chairman.

31. Mr. HSU asked whether the Commission could take up again the question of the formulation of the Nürnberg principles if, in discussing the Code, it decided that the taking of hostages was a war crime.

32. The CHAIRMAN replied that the Commission would not discuss the Principles again.

33. Mr. HUDSON said he would like to make a suggestion regarding the statement of Principles. In Principle I, the Commission had stated that " Any person who commits or is an accomplice in the commission of an act ... etc." He asked whether the principles should take into account cases of complicity. An accomplice committed an act, and that act was a crime according to the Charter and judgment. Article IV of the Convention on genocide said: " The following acts shall be punishable: (e) complicity in any of the acts ... etc."

33 a. He suggested that the Commission add to section B a paragraph (d), worded as follows: " Complicity in

[4] *Trial of the Major War Criminals before the International Military Tribunal,* Nürnberg, 1947, Volume 1, pp. 277-228.

[5] *Ibid.,* p. 234.

the commission of a crime against peace, a war crime, or a crime against humanity, as set forth in (a), (b) and (c)." It would thus be unnecessary to mention accomplices in Principle I. Mr. Spiropoulos, whom he had consulted on this point, had agreed with him and had asked him to propose the deletion of the words " or is an accomplice in the commission of ".

34. The CHAIRMAN thought that Mr. Hudson's proposal would be useful as clarifying the Nürnberg principle. He asked the opinion of Mr. Amado as a specialist in penal law.

35. Mr. AMADO approved Mr. Hudson's proposal.

36. Mr. SANDSTRÖM thought a perusal of Principle I made it clear that it referred to all the crimes listed in paragraphs (a), (b) and (c). He asked whether paragraph (a) (ii) of section B did not cover Mr. Hudson's objections.

37. Mr. HUDSON said it was a question of logic. Paragraph (a) (ii) did, of course, say " participation in a common plan or conspiracy "; but complicity was another matter.

38. Mr. BRIERLY supported this new wording as being an improvement.

39. Mr. ALFARO also supported the proposal.

40. Mr. SANDSTRÖM remarked that in Sweden, complicity was not a separate crime, but was an aspect of each category of crimes. He thought the arrangement in the report was preferable.

41. Mr. CÓRDOVA shared this view, though for different reasons. The Charter referred to complicity only in the case of crimes against peace. Hence to apply the notion to other crimes meant extending the principle. The Commission recognized that complicity was a crime, even though the Charter was silent on the point. Hence it was extending the list of crimes. Nevertheless this was an improvement, and he would vote for the proposal.

42. Mr. HUDSON asked Mr. Córdova to refer to paragraph (2) of the commentary on Principle I,[6] where Mr. Spiropoulos stated: " *prima facie,* this principle seems to go further than the Charter ", and maintained that the judgment had applied either the last paragraph of article 6 by analogy, or the general principles of criminal law in regard to complicity. If the change he proposed was adopted, the commentary on Principle I would also have to be changed.

The Commission decided without opposition to adopt Mr. Hudson's proposal.

43. Mr. ALFARO said that one of the most severe criticisms of the Nürnberg trials was that they constituted a violation of the principle of penal law *nullum crimen, nulla poena, sine lege.* Article 27 of the Nürnberg Charter provided that: " The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just." It had been maintained that this provision established an *ex post facto* penalty, but the fact remained that the Charter imposed penalties for the crimes it defined. While he did not advocate the imposition of the death penalty for any crime, he believed that it might be deemed necessary to incorporate in the Commission's formulation a principle corresponding to article 27 of the Nürnberg Charter.

43 a. In general terms, the Commission might formulate the important principle that persons found guilty of the crimes therein defined would be punished by imprisonment for such terms as might be determined to be just by such international organ of criminal jurisdiction as might be created in the future. Or else the formulation might state that inasmuch as the principle *nulla poena sine lege* must be observed in any international system of crime repression, the Code of offences against the peace and security of mankind should fix the penalties to be imposed on persons found guilty of such offences. In this way, the Commission's formulation would consist of three logical parts: the principles, the crimes, and the penalties. This course was indispensable, because otherwise the Commission could be criticized for leaving out of its formulation the basic provision of article 27 of the Charter; and it might be asked how principles of international penal law and definitions of crimes could be established permanently for the future without laying down the penalties with which the crimes defined should be punished.

