

Provisional

For participants only

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Provisional summary record of the 3382nd meeting

Held at the Palais des Nations, Geneva, on Wednesday, 26 July 2017, at 10 a.m.

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Report of the Drafting Committee

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Present:

Chairman: Mr. Nolte

Members: Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Hmoud
Mr. Kolodkin
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 7) (*continued*)

Interim report of the Drafting Committee (ILC(LXIX)/DC/JC/CRP.2)

Mr. Rajput (Chairman of the Drafting Committee) introduced the titles and texts of draft conclusions 1, 2 [3 (2)], 3 [3 (1)], 4, 5, 6 and 7, as provisionally adopted by the Drafting Committee and as contained in document ILC(LXIX)/DC/JC/CRP.2, which read:

*“Peremptory norms of general international law (*jus cogens*)*

Draft conclusion 1

Scope

The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*).

Draft conclusion 2 [3 (2)]

General nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

Draft conclusion 3 [3 (1)]

Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Draft conclusion 4

Criteria for identification of a peremptory norm of general international law (*jus cogens*)

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

(a) it is a norm of general international law; and

(b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Draft conclusion 5

Bases for peremptory norms of general international law (*jus cogens*)

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).
2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Draft conclusion 6

Acceptance and recognition

1. The requirement of ‘acceptance and recognition’ as a criterion for identifying a peremptory norm of general international law (*jus cogens*) is distinct from acceptance and recognition as a norm of general international law.
2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Draft conclusion 7

International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).
2. Acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.
3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form a part of such acceptance and recognition.”

The Drafting Committee had held three meetings on the topic, from 13 to 20 July 2017. It had been able, within the time allocated to it, to complete the work left over from the previous year and to consider the Special Rapporteur’s proposals for draft conclusions 4 to 8, referred to it in July 2017. Owing to lack of time, the consideration of the Special Rapporteur’s proposal for draft conclusion 9 had been deferred to the next session of the Commission, in 2018. Consistent with the approach taken the previous year, the Special Rapporteur had recommended that the draft conclusions should remain in the Drafting Committee until the full set had been adopted, so that the Commission would be presented with a full set of draft conclusions before taking action. His own statement, accordingly, was presented in the form of an interim report, intended to provide the Commission with information on the progress made in the Drafting Committee so far.

Draft conclusion 2 [3 (2)] had originally been proposed by the Special Rapporteur as a second paragraph for draft conclusion 3. A minority of members had continued to express doubts about the legal basis and purpose of the paragraph. The Drafting Committee had considered a proposal for it to be included in a new combined text of draft conclusions 6 and 8. Other suggestions had been to postpone the consideration of the provision with a view to examining it in conjunction with either draft conclusion 7, on the international community as a whole, or draft conclusion 9, on evidence. Another proposal had been to deal with the matter in a preamble to the entire set of draft conclusions. The prevailing view had been that the paragraph should be retained in the text as a self-standing provision: the majority of members considered that it was an important provision that provided a general orientation on the provisions that followed. As to the text itself, it largely followed the one proposed by the Special Rapporteur in his first report, with a technical modification to the use of “*jus cogens*” so as to reflect the new title of the topic. The provision now also included the phrase “reflect and protect”, referring to the process of identification of peremptory norms, as well as their consequences.

The title of draft conclusion 2 [3 (2)] was “General nature of peremptory norms of general international law (*jus cogens*)”.

The text of draft conclusion 3 [3 (1)] had been adopted the previous year. With the relocation of paragraph 2 of the original draft conclusion 3 to a separate draft conclusion, the text now contained only one paragraph. The Drafting Committee had adopted the title “Definition of a peremptory norm of general international law (*jus cogens*)”. Despite a suggestion that the title should be shortened to read only “Definition”, consensus had been reached on the longer title: it was consistent with the terminology used in article 53 of the Vienna Convention on the Law of Treaties and it followed the approach used for draft conclusion 4 of the text on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Draft conclusion 4 had been considered on the basis of a revised text, presented by the Special Rapporteur, which sought to address suggestions made by a number of members that, in accordance with article 53 of the Vienna Convention, the draft conclusion should refer, not only to the fact that a peremptory norm was a norm from which no derogation was permitted, but also to the fact that it could be modified only by a subsequent norm of general international law having the same character. The Drafting Committee had

