

Provisional

**For participants only**

2 October 2019

Original: English

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**International Law Commission**  
**Seventy-first session (second part)**

**Provisional summary record of the 3501st meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 6 August 2019, at 10 a.m.

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***Present:***

*Chair:* Mr. Šturma

*Members:* Mr. Argüello Gómez  
Mr. Cissé  
Ms. Escobar Hernández  
Ms. Galvão Teles  
Mr. Gómez-Robledo  
Mr. Grossman Guiloff  
Mr. Hassouna  
Mr. Huang  
Mr. Jalloh  
Mr. Laraba  
Ms. Lehto  
Mr. Murase  
Mr. Murphy  
Mr. Nguyen  
Mr. Nolte  
Ms. Oral  
Mr. Ouazzani Chahdi  
Mr. Park  
Mr. Petrič  
Mr. Rajput  
Mr. Reinisch  
Mr. Ruda Santolaria  
Mr. Tladi  
Mr. Valencia-Ospina  
Mr. Vázquez-Bermúdez  
Sir Michael Wood  
Mr. Zagaynov

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

*The meeting was called to order at 10.05 a.m.*

**Immunity of State officials from foreign criminal jurisdiction** (agenda item 2)  
(*continued*) (A/CN.4/729)

*Interim report of the Drafting Committee* (A/CN.4/L.940)

**The Chair** invited the Chair of the Drafting Committee to present the interim oral report of the Drafting Committee on the topic “Immunity of State officials from foreign criminal jurisdiction”.

**Mr. Grossman Guiloff** (Chair of the Drafting Committee) said that the report of the Drafting Committee ((A/CN.4/L.940) reproduced the text of draft article 8 *ante*, provisionally adopted by the Committee at the current session.

Before addressing the details of the report, he wished to pay tribute to the Special Rapporteur, Ms. Escobar Hernández, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the other members of the Drafting Committee for their active participation and significant contributions to the success of its work.

It would be recalled that, at its 3488th meeting, the Commission had referred draft articles 8 to 16, as contained in the Special Rapporteur’s seventh report (A/CN.4/729), to the Drafting Committee, taking into account the proposals offered in the plenary. The Drafting Committee had devoted five meetings to the examination of those draft articles. Owing to time constraints, the Drafting Committee had only managed to complete draft article 8 *ante*, which it had provisionally adopted. The Drafting Committee would continue its work during the Commission’s seventy-second session, when it expected to complete its first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction.

After an introduction and proposal by the Special Rapporteur, the Drafting Committee had held a general discussion on the draft articles referred to it by the Commission, reordered by the Special Rapporteur as draft articles 8, 9 [12], 10, 11, 12 [13], 13 [9], 14, 15 and 16. In its discussion, the Drafting Committee had also considered proposals made by members of the Commission during the plenary debate and in the Drafting Committee, taking into account the general interest in the topic within the Commission and among States in the Sixth Committee.

As in the plenary debate on the topic, the Drafting Committee’s discussion had focused mainly on how to proceed regarding procedural provisions and safeguards, given the importance attached to such safeguards and the views expressed by some members about the need to include a draft article on specific safeguards relating to draft article 7. There had been general agreement on the need to proceed carefully and cautiously, ensuring in particular that the Drafting Committee would aim to adopt texts without a vote. A number of members had expressed the view that the draft articles proposed by the Special Rapporteur formed a good basis for debate, while also expressing support for the proposals made by other members.

Overall, the comments made had related, *inter alia*, to the relationship between the draft articles forming Part Four, on procedural guarantees and safeguards, and draft article 7. In particular, the Drafting Committee had discussed whether the guarantees in Part Four would apply to draft article 7 as currently formulated and whether any additional issues regarding safeguards needed to be addressed, without seeking to reopen the discussion on draft article 7.

Members had stressed the importance of developing procedural guarantees and safeguards in relation to the topic. In particular, it had been recalled that the Commission had adopted draft article 7 on the understanding that procedural provisions and safeguards would be elaborated, as indicated in the footnote to the title of Part Two and Part Three of the draft articles. Several members had focused on the relationship between procedural safeguards and draft article 7 in their statements during the general discussion. The sense within the Drafting Committee had been that it might be useful to have a general provision on the applicability of Part Four to all the draft articles, affirming that such guarantees and safeguards applied generally, including with respect to draft article 7. Moreover, various

proposals had been made to strengthen the procedural guarantees and safeguards contained in the draft articles.