43 b. The last page of Mr. Spiropoulos' second report (A/CN.4/25) contained *Basis of Discussion No. 4,* whereby it was proposed that the parties to the Code should " undertake to enact the necessary legislation for the establishment of penal sanctions applicable to persons found guilty of any of the crimes defined in the Code." He nevertheless wondered if the Commission should not discuss this matter in connexion with the formulation of the Nürnberg principles, in view of the fact that penalties were established by the Charter and actually imposed by the Tribunal in its judgment.

To sum up, his proposal was that the Commission should determine whether or not it ought to include in its formulation of the Nürnberg principles a clause relative to penalties.

44. The CHAIRMAN requested Mr. Alfaro to draft a specific proposal.

45. Mr. SANDSTRÖM agreed that it was clear that the Nürnberg Charter imposed penalties, but he could not agree that it was a principle of international law prior to Nürnberg. His view was that international crimes should carry penalties. The Commission should examine the question when dealing with the draft Code.

46. Mr. AMADO was of the same opinion as Mr. Sandström. In connexion with the *Basis of Discussion No. 4* on the last page of Mr. Spiropoulos' second report, he recalled that the Nürnberg Charter had applied the system of indeterminate penalty. The judge fixed the penalty. He felt that there was a tendency to go too quickly. He would revert to the question later, and was not in favour of Mr. Alfaro's suggestion.

47. The CHAIRMAN felt the Commission would do better to examine the question when the draft Code of offences against the peace and security of mankind came up for consideration. The General Assembly had

[6] A/CN.4/22, para. 43.

asked the Commission to formulate the principles of international law recognized in the Charter and judgment; and in the case in point, it was difficult to decide whether a principle of international law was involved. In French constitutional law, it had been considered for a long time—if indeed it was not still considered—that the High Court of Justice was not bound by the principle *nullum crimen*. Would it be wise to bind an international criminal court to this principle? He personally was doubtful; he thought it might be premature to do so. He asked the Commission whether the proposal should be put to the vote.

48. Mr. ALFARO thought that as the Commission had hardly discussed the question, and only two of its members had expressed an opinion, it seemed preferable to postpone the discussion of his suggestion until later, when item 3 (b) of the agenda was being dealt with. The Commission's terms of reference were clear—it had to indicate what place the Nürnberg principles should be given in the Code.

49. Mr. SANDSTRÖM pointed out that it was not the Nürnberg principles which the Commission would insert in the Code, but the principles of international law recognized in the Charter and judgment.

50. Mr. el-KHOURY thought that if the Commission was to prepare a comprehensive international criminal code, the principles would appear in it as well as the penalties.

51. The CHAIRMAN said that the Commission had two tasks before it; to draft a Code of offences against the peace and security of mankind, and to indicate what place should be given in the Code to the principles of international law recognized in the Nürnberg Charter and judgment. It was not essential that the Code should be complete. It was too early to raise the question whether the Commission should insert the principle of the legality of offences and penalties. He had his doubts; and he thought he was not alone in having them. The introduction of this principle into international law might hamper its development. Neither the Charter nor the judgment had seen fit to adopt the principle. The same was true of many undeveloped legal systems. In all primitive judicial systems, offences appeared before any provision had been made for them. Indeed, before 1939, who would have imagined that the government, officials and private individuals in Germany could commit such crimes? It would have been impossible to foresee them, and they could not have been punished if the principle of the legality of offences and penalties had been strictly adhered to.

52. Mr. CÓRDOVA shared Mr. Alfaro's views. Article 27 of the Charter showed that the Tribunal had the right to impose such punishment as it considered just. The Commission could not ignore this principle, since it was to be found in the Charter and judgment; on the other hand, he did not think there was any principle of international law granting a tribunal full discretion to pronounce sentence. Hence he was opposed to this formula.