also considered the advantages and disadvantages of the Special Rapporteur's proposal to divide subparagraph (b) into two separate paragraphs, with non-derogation in (i) and modification in (ii), an approach viewed by some as providing clarity. The proposal had also been made to list modification as a third criterion of identification, under a subparagraph (c), but the Special Rapporteur had felt that that would depart from the structure of article 53 of the Vienna Convention. The Drafting Committee had settled on keeping the two elements of derogation and modification in subparagraph (b): they were two aspects of the same criterion, and their separation could lead to the false impression that two separate tests would have to be satisfied to fulfil the criteria for identifying a peremptory norm of general international law.

In the course of its discussions, the Drafting Committee had considered the need to ensure consistency of usage, throughout the draft conclusions, of the term "a peremptory norm of general international law (*jus cogens*)"; accordingly, it had introduced that wording, to replace "a norm as one of *jus cogens*", in the chapeau of the draft conclusion. Following a suggestion to replace the word "show" with "ascertain" in the chapeau, in line with draft conclusion 2 in the draft conclusions on the identification of customary international law, the Drafting Committee had decided that "establish" was the most apt in the present context. It had settled on "*démontrer*" in the French text, although members had noted a slight discrepancy between the two terms. Lastly, the Drafting Committee had decided to change "two criteria" to "the following criteria" in the chapeau, and "it must be" at the start of both subparagraphs (a) and (b) to "it is", in order to better reflect the fact that the subparagraphs described intrinsic characteristics of a peremptory norm of general international law (*jus cogens*).

The title of draft conclusion 4 was "Criteria for identification of a peremptory norm of general international law (*jus cogens*)"

Turning to draft conclusion 5, he said that the Drafting Committee had proceeded on the basis of a proposal made by the Special Rapporteur in his second report. The draft conclusion now reflected the agreement reached by members of the Drafting Committee, after lengthy consideration, on various aspects of the initial and revised proposals. The draft conclusion consisted of two paragraphs, whereas the initial proposal had had four. The Drafting Committee had taken into account the various concerns expressed about the meaning of "general international law" and the propriety of adopting a three-tier structure, regarding the sources of peremptory norms, that included not only customary international law and general principles of law but also treaties.

The Special Rapporteur's proposal had included a paragraph 1, intended to make a linkage with draft conclusion 4 and to provide some clarity to the term "general international law". Different suggestions had been considered, including deleting the paragraph or moving it to what had become draft conclusion 3 [3 (1)] (Definition), or draft conclusion 4 (Criteria for *jus cogens*). Eventually, the Drafting Committee had decided to delete the paragraph, on the understanding that the Special Rapporteur would provide an explanation in the commentary as to what constituted general international law having a general scope of application.

Members had agreed about the important position of customary international law in the formation of peremptory norms of general international law. During the discussion, some members had expressed a preference for the word "source" instead of "basis" for the formation of *jus cogens* norms of international law. Nonetheless, the Drafting Committee had adopted the word "basis", out of the concern that "source" was a term used in Article 38 (1) (c) of the Statute of the International Court of Justice, where no reference was made to peremptory norms of general international law. The accompanying commentary would indicate that "basis" was to be understood flexibly, so as to capture a range of ways in which the traditional sources of law might feed into the formation of *jus cogens* norms.

Paragraphs 3 and 4 of the initial proposal had been the subject of substantial differences of views within the Drafting Committee. The text had undergone multiple revisions, resulting in the merger of the two paragraphs. Furthermore, the Drafting Committee had decided to invert the order, placing the reference to treaty provisions before that to general principles of law. The Drafting Committee had further refined the text to

read “treaty provisions”, which had been deemed more appropriate than “provisions in multilateral treaties”, as some members considered that peremptory norms of general international law (*jus cogens*) could also be located in bilateral treaties. However, the reference to treaty provisions and general principles of law in a single paragraph was not meant to place them necessarily at the same level. A clarification on the reasoning of the Drafting Committee on that aspect, as well as on the fact that “general principles of law” was to be understood within the meaning of Article 38 (l) (c) of the Statute of the International Court of Justice, would be provided in the commentary.