The adoption of specific safeguards applicable to draft article 7 had been essential for some members, even though the view had also been expressed that any procedural guarantees and safeguards were unlikely to overcome the structural difficulty presented by draft article 7. In the view of some members, such procedural guarantees and safeguards applied only when immunity existed, which seemingly was not the case with respect to draft article 7 as it was couched in absolute terms, stating that immunity *ratione materiae* did not apply in respect of the crimes under international law it listed. Several members, however, had supported a broader interpretation of the draft articles proposed by the Special Rapporteur and envisaged a role for procedural safeguards and guarantees even with respect to situations involving draft article 7. It had been recalled that the commentary to draft article 7 noted that paragraph 1 of the draft article listed the crimes which, if committed, would prevent the application of such immunity to a foreign official. Moreover, it had been stressed that the central aim of those safeguards remained that of avoiding abuse, particularly in respect of politically motivated prosecutions of foreign State officials, which was bound to affect aspects of both immunity *ratione personae* and immunity *ratione materiae*. According to those who shared that view, specific safeguards applicable only to draft article 7 were neither needed nor desirable.

Bearing in mind the short time available for the Drafting Committee to consider the draft articles proposed by the Special Rapporteur and the suggestions from other members, some members had called for the Drafting Committee to decide which proposals should be given priority at the present session. The Drafting Committee had ultimately agreed to the proposal by the Special Rapporteur to first consider a new draft article on the application of the procedural provisions and safeguards, then to focus on those draft articles more directly linked with procedural safeguards, namely draft articles 13 [9] and 14. The remaining draft articles – 8, 9 [11], 12, 15 and 16 – would be tackled later. Many of the issues would continue to be addressed at the Commission’s seventy-second session.

The report contained in document [A/CN.4/L.940](#) set out the text of draft article 8 *ante*, provisionally adopted by the Drafting Committee, which read: “The procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the draft articles.”

The Drafting Committee had primarily discussed whether a general statement that the procedural provisions and safeguards, as set out in Part Four, were clearly applicable to the draft articles included in Part Two and Part Three was sufficient to show that the safeguards applied to those draft articles, or whether a specific reference to determinations that concerned draft article 7 was needed. Even though some members had sought such a specific reference, the Drafting Committee had settled on a general and neutral formulation in respect to whether immunity applied or did not apply under any of the provisions of the draft articles.

Draft article 8 *ante* clarified that Part Four applied to all the draft articles contained in Part Two and Part Three. It therefore applied to both immunity *ratione personae* and immunity *ratione materiae*; moreover, it clarified that its scope included questions concerning the determination of whether immunity applied or did not apply under any of the draft articles. In addition, draft article 8 *ante* sought to confirm that the procedural provisions and safeguards in Part Four of the draft articles were applicable in relation to any criminal proceeding against a foreign State official. The formulation “the procedural provisions and safeguards in this Part shall be applicable in relation to any criminal proceeding against a foreign State official ...” reflected that operational orientation. Given the nature of the draft articles, and their applicability to immunity *ratione personae* and immunity *ratione materiae*, both current and former State officials were subject to the procedural guarantees and safeguards set out therein.

The reference to “in relation to any criminal proceeding” denoted a broad understanding of the range of issues that might come into play, even those outside an actual

trial. The commentary would explain the meaning of a “criminal proceeding”, bearing in mind the differences in practice among various legal systems and traditions, including whether the processes involved were executive, prosecutorial or judicial. The latter part of the draft article, relating to the “determination” of immunity, which would be further clarified in the commentary, specified how immunity should be assessed from a procedural perspective, as provided for in Part Four of the draft articles. The phrase “immunity applies or does not apply under any of the draft articles” linked those processes to determinations of both immunity *ratione personae* and immunity *ratione materiae*, including the application of immunity in relation to draft article 7.

The adoption of draft article 8 *ante* would not prejudice, and was without prejudice to, the adoption of any additional procedural guarantees and safeguards, including whether specific safeguards applied to draft article 7. The title of draft article 8 *ante* was “Application of Part Four”.