53. Mr. KERNO (Assistant Secretary-General) observed that Mr. el-Khoury had wondered whether the Commission, when it reached the second part of the task entrusted to it by the General Assembly, intended to draw up a general international penal code, or merely a code of offences against the peace and security of mankind. In the course of the preliminary work, both possibilities had been considered, but resolution 177 (II) of 21 November 1947, which governed the Commission's debates, had referred only to a restricted draft code.

54. Mr. el-KHOURY thought the Commission might postpone a number of questions and take them up again when the Code came under discussion. At the previous meeting, he had asked the Commission to declare that the crimes remained crimes even when committed by the party attacked. The Charter and judgment dealt, of course, with a specific case. The Commission should adopt the equitable point of view that a crime is always a crime. The non-aggressor was not answerable to the Nürnberg Tribunal because the Tribunal was set up by the victors; but the Commission was called upon to establish a general principle. He hoped it would decide to include the following passage in its report:

> "The Commission is of the opinion that these crimes are to be considered international crimes, irrespective of which side has committed them."

55. Mr. YEPES read Principle I, concluding that the words "Any person" implied that the victor as well as the vanquished was responsible for his crimes.

56. Mr. KERNO (Assistant Secretary-General) pointed out that undoubtedly the intention of the General Assembly had been to make the principles recognized at the Nürnberg Trial general in their application. At present, the Commission was concerned merely with formulating the Nürnberg principles. These principles of international law recognized in the Charter and judgment included crimes which could only be committed by an aggressor—namely, crimes against peace; but war crimes and crimes against humanity could be committed by either side. The Commission might go into this question in the second half of its work when dealing with the draft Code. The general tendency in the future would surely be to demand punishment for certain types of crime, irrespective of which side had committed them. But certain crimes by definition could only be committed by an aggressor.

57. Mr. CÓRDOVA thought that a commentary at least would be called for, indicating that the Commission felt that the restriction imposed on the Nürnberg Tribunal should not be considered as a principle of international law, and adding that when it came to examine the criminal code, it would revert to crimes committed by parties other than aggressors, and would make them crimes under international law as they deserved to be. The Commission might state, either in the text or in the commentary on the text: "committed by the aggressor or the victim of aggression"; or it could leave the text as it stood, stating that in its opinion the principle was not one of international law, but a Nürnberg principle.

59. Mr. el-KHOURY explained that his proposal had

not been to alter the text, but to mention in the report that the Commission did not consider that only an aggressor was punishable.

59. Mr. SANDSTRÖM agreed with Mr. Yepes. Under the principles adopted by the Commission, any person guilty of a crime against humanity and against peace was punishable. Crimes against humanity could be committed not merely by an aggressor but by the victim of aggression, whether in connexion with a crime coming within the jurisdiction of the tribunal or not. To cite an example, it was conceivable that a country attacked might exterminate all enemy subjects within its territory. Clearly this was a crime against humanity.

60. The CHAIRMAN thought that this was self-evident, but he had no objection to the idea being expressed in the report. In reply to a question by Mr. Yepes, he explained that all the opinions expressed in the debates would be mentioned in the report.

61. Mr. CÓRDOVA argued that under the terms of the Charter, a crime against humanity could not be the subject of proceedings unless committed in connexion with the initiation or waging of an aggressive war. The report should state clearly that in the view of the Commission, the war crimes and crimes against humanity referred to in article 6, paragraphs (b) and (c) of the Charter could be committed even by a non-aggressor.

62. Mr. SANDSTRÖM pointed out that the term " in connexion with " in no way implied that only an aggressor could be proceeded against.

63. The CHAIRMAN felt that Mr. Córdova's scruples were hardly warranted. At the same time, he had no objection to the idea he had expressed being explained and included in the report, on the grounds that one could never be too careful. The Rapporteur could include a note in his report to the effect that on this point, the aggressor and the victim of aggression were on an equal footing.

64. Mr. YEPES said that as he had been absent at the end of the previous meeting, he did not know whether the Commission had examined footnote 67, which was of the utmost importance since it dealt with the responsibility of organizations.