The title of the draft conclusion 5 was “Bases for peremptory international law (*jus cogens*)”.

Draft conclusion 6 had been considered on the basis of a revised proposal presented by the Special Rapporteur which took into account suggestions to streamline the text. The revised proposal combined the Special Rapporteur’s proposals for draft conclusions 6 and 8. The basic thrust of the initial draft conclusion was retained — namely, that the requirement of acceptance and recognition for peremptory norms was different from acceptance as law for customary international law and recognition for the purposes of general principles of law.

Paragraph 1 had been aligned with the new formulation of the topic title, and the earlier phrase “as law for the purposes of identification of customary international law” had been replaced by “and recognition as a norm of general international law”. That had been done on the understanding that, in the commentary, a distinction would be introduced between the identification of peremptory norms of general international law and norms of general international law in general. The inverted commas around “acceptance and recognition” were meant to reflect the fact that the phrase was drawn from article 53 of the Vienna Convention.

The purpose of paragraph 2 was to indicate the evidence required to identify a norm as being a peremptory norm of general international law (*jus cogens*): that such a norm should be accepted and recognized as one from which no derogation was permitted and which could only be modified by a subsequent norm of international law having the same character. The formulation had been aligned with the final sentence of article 53 of the Vienna Convention.

The title of draft conclusion 6 was “Acceptance and recognition”.

Draft conclusion 7 dealt with the concept of the “international community of States as a whole” for the purposes of identification of peremptory norms of general international law (*jus cogens*). The Drafting Committee had worked on the basis of a revised version of the proposal of the Special Rapporteur. Paragraph 1 largely tracked the initial proposal, except that the second sentence, which referred to the “attitude” of States, a word that had been criticized during the plenary debate, had been deleted.

Paragraphs 2 and 3 of the Special Rapporteur’s initial proposal had been inverted, so that paragraphs 1 and 2 together dealt with the question of the majority of States required for the identification of a norm as a peremptory norm of general international law (*jus cogens*), while paragraph 3 dealt with the positions of other actors. The Drafting Committee had accepted the suggestion made during the plenary debate that the text should be amended to reflect the reference by the Chairperson of the Drafting Committee at the Vienna Conference to a “very large majority of States” as being required for the identification of a norm as a peremptory norm. The commentary would explain that the reference was not necessarily to a numerical consideration, but would also involve a qualitative assessment. The Drafting Committee had considered a proposal to delete the concluding clause, “acceptance and recognition by all States is not required”, as being repetitive. However, on balance, it had decided to retain the text, as a useful clarification.

Paragraph 3 was a streamlined version of the Special Rapporteur’s proposal for paragraph 2. Some of the drafting refinements introduced included: replacing the word “attitudes”, which had been considered too vague, with “positions”; replacing “actors other than States” with “other actors”; and including a reference to the role of other actors in “providing context”. Notwithstanding such amendments, the basic thrust of the provision,

namely that the positions of other actors could not, in and of themselves, form a part of the relevant acceptance and recognition, had been retained.

The title of draft conclusion 7 was “International community of States as a whole”.

Before concluding his report, he wished to pay tribute to Special Rapporteur, whose knowledge of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. Lastly, he emphasized that the Commission was not, at the present stage, being requested to act on the draft conclusions: his report had been presented for information purposes only.

The Chairman said he took it that the Commission wished to take note of the statement by the Chairman of the Drafting Committee.

It was so decided.

Provisional application of treaties (agenda item 3) (*continued*)

Report of the Drafting Committee (A/CN.4/L.895/Rev.1)

Mr. Rajput (Chairman of the Drafting Committee) introduced the titles and texts of the draft guidelines on the provisional application of treaties, as adopted by the Drafting Committee and as contained in document A/CN.4/L.895/Rev.1, which read:

“Provisional application of treaties

Guideline 1

Scope

The present draft guidelines concern the provisional application of treaties.