At the current session, the Drafting Committee had also considered draft article 13 [9] concerning determination of immunity, as it bore closely upon questions relating to safeguards, including those concerning draft article 7. Work on that draft article had proceeded on the basis of various proposals made by the Special Rapporteur and by some members of the Drafting Committee, focusing on the appropriate actors and timing requirements leading to the determination of immunity. The Drafting Committee’s debate had predominantly focused on the substantive requirements to be considered by courts and other competent authorities when making a decision on the applicability of immunity. Owing to time constraints, the Drafting Committee had not been able to reach agreement on any text, and many of the issues would continue to be addressed at the Commission’s seventy-second session, including whether specific safeguards should be adopted in respect of draft article 7.

In order to take into account the comments and suggestions made by members, both in the plenary debate and in the Drafting Committee, the Special Rapporteur had submitted two revised draft articles to the Drafting Committee: 13 [9] (Determination of immunity) and 14 (Transfer of criminal proceedings). They had been circulated as working papers of the Drafting Committee and would be considered during the Commission’s seventy-second session.

As the Drafting Committee had not yet completed its work on the topic, the Chair’s report was being submitted for information purposes only. The Drafting Committee recommended that the Commission consider the adoption of draft article 8 *ante* at its seventy-second session, in the light of the provisions to be proposed at that juncture by the Drafting Committee.

**Ms. Escobar Hernández** (Special Rapporteur), drawing attention to certain corrections required to the Spanish version of the report contained in document [A/CN.4/L.940](#), said that the limited time available for Drafting Committee meetings had somewhat hampered progress. Given how much work the Drafting Committee would have before it at the Commission’s seventy-second session, she urged those responsible for planning the session to allow sufficient time for it to tackle the topic and all the pending draft articles effectively.

**The Chair** said he took it that the Commission wished to take note of the interim oral report of the Chair of the Drafting Committee.

*It was so decided.*

#### **Draft report of the Commission on the work of its seventy-first session** (*continued*)

*Chapter V. Peremptory norms of general international law (jus cogens)* (*continued*)  
([A/CN.4/L.929](#), [A/CN.4/L.929/Add.1](#) and [A/CN.4/L.929/Add.2](#))

**The Chair** invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document [A/CN.4/L.929/Add.1](#).

*Commentary to draft conclusion 4 (Criteria for the identification of a peremptory norm of general international law (jus cogens))*

*Paragraph (5)*

**Mr. Tladi** (Special Rapporteur), recalling that certain textual amendments had been proposed to paragraph (5) at the Commission's previous meeting and had met with support, expressed the hope that the paragraph could now be adopted as amended. Those amendments included Mr. Park's suggestion that, in the second sentence, after the marker (c), "another peremptory norm" should be replaced with "subsequent peremptory norm", and Sir Michael Wood's proposal concerning the first sentence of the paragraph. In addition, he had submitted some small amendments to the Secretariat in writing.

**Sir Michael Wood** explained, for the sake of clarity, that his proposal was to alter the opening of the paragraph to read: "Alternatively, it has been suggested that the phrase 'accepted and recognized' qualifies 'general international law'..."

**The Chair** said he took it that the Commission agreed to adopt paragraph (5) with those two amendments.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

**Sir Michael Wood** said that the English and French versions of the quotation from Rivier in footnote 46 did not seem to be aligned and suggested that the Secretariat might look into the matter. In the third sentence of the paragraph, the words "as having the quality of non-derogation" seemed an unusual turn of phrase in the context; "as having a peremptory character" might be better.

**Mr. Vázquez-Bermúdez** suggested that the phrase "as having the quality of non-derogation" should be supplemented by a reference to the need for a peremptory norm to be modifiable only by a subsequent norm of general international law having the same character, as the two cumulative criteria for the identification of a *jus cogens* norm were inseparable.

**Mr. Tladi** (Special Rapporteur) said that, as the term "peremptory character" was explained earlier in the text, it could effectively be used as a short form. Sir Michael Wood's proposal would therefore respond to the point made by Mr. Vázquez-Bermúdez.