65. Mr. SANDSTRÖM replied that the Commission had decided to delete the footnote.[7]

66. Mr. YEPES regretted the decision. The footnote concerned a most important legal principle. The Charter appeared to establish the new principle of " responsibility of organizations ", and the comments of the Rapporteur, given in the footnote on that question, brought out the fact that the principle that " criminal guilt is personal and that mass punishment should be avoided " remained inviolate. He emphasized that point, because the principle that fraud cannot be transmitted (" l'intransmissibilité du dol ") was fundamental to criminal law and was upheld by the declarations made in footnote 67.

67. The CHAIRMAN pointed out that as the Commission had taken a formal decision, this could not be revoked. Incidentally, the author of the report, Mr. Spiropoulos, had agreed to the deletion of the note. But to meet Mr. Yepes' wishes, the summary record would mention the reservation he had just made.

67 a. He declared the discussion of Mr. Spiropoulos' report on the formulation of the Nürnberg principles closed.

Law of Treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23)

68. The CHAIRMAN said that the Commission had decided to pass on to the examination of Mr. Brierly's report before taking up the second report by Mr. Spiropoulos on the draft Code of offences against the peace and security of mankind. He asked Mr. Brierly to tell the Commission how he would like his report discussed.

69. Mr. BRIERLY said he was sure that the members of the Commission had read his report, which he explained was merely a draft. He then gave a summary of the Explanatory Note introducing the report (paras. 1 - 12). He emphasized that this preliminary report dealt only with the definition of certain terms, treaty-making capacity and the making of treaties. Other chapters would be added to it. There were certain difficulties in the way of codifying rules likely to be generally acceptable; and instead of codifying the propositions of existing law, he could have adopted another method—namely, to evolve a set of rules which States might apply or modify as they chose. He had rejected this second method. The questions raised in paragraphs 6 and 7 would afford material for future discussion, as would also the subject matter of paragraph 8. He explained why he had avoided using the terms " ratification " and " accession "—this being a new practice instituted by the United Nations and not applied consistently. As rapporteur, he had tried to define the precise scope of the term " treaty ", and so had included in his draft other agreements such as Exchanges of Notes. He also mentioned various draft codes on which his report was based. He added that he had received a great deal of help from the Secretary-General and the Secretariat. Without it, his report could not have been prepared.

70. Mr. KERNO (Assistant Secretary-General) paid tribute to the high standard of the report. He felt he should draw the Commission's attention particularly to one of the sections of the report which was of great immediate importance to the United Nations—namely, the section dealing with " Reservations to Treaties " (Articles 10, paras. 84 - 102). He explained that as the depository of a great many international conventions, the Secretary-General of the United Nations had often been faced with great difficulties. This had been particularly true of the Convention on Genocide. If the Commission decided to discuss this part of the report, it would be of great value to the Secretary-General, as the question of reservations was of considerable importance to him. He intended, in fact, to place the question of reservations, including those referring to the Convention on Genocide, on the agenda of the next General Assembly. The report raised so many problems

[7] See Summary record of the 48th meeting, para. 134.

that the Commission might not manage to reach a definite conclusion on all of them at the present session. But he hoped that on the subject of reservations, certain preliminary conclusions might arise out of the Commission's debates, and these would certainly be of great help to the Secretary-General, as well as to the General Assembly and the Sixth Committee when they discussed that particular item on the agenda.

71. Mr. FRANÇOIS commended the high quality of Mr. Brierly's report. He was not very clear, however, as to the legal scope of the provisions it contained. Nor did he see what legal obligations would be incurred by States ratifying a convention established on the basis of the report. In a number of countries, the constitution made a distinction between treaties and other conventions or agreements, such as exchanges of notes. In such countries, treaties were subject to parliamentary approval, while other conventions were not. If a country accepted the convention envisaged by the Rapporteur, would it be bound by the convention, or would it still be at liberty to make a distinction between a treaty and, for example, an exchange of notes ? This distinction was made by the Netherlands Constitution. Or alternatively, would exchanges of notes and other agreements as well as treaties have to be submitted to parliament ? He thought a great deal of confusion might arise as to the legal consequences to States of the acceptance of the convention.