Guideline 2

Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Guideline 3

General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4

Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

- (a) A separate treaty; or
- (b) Any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or international organization that is accepted by the other States or international organizations.

Guideline 5 [6]

Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Guideline 6 [7]**Legal effects of provisional application**

The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Guideline 7 [8]**Responsibility for breach**

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Guideline 8 [9]**Termination upon notification of intention not to become a party**

Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

Guideline 9 [10]**Internal law of States or rules of international organizations and observance of provisionally applied treaties**

1. A State that has agreed to the provisional application of a treaty or part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 10 [11]**Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties**

1. A State may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 11 [12]**Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations**

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.”

The topic “Provisional application of treaties” had been dealt with in an earlier report of the Drafting Committee (A/CN.4/L.895) that had been considered during the first part of the current session. On 12 May 2017, following the introduction of that report, the Commission had adopted a set of 11 draft guidelines. At that time, draft guideline 5 had been left in abeyance, as the Drafting Committee had not had enough time to consider it. The Committee had subsequently been able to hold one further meeting, on 24 July 2017. The outcome of the work carried out at that meeting was contained in document A/CN.4/L.895/Rev.1.

He wished to pay tribute to the Special Rapporteur, whose constructive approach had facilitated the Committee’s work. Thanks were also due to the members of the Committee, for their active participation, and the Secretariat, for its invaluable assistance.

Regarding the proposal for a draft guideline 5 on provisional application by means of a unilateral declaration, the Committee had proceeded on the basis of a revised proposal initially presented by the Special Rapporteur in 2016. The proposal had had two components. The first had addressed the possibility of provisional application arising from a unilateral declaration, where such an outcome was envisaged in the treaty itself or was in some other manner agreed. The second had addressed the situation in which the treaty was silent, and the possibility that a State could give effect to the provisional application of a treaty by means of a unilateral declaration, provided that no objection was made in that regard.

The prevailing view in the Committee had been that the first component could feature in the draft guidelines as an additional means by which provisional application could be agreed. The Committee had focused on a proposal to include it in the existing text of draft guideline 4, either as an additional specification in subparagraph (b) or in a new subparagraph (c). Another option that had been considered had been to incorporate it in the part of the commentary explaining the meaning of the phrase “other means or arrangements”.

In the end, the Committee had opted for an explicit reference in the text of draft guideline 4 itself, through the addition, at the end of subparagraph (b), of the phrase “or a declaration by a State or international organization that is accepted by the other States or international organizations”. The inclusion of the reference in draft guideline 4 meant that such a declaration had to be made within the context of an agreement between the parties. That was made clearer by the fact that the text referred to a “declaration by a State”, as opposed to a “unilateral declaration”, in order to distinguish between the two. There had been agreement that the possibility should be subject to acceptance, rather than to non-objection, since the latter was potentially too uncertain in practice.

The necessary agreement could arise in advance, for example, by means of a treaty clause or a conference resolution, thereby allowing each party, separately, the freedom to elect to apply the treaty provisionally. In the commentary, the Commission would elaborate on how such a declaration might manifest itself and make it clear that acceptance of the declaration must be explicit. It would also emphasize that the words “in addition to the case where the treaty so provides” covered the situation in which the treaty was silent but the parties nonetheless agreed to provisional application by other means, including through the acceptance of a declaration.

An earlier version of the text had contained a reference to acceptance being “in written form”, but the Committee had decided that the matter was best left to the commentary, where it would be stated that acceptance must be “express” and that most known examples were of agreement in writing. At the same time, by not referring to acceptance as having to be in writing, the draft guidelines would retain a certain flexibility and allow for other modes of acceptance.

As to provisional application by means other than through agreement, some members had been concerned that the legal effects of unilateral acts lay outside the scope of the topic, *stricto sensu*, and should therefore not feature in the text. Others had stressed that, since the text was in the form of draft guidelines, it could provide guidance on alternative modes of agreement, regardless of how infrequently they arose. The prevailing view had

been that the matter should not be addressed in the text of draft guideline 4, but could be referred to in the commentary thereto.