**The Chair** said he took it that the Commission agreed to adopt paragraph (6) with the amendments suggested by Sir Michael Wood, including the alignment of the translations in footnote 46.

*Paragraph (6), as amended, was adopted.*

*Commentary to draft conclusion 5 (Bases for peremptory norms of general international law (jus cogens))*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Sir Michael Wood**, drawing attention to certain minor editorial changes needed in the English version of footnote 48, suggested that, in the same footnote, the words "the footnote to" should be added after "see also". He requested the Secretariat to check whether the conclusions on the identification of customary international law referenced in that footnote should still be referred to as "draft", given that they had already been annexed to a General Assembly resolution, and to amend the text accordingly if not.

**Mr. Nolte** said that, in the first sentence of the paragraph, the words "International Law" should be deleted before "Commission", in accordance with the Commission's stylistic practice.

**The Chair** said he took it that the Commission agreed to adopt the paragraph with those amendments, on the understanding that the Secretariat would deal with the stylistic issues referred to by Sir Michael Wood.

*On that understanding, paragraph (2), as amended, was adopted.*

*Paragraphs (3) to (5)*

*Paragraphs (3) to (5) were adopted.*

*Paragraph (6)*

**Mr. Zagaynov** suggested that, in the first sentence, the words “main basis” should be altered to “most common” basis, in line with the wording of draft conclusion 5 (1). A similar change could also be made to the phrase “though not common” in the last sentence; alternatively, the phrase could be deleted.

**Mr. Tladi** (Special Rapporteur) said that, stylistically, he would prefer to delete the phrase, although he was content to accept Mr. Zagaynov’s suggested amendment to the first sentence.

**The Chair** said he took it that the Commission agreed to those two amendments.

*Paragraph (6), as amended, was adopted.*

*Paragraph (7)*

**Sir Michael Wood** said that the order of paragraphs (7) and (8) might be reversed so as to reflect the order in which the issues dealt with in those paragraphs appeared in the draft conclusion. The introductory part of footnote 68 should be simplified and the sense altered slightly. He suggested that, in that footnote, the first sentence and the first phrase of the second sentence, namely “See for example”, should be replaced with the following wording: “While there is little practice in support of general principles of law as a basis for peremptory norms of general international law (*jus cogens*), the following cases may be considered in this connection:”.

**Mr. Park** said that, in the interests of consistent terminology, the words “general principles” should not be used as a short form of the term “general principles of law”. He therefore suggested that the words “of law” should be added where “general principles” appeared in the second and third sentences of the paragraph, assuming that the meaning was indeed “general principles of law”.

**Mr. Vázquez-Bermúdez** said that he supported Mr. Park’s suggestion. The same change should also be made in the last sentence of the paragraph. Sir Michael Wood’s proposed change to footnote 68 was helpful; however, he suggested adding the words “among others” after “following cases” in the proposed text.

**Mr. Murphy** said that the use of quotation marks in the third sentence of paragraph (7) was potentially misleading: as drafted, it read as though the International Court of Justice had stated that general principles of law were part of general international law, an issue that had not been addressed in the case cited in footnote 69. He suggested that the quotation marks should be removed and the footnote deleted, so that the point made would be represented as the Commission’s view.

**Mr. Tladi** (Special Rapporteur) said that, in the case cited, the Court had been describing general international law. The purpose of the third sentence of paragraph (7) was to draw a parallel with general principles of law. As the point was important, he would prefer the reference to the case to be maintained, even if the quotation marks were removed; however, the citation could be clarified by amending the footnote to include an explanation of the Court’s judgment and distinguish it from the conclusions being drawn by the Commission.

**Mr. Vázquez-Bermúdez** said that he could agree with that suggestion.

**Mr. Murphy** said that he too was happy to go along with the Special Rapporteur’s proposal.

*Paragraph (7), as amended, was adopted.*

*Paragraph (8)*

**Mr. Zagaynov** proposed that, in the fourth sentence, the words “as a general rule” should be replaced with “in most cases”, as he was not convinced that there was actually a general rule that treaties were not general international law since they did not usually have a general scope of application. That amendment would have the added benefit of avoiding the overuse of the word “general” in the paragraph. In the fifth sentence, it was noted that there was “some support” in scholarly writings that provisions in treaties could form the basis of *jus cogens* norms. Given that paragraph (7) referred only to “support in writings”, it might be preferable, in order to avoid suggesting a hierarchy, to delete the word “some” in the fifth sentence of paragraph (8).