72. Mr. BRIERLY replied that if the draft convention were ratified, countries would be at liberty to distinguish between treaties and other agreements in accordance with their constitutional law. In article 1 of his draft convention, he had tried to give a definition of the term " treaty " for the limited purposes of the convention; and as the definition stood, he did not think he had created any constitutional difficulties for the States referred to by Mr. François, even though he had been obliged to use here and there a different terminology from that used by some States.

73. Mr. AMADO was of the opinion that the draft Convention on the Law of Treaties as presented by Mr. Brierly departed greatly from tradition. While he recognized the great value of the report, he wondered whether the flexibility of the draft and of the definitions it contained were likely to remove the theoretical or practical discrepancies and controversies connected with the law of treaties.

73 a. The Commission's task was " to promote the progressive development of international law and its codification." The work of codification presupposed the existence of earlier customary material, and this could not be ignored even if it had to be adapted to modern practice, where international organizations were sometimes parties to agreements. The notion of " treaty " had always been regarded as the expression of concordance of views between the parties, and at the same time as the instrument recording this concordance. The definition of a " treaty " as expressing agreement between the parties was wider than the formal definition of a treaty as an instrument. The wording of article 1 (a) of Mr. Brierly's draft was electic, since it stated that a treaty was an agreement, and at the same time recognized the formal nature of a treaty, which according to Mr. Brierly must be " recorded in writing ". The origin of all conventional international norms was *consensus* between the parties. But, in paragraph 19 of his report, Mr. Brierly stated that there was no absolute rule of law requiring that a treaty should be in writing. Quoting the works of Professors Scelle, Genet and Rousseau, he argued that the *consensus* was what brought a treaty into existence, while the agreement was the concordance of views giving validity to the treaty, a formal instrument which recorded the conditions of the agreement. On this point, he thought it would be preferable to revert to the definition given in the Harvard Draft Convention, article 1 of which stated: " A treaty is a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves." [8] This point was most important with regard to the definition of agreements by exchanges of notes, referred to in article 1 (b) of Mr. Brierly's draft, under which the term " treaty " covered agreements by exchange of notes. According to the Harvard draft, the term " treaty " did not cover agreements made by exchanges of notes. He wondered which of the two definitions was the more in keeping with the evolution of the needs of international law.

73 b. The most serious problem in treaty law was to make it possible for conventions to become an integral part of international conventional law. This could be achieved by the definitive adoption of the agreements by governments, and their transformation from simple treaty drafts into valid international rules. In other words, they must be ratified; and the provisions of article 8 of Mr. Brierly's draft were not likely to induce States to renounce their right to reconsider texts which had been negotiated by their plenipotentiaries. It would indeed constitute a great step forward if States regarded themselves as bound by the decisions of their plenipotentiaries; but the constitutions of most countries gave the legislatures the power to make the final decision as to international undertakings. It was therefore doubtful whether the inclusion of agreements by exchange of notes under the definition of the term " treaty " implied progress or retrogression. Such agreements had always been regarded as a guarantee of flexibility in the relations between States—the slow, complex procedure of legislative ratification being thus avoided as it was by all agreements of a simplified kind—e.g., the well known American " executive agreements ", interdepartmental agreements, etc. He referred in this connexion to paragraph VI of the report of the First Committee of the League of Nations Assembly of 2 October 1930 (document A.83.1930.V.).

73 c. The part played by the " executive agreements " in the diplomatic history of the United States was well known—e.g., the exchange of notes between the United States and England in 1817 on the limitation of naval forces on the Great Lakes; the exchange of notes with

[8] *American Journal of International Law*, Vol. 29, No. 4 (1935), Supplement, p. 657.

England in 1850 ceding Buffalo Bay to the United States; the Protocol of 1898 on the cession to the United States of Spanish sovereign rights over Cuba and Puerto Rico, etc. If the United States were ever bound by a convention such as that contemplated under article 1 (b) of Mr. Brierly's draft, the agreements by exchange of notes would be classed as treaties, and would come up for legislative ratification under the terms of article II, section 2 of the United States Constitution. The same would apply to Brazil and many other countries. Hence, he was inclined to think that the solution proposed by Mr. Brierly, under which agreements by exchange of notes would be submitted to the formal process for the conclusion of a treaty, would not contribute to the development of international relations. The immediate consequence of the adoption of Mr. Brierly's plan would be to make the agreements on a number of subjects in which the executive authorities at present had full liberty of action dependent on the formality of ratification.