For the sake of clarity, the Committee had decided to refer, in subparagraph (a), to a “separate treaty” rather than a “separate agreement”, since subparagraph (b) also dealt with agreement, albeit through other modes. The title of draft guideline 4 had been amended to read “Form of agreement” in order to emphasize the purpose of the provision. With the new wording of draft guideline 4 (b), there was no longer a need for a draft guideline 5 on unilateral declarations to be retained. The subsequent draft guidelines had been renumbered accordingly.

As to draft guideline 2, there had been a proposal to make an explicit reference to the 1986 Vienna Convention, but it had instead been agreed that the commentary would treat the two Vienna Conventions as not being on the same level, as was implied by the text of draft guideline 2.

Draft guideline 3 had been aligned with draft guideline 6 through the addition of the phrase “between the States or international organizations concerned”.

With regard to draft guideline 6 [7], one member of the Commission had objected to the reference to the provisional application of a treaty as producing “the same legal effects as if the treaty were in force”, arguing that it did not accurately reflect the legal position. Some members had raised a procedural objection to reopening the matter, on the grounds that the Drafting Committee was at the *toiletage* stage and that draft guideline 6 had been approved by the plenary Commission.

The Committee had considered an alternative formulation that would indicate that the provision was “without prejudice to draft guideline 8 [9]”, but had been hesitant to introduce any such modification at that stage. It had been proposed, and the Special Rapporteur had agreed, that the issue could be addressed in the commentary. If necessary, the draft provision could be reconsidered during the second reading.

In draft guideline 8 [9], the word “is” had been preferred to “shall”, in keeping with the style favoured by the Commission for draft guidelines. Lastly, the title of draft guideline 11 [12] had been amended by replacing the word “regarding” with the phrase “to provisional application with”. Some minor technical changes had also been made to the provision.

To conclude, he recommended that the Commission should adopt the revised draft guidelines as presented by the Drafting Committee.

The Chairman invited the Commission to adopt the titles and texts of the draft guidelines, as provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions of the Commission and contained in document A/CN.4/L.895/Rev.1.

Draft guidelines 1 to 3

Draft guidelines 1 to 3 were adopted.

Draft guideline 4

The Chairman said that the first words of subparagraphs (a) and (b) should be entirely in lower case. The word “concerned” should be inserted at the very end of subparagraph (b).

Mr. Murphy proposed that the word “an” should be added before the second occurrence of the term “international organization” in subparagraph (b).

Draft guideline 4, as amended, was adopted.

Draft guidelines 5 to 8

Draft guidelines 5 to 8 were adopted.

Draft guideline 9

The Chairman said that the word “a” should be inserted before the phrase “part of a treaty” in subparagraphs (a) and (b).

Draft guideline 9, as amended, was adopted.

Draft guideline 10

The Chairman said that the word “a” should be inserted before the phrase “part of a treaty” in subparagraphs (a) and (b).

Draft guideline 10, as amended, was adopted.

Draft guideline 11

Draft guideline 11 was adopted.

The Chairman said he took it that the Commission wished to adopt the report of the Drafting Committee on the provisional application of treaties, as contained in document A/CN.4/L.895/Rev.1, as a whole.

It was so decided.

Farewell to Mr. Roman Kolodkin

The Chairman, speaking in Russian, said that the Commission was very sorry to lose an excellent colleague and kind person in Mr. Kolodkin, who had contributed enormously to the work of the Commission and to the sense of collegiality among its members. The Commission wished him well in his future endeavours as a judge at the International Tribunal for the Law of the Sea.

Mr. Kolodkin said that he had been fortunate enough to serve on the Commission and thereby to make his own modest contribution to the codification and progressive development of international law. He was thankful to all his colleagues, past and present. There had been disagreements, but they had never had an impact on their warm personal relationships. Over the years, he had forged a number of close friendships, and that was one of the things he would treasure most from his time in the Commission.

The meeting rose at 10.50 a.m. to enable the Working Group on Methods of work to meet.