**Mr. Murphy** proposed that the final sentence and the corresponding footnote should be deleted, as they were neither necessary nor factually correct. It was not clear to him why the Commission would put forward the proposition that where a rule of customary international law was also reflected in a treaty rule, it was the rule of customary international law that served as a basis for the peremptory norm of general international law (*jus cogens*). He did not believe that that was the point that the International Court of Justice had made in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, cited in footnote 81. In that case, the Court had been precluded from applying the Charter of the United Nations because of the reservation lodged by the United States in relation to the Court’s compulsory jurisdiction, but it had not argued that, to the extent that a *jus cogens* rule existed, the Court must rely on custom rather than treaty.

**Mr. Tladi** (Special Rapporteur) said that he supported Mr. Zagaynov’s proposals and, although his preference would be to retain the last sentence and the corresponding footnote, he would not object to their deletion if the members so wished.

*Paragraph (8), as amended by Mr. Zagaynov and Mr. Murphy, was adopted.*

*Paragraph (9)*

**Mr. Vázquez-Bermúdez** said that he wished to propose the insertion of an additional paragraph that would become a new paragraph (9). It would read: “The phrase ‘accepted and recognized’ has a particular relevance for the sources which can serve as a basis for peremptory norms of general international law (*jus cogens*). The text ‘accepted and recognized by the international community’ was adopted at the United Nations Conference on the Law of Treaties on the basis of a joint proposal of Finland, Greece and Spain (‘recognized by the international community’), to which the Drafting Committee at the Conference had inserted the word ‘accepted’. As explained by the Chairperson of the Drafting Committee, this was done because Article 38 of the Statute of the International Court of Justice includes both the words ‘recognized’ and ‘accepted’; ‘recognized’ was used in connection with conventions and treaties and general principles of law, while ‘accepted’ was used in connection with customary international law.”

**Mr. Nolte** said that he agreed in principle with Mr. Vázquez-Bermúdez’s proposal. However, it should be clarified that the joint proposal by Finland, Greece and Spain had been made with regard to what had later become article 53 of the Vienna Convention. Since article 53 referred to “the international community of States as a whole”, he wondered whether that formulation should be used rather than simply “the international community”.

**Mr. Murphy** said that he supported Mr. Vázquez-Bermúdez’s proposal but wondered whether it might not be better positioned as a paragraph (2 *bis*) in the commentary to draft conclusion 6 on acceptance and recognition since it focused on the phrase “accepted and recognized”.

**Sir Michael Wood** said that he had had the same thought as Mr. Murphy about the location of the new paragraph, but as the first sentence referred to “particular relevance for the sources which can serve as a basis for peremptory norms of general international law (*jus cogens*)” perhaps it was appropriate to keep it in the commentary to draft conclusion 5.

He proposed adding the words “of States as a whole” in the second sentence, after “accepted and recognized by the international community”. Whether that same change could be made in the parentheses referring to the proposal of Finland, Greece and Spain depended on the wording that had actually been proposed at the time.

**Mr. Tladi** (Special Rapporteur) said that he did not believe that any change should be made to reference to the joint proposal made by Finland, Greece and Spain. However, the words “of States as a whole” could be added after “accepted and recognized by the international community” at the beginning of the second sentence. As for the placement of the new paragraph, Mr. Vázquez-Bermúdez’s preoccupation had been to make the connection with the various bases for peremptory norms of general international law so it was appropriate to keep it in the commentary to draft conclusion 5.

**Mr. Ruda Santolaria** said that he supported Mr. Vázquez-Bermúdez’s proposal and agreed that it should become the new paragraph (9) of the commentary to draft conclusion 5.

**Mr. Murphy** said that, if the new paragraph were to remain in the commentary to draft conclusion 5, perhaps a footnote reading “see draft conclusion 6” should be inserted after the phrase “accepted and recognized”, since it did not actually appear in draft conclusion 5.

**Mr. Tladi** (Special Rapporteur) said that he agreed that such a footnote would be helpful. A footnote with a reference to the official records of the United Nations Conference on the Law of Treaties would also be added.