73 d. He thought that article 2 on the use of the terms "State" and "international organization" might very well be eliminated. Mr. Brierly had stated that he had not attempted a definition of the term "State" (para. 36). His intention appeared to be to avoid making the convention apply to the various entities which make up a State, such as provinces or cantons, which were not members of the community of nations. Moreover, article 2 was not strictly logical, since it might well be asked whether an international organization was not itself a member of the community of nations.

73 e. The rule laid down in article 5 (b) struck him as very wide in scope. It was true that nowadays it frequently happened that ministers of finance or transport, for example, concluded international agreements with their colleagues direct. But it would be going too far to lay down that the powers proper to the Head of a State could be presumed to be delegated to anyone assuming ministerial functions. The rule should be confined to the conclusion of agreements of secondary importance.

73 f. Article 7 laid down the principle of the autonomy of consent of all the parties. In this respect, he was in agreement with Mr. Brierly.

73 g. Under article 8, signature would be the normal procedure for acceptance, in the absence of a declaration to the contrary in the treaty. Signature would therefore be the general rule, whereas ratification would be the exception. This would mean a return to the privatist doctrine of Grotius, under which the relations between Heads of States and plenipotentiaries were similar to those between the parties with regard to powers of attorney. This doctrine was contrary to the practice of the last few centuries. The position taken by Mr. Brierly on this point represented a doctrine which during the last few years had had several protagonists in England—Sir Arnold McNair, Sir Gerald Fitzmaurice, etc. There must be no confusion between ratification, an institution of international law, and approval by legislatures, which was an institution of constitutional law; but there was a certain correlation between the two. Where the constitution required legislative approval, the Head of the State could not sanction the instrument of ratification without consulting the representatives of the people. Thus, the principle proposed by Mr. Brierly would not avoid the obstacles to ratification, since States in which the power to conclude treaties was subject to reference to the legislature would stipulate that treaties to which they were parties must be ratified, except perhaps in the case of agreements of secondary importance. Mr. Brierly stated in paragraph 76 of his report that the tendency during the last few years had been to make treaties binding by signature alone, quoting the example of the UNRRA Agreement, etc. Nevertheless, a great many agreements —e.g., the Charter of the United Nations, etc.—still stipulated that they must be ratified. The necessity for ratification as a condition of validity for treaties had been declared time and time again by the Permanent Court of International Justice. Article 5 of the Convention on Treaties signed at Havana in 1928 consecrated the principle of compulsory ratification.

73 h. The opponents of the principle of compulsory ratification for the validity of treaties used the argument that a ratification clause was almost always expressly put in. But this clause never stated anything but the necessity for the formality; it invariably contained a stipulation as to the procedure for the exchange of instruments of ratification, the place where this should take place, and the deposit of ratifications. Incidentally, the argument could also be used against its advocates, since the clause under which a treaty was valid from the time of signature was never implicit, but always expressly stated. Article 8 provided that a representative should have authority to conclude the treaty. But States would endeavour to limit the full powers of their representatives, at least in respect of treaties of some importance. Moreover, in countries where legislative approval was required by the constitution for the conclusion of treaties, the Executive could never grant full powers authorizing a representative to conclude international treaties simply on his signature.

73 i. In short, Mr. Brierly's draft did not express the unanimous views of the various legal systems regarding the law of treaties, but was built up on the model of the British legal system. Incidentally, in his book, "The Law of Nations" (fourth edition, 1949, pp. 231 - 232),[9] Mr. Brierly had outlined a doctrine diametrically opposed to the one on which his present draft was based.