**The Chair** said he took it the Commission wished to adopt the new paragraph (9) on the basis of the text proposed by Mr. Vázquez-Bermúdez and as further amended.

*It was so decided.*

**Mr. Park** said that, since the original paragraph (9) focused on the use of the word “basis”, perhaps it would be better placed between paragraphs (2) and (3).

**Mr. Tladi** (Special Rapporteur) said that he would have no objection to the existing paragraph (9) becoming paragraph (2 *bis*).

*Paragraph (9) was adopted on that understanding.*

*Commentary to draft conclusion 6 (Acceptance and recognition)*

*Paragraph (1)*

**Mr. Murphy** proposed replacing the word “replaced” with “modified” in the sixth sentence.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Sir Michael Wood** said that the latter part of the first sentence should be redrafted to read “seeks to make clear that the acceptance and recognition referred to in the draft conclusion is distinct from the acceptance and recognition required for other rules of international law”. The fourth sentence stated that “acceptance as law (*opinio juris*) addresses the question whether States accept a practice as a rule of law and is a constitutive element of customary international law”. In his view, a parallel sentence should be added to address general principles of law. The sentence could begin: “Recognition as a general principle of law addresses the question whether a principle has been recognized by ...”. However, a formulation would be required in order to finish the sentence and avoid the unfortunate phrase “recognized by civilized nations” used in the Statute of the International Court of Justice.

**Mr. Tladi** (Special Rapporteur) said that it had been his intention to introduce a parallel sentence. His proposal would read: “Similarly, recognition as an element of general principles is concerned with whether a principle of law is recognized as forming part of international law”. He had used the formulation “forming part of international law”

precisely to avoid the term “civilized nations”, although perhaps a better alternative could be found.

**Sir Michael Wood** proposed that the sentence could read: “Recognition as a general principle of law addresses the question whether a principle has been recognized as provided for in Article 38 (1) (c) of the Statute of the International Court of Justice.”

*Paragraph (2), as amended by Sir Michael Wood, was adopted.*

*Paragraph (3)*

**Mr. Nguyen** said that, as paragraph (3) addressed the second step of the two-step approach to identifying the peremptory norms of general international law, perhaps the words “of general international law” should be added after the word “norm” in the first sentence, at the beginning of the second and third sentences and in the final sentence.

**Mr. Nolte** proposed replacing the infelicitous phrase “the content of the acceptance and recognition” in the first sentence with the words “what is meant by the acceptance and recognition”.

**Mr. Tladi** (Special Rapporteur) said that he had no objection to the proposed changes, although Mr. Nguyen’s proposal to add the words “of general international law” after “norm” was not necessary at the beginning of the third sentence, as it was immediately followed by the term “peremptory of general international law”. He had sent two other minor changes to the Secretariat.

**Sir Michael Wood** proposed that, at the end of the second sentence, the phrase “with the same character” should be replaced with “having the same character” in order to mirror the language of the draft conclusion itself and article 53 of the Vienna Convention. At the end of the third sentence, the words “norm of a similar character” should also read “norm having the same character”.

*Paragraph (3), as amended, was adopted.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were adopted.*

*Commentary to draft conclusion 7 (International community of States as a whole)*

*Paragraph (1)*

**Mr. Nguyen** said that the words “and recognition” should be added after “acceptance” in the last sentence.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Sir Michael Wood** said that, in the first sentence, the words “by the international community” should be added before “of States as a whole”. In his view, the word “primarily” in the second and third sentences was unnecessary and could be deleted.

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

**Mr. Nolte** said that, during the debate, it had been agreed that the role of international organizations should be reflected in the commentaries. The commentary to draft conclusion 7 on the international community of States as a whole was an appropriate place to do so. He therefore proposed rewording the end of the last sentence to read: “acts and practice generated by States, such as treaties, and by international organizations with universal membership of States, such as General Assembly resolutions”. That would make clear that organizations with universal membership were potentially capable of expressing the view of the international community as a whole.

**Sir Michael Wood** said that Mr. Nolte's proposal added considerable detail that he did not consider necessary. In any case, if reference was to be made to international organizations, he did not see why it should be limited to those with universal membership.

**Mr. Nolte** said that, in his view, it was useful and important to mention that practice which was relevant for the recognition and acceptance by the international community as a whole could also be generated by States acting within international organizations.

**Mr. Murphy** said that he was not sure that he had understood Mr. Nolte's proposal. Draft conclusion 7 concerned how the acceptance and recognition of norms by the international community of States was achieved. In referring to "acts and practice generated by States, such as treaties and General Assembly resolutions", the paragraph already captured the idea that the acts of States within an international organization were relevant. His own preference would be to retain the original wording, as Mr. Nolte's proposal risked excluding the possibility of States operating through different international organizations that were not universal in character.

**Mr. Jalloh** said that the idea of clarifying that State action that occurred in the context of international organizations ought to be relevant was helpful, and the proposed addition served as a good introduction to the reference to General Assembly resolutions. However, he was unsure as to whether the nature of the international organizations should be qualified. Given that the sentence referred to General Assembly resolutions, it seemed to be implied that the organizations in question would be of universal character.

**Mr. Vázquez-Bermúdez** said that, while he saw merit in Mr. Nolte's proposal, in his view it should be reformulated to avoid the possibility of its being interpreted as excluding acts in the context of regional organizations.

**Mr. Nolte** said that it had not been his intention to exclude regional organizations, which he understood might contribute to articulating the view of the international community of States as whole. He would therefore be in favour of Mr. Jalloh's proposal to refer simply to the acts of international organizations, such as General Assembly resolutions.

**Mr. Park** said that, like others, he was not convinced that it was necessary to refer to "international organizations with universal membership". That paragraph concerned State practice, whereas paragraph (4) of the commentary referred to the "other actors" mentioned in paragraph 3 of the draft conclusion. In his view, the reference to international organizations should therefore be included in paragraph (4). It was not clear to him why specific reference was made to General Assembly resolutions, which represented collective action by States but which were sometimes also considered unilateral acts of an international organization.

**Mr. Tladi** (Special Rapporteur) said that he did not have any strong views on the matter. An adequate solution might be to refer to "acts and practice generated by States, including within international organizations, such as treaties and General Assembly resolutions". In that way, the emphasis remained on States.

*Paragraph (3), as amended by the Special Rapporteur, was adopted.*

*Paragraph (4)*

**Mr. Nolte** proposed adding a new sentence after the marker for footnote 93. It would read: "Acts and practice of international organizations may provide evidence for the acceptance and recognition of States when determining whether a norm has a peremptory character." A footnote would be inserted with a reference to the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. The addition of the new sentence would serve the purpose of making some reference to the role of international organizations in the context under consideration, as had been discussed in the Drafting Committee.

**Mr. Grossman Guiloff**, supported by **Mr. Ruda Santolaria**, **Mr. Jalloh** and **Ms. Escobar Hernández**, said that he would be in favour of adopting Mr. Nolte's proposal.

**Mr. Tladi** (Special Rapporteur) said that he had passed on to the Secretariat a minor proposal to replace the words “such subsidiary role” with “the subsidiary role” at the beginning of the third sentence.

**Sir Michael Wood** said that, in the second sentence, the reference should be to the “international community of States as a whole” rather than simply the “international community of States”. In fact, that phrase should be used throughout the commentary. He proposed rephrasing the fourth sentence to read: “In its conclusions on the identification of customary international law, the Commission stated that it was ‘primarily ... the practice of States that contributed to the formation, or expression, of rules of customary international law’, while noting that ‘in certain cases the practice of international organizations also contributes to the formation, or expression, of rules of customary international law’, it went on to note that the conduct of non-State actors, though not practice, ‘may be relevant when assessing the practice’ of States.”

**Mr. Murphy** said that, although he had no objection to the Special Rapporteur’s proposed amendment, he was concerned that he did not share the Special Rapporteur’s understanding of what constituted a “minor change” that did not need to be discussed in plenary. To his mind, minor changes were simply typographical errors or incorrect citations, but not amendments that might have more substantive implications.

**The Chair** proposed that paragraph (4) should be held in abeyance to allow Sir Michael Wood to provide his proposal in writing.

*It was so decided.*

#### *Paragraph (5)*

**Sir Michael Wood** proposed that the words “as a collective or community” in the last sentence should be replaced with “collectively”.