74. The CHAIRMAN asked whether Mr. Brierly would like to reply at once to Mr. Amado's speech, which incidentally confirmed the impression he himself had had when he read the report. Every line of the report would be likely to give rise to discussions which would be of great value to the Commission. To discuss it seriously, the Commission would need, not a week or two, but possibly months, to exhaust the subject and to reach definite conclusions. That was true, of course, of all reports dealing with vast subjects which

[9] J. L. Brierly, *The Law of Nations*, Oxford, The Clarendon Press, 1949.

could not be thoroughly discussed in a short space of time. He agreed with the Assistant Secretary-General that the Commission might give the General Assembly its opinion, not on the draft as a whole, but on certain points.

75. Mr. KERNO (Assistant Secretary-General) repeated that it would be most desirable to reach definite decisions and conclusions; but he was sure that the Commission had no illusions as to the possibility of completing its agenda quickly. In regard to certain topics, it would be useful if a definite report could be submitted to the General Assembly—for example, on the Nürnberg principles, on the international criminal jurisdiction, and on the ways and means for making the evidence of customary international law more readily available. In regard to the law of treaties, the Commission might be well advised to try to agree on the basic principles and to examine certain particular points, with a view to enabling the rapporteur to submit a more concrete report and proposals at the next session. The Commission might, for example, discuss the possibility of drafting a convention on the law of treaties, or merely certain principles. It was certainly desirable that on this topic also the Commission should make progress.

76. The CHAIRMAN remarked that in conformity with the decision of the General Assembly, certain reports had priority. Mr. Brierly's report was not one of them. It might perhaps have been better to take up the study of the priority topics. He thought the Commission might have to limit the time it devoted to each report. At any rate, it hardly seemed possible for Mr. Brierly's report, which raised the most vital questions, to be examined carefully and thoroughly. Hence, it would be better to limit the discussions and to examine some of the principles laid down by Mr. Brierly. The point raised by Mr. Kerno had not been examined by Mr. Brierly—namely, whether the Commission was to draft a convention or merely a set of principles. There seemed to be no doubt that the Commission's task was to draw up draft conventions, but he did think there would be time to reach agreement on all the terms of a convention. As the Commission had seen, the standpoint taken by Mr. Amado was contrary to Mr. Brierly's; and his seemed to indicate that the study of article 1 alone would keep the Commission busy for days. Henee, he suggested that the current week be devoted entirely to the study of Mr. Brierly's report, and the report by Mr. Spiropoulos on the draft Code of offences against the peace and security of mankind be taken up the following week. He also reminded the Commission that it would have to discuss the report to be submitted by its general rapporteur. When it did so, it would certainly resume the discussion of a number of points it had examined previously.

The meeting rose at 6.5 p.m.

50th MEETING

Tuesday, 20 June 1950, at 10 a.m.

CONTENTS

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).

Law of Treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (continued)

ARTICLE 1

1. The CHAIRMAN did not think it possible for the Commission to embark on a thorough discussion, though it might take up some individual points. Article 1, paragraph (b), assimilated what were previously known as treaties to the simplified agreements which were exchanges of notes.

2. Mr. HUDSON had difficulty in understanding paragraphs 3, 4 and 5 of the Explanatory Note. The last sub-paragraph on page 5 read: " these rules [1] are so broad that if they were stated in reverse they would command scarcely less agreement ". He was unable to see how they could be stated in reverse. Paragraph 6, dealing with standard clauses, was important and he hoped the Commission would find it possible to revert to that matter. He was not clear as to the meaning of paragraph 7. What sort of depositories were contemplated ? In paragraph 8 he had indeed been surprised to find that the terms " ratification " and " accession " were not employed at all. He could not understand why tradition had been departed from there. The Genocide Convention and the 1949 Geneva Convention employed those words. He wondered what problem connected with exchanges of notes it would be appropriate for the Commission to discuss (paragraph 9). The Commission was not considering all types of agreements, and he had been pleased to see in paragraph 10 that purely unilateral engagements did not come within the purview of the draft

2 a. The title of Section C " Source of the Draft " was misleading. Paragraph 11 gave a list of drafts; but

[1] Articles 5 (b) and 7 of the Harvard Draft Convention; see A/CN.4/23, p. 52.