**Mr. Vázquez-Bermúdez**, supported by **Mr. Jalloh** and **Mr. Gómez-Robledo**, said that the word “community” should be retained. One way of doing so would be to replace the words “as a collective or community” with “collectively or as a community”.

**Mr. Murphy** said that the wording suggested by Mr. Vázquez-Bermúdez might be read as implying that it was either for States collectively or for States as a community to accept and recognize the non-derogability of a norm.

**Mr. Jalloh** said that the wording suggested by Mr. Vázquez-Bermúdez emphasized that it was for States as a larger group to accept and recognize the non-derogability of a norm.

**Mr. Gómez-Robledo** said that the expression “as a community” had a connotation of unified purpose that the word “collectively” lacked.

**Mr. Tladi** (Special Rapporteur) said that he, too, would be in favour of retaining the word “community”.

**Sir Michael Wood** said that he withdrew his proposal.

*Paragraph (5) was adopted.*

#### *Paragraph (6)*

**Mr. Tladi** (Special Rapporteur) proposed that, in accordance with the understanding reached in the Drafting Committee in May 2019, and as a matter of principle, an additional sentence should be inserted at the end of the paragraph, to read: “A view was expressed that, in the light of the importance of State consent and the extraordinarily strong legal effect of peremptory norms of general international law (*jus cogens*), the recognition and acceptance of the ‘overwhelming majority of States’, ‘virtually all States’, ‘substantially all States’ or ‘the entire international community of States as a whole’ was required.”

**Mr. Nolte** said that the words “of a simple ‘majority’” in the first sentence should be replaced with “by a simple ‘majority’”.

While he was grateful to the Special Rapporteur for the additional sentence that had been proposed, he had requested the inclusion of a footnote containing a reference to the 1985 judgment of the International Court of Justice in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, in which the expression “overwhelming majority of States” had been used.

**Mr. Jalloh** said that he would appreciate clarification regarding the connection between the additional sentence proposed by the Special Rapporteur and the footnote requested by Mr. Nolte, which seemed to relate only to the expression “overwhelming majority of States”.

**Mr. Tladi** (Special Rapporteur) said that the expression “overwhelming majority of States” was the first of several qualifiers listed in his proposal. The indicator for the footnote requested by Mr. Nolte would appear immediately after that expression in the body of the text.

**Mr. Nolte** said that he had requested only that, on the basis of the formulation used by the International Court of Justice, the words “overwhelming majority of States” should be included. He had not requested that a list of other qualifiers should be provided.

**Mr. Jalloh** asked whether it would be possible to amend the Special Rapporteur’s proposed additional sentence such that the expression “overwhelming majority of States” was the only qualifier given as an example. The footnote requested by Mr. Nolte related to that expression only.

**Mr. Zagaynov** said that he wondered whether the additional sentence proposed by the Special Rapporteur could be amended so as to make clear that it reflected a view expressed by more than one member of the Commission. It could, for example, be reformulated to begin: “Some members of the Commission were of the view ...”.

**Mr. Tladi** (Special Rapporteur) said that the language that he was proposing served to honour a commitment that he had made in the Drafting Committee. Some members of the Drafting Committee had agreed to accept the text on the understanding that a sentence of the kind proposed was included in the commentary. The Commission’s practice was to use the singular “a view” to refer to a minority view in the Commission, regardless of the number of members who had expressed that view.

**Mr. Nolte** said that it would be useful if the Secretariat could confirm whether it was the Commission’s practice to use a single formulation to record a minority view regardless of the number of members who had expressed that view. As far as he recalled, the phrase “some members expressed the view” was sometimes used instead.

**Mr. Tladi** (Special Rapporteur) said that, on previous occasions, the singular “a view” had been used to record a view expressed by more than one member. The phrase “some members” was ambiguous, as it could refer to a majority of the members of the Commission. In one of the additional sentences that Mr. Murphy had proposed for inclusion elsewhere in the commentaries under consideration, the words “a view” were used to refer to a view expressed by at least seven members.

**The Chair** said that, according to his understanding, various phrases, including “a view was expressed”, “certain members were of the view” and “several members were of the view”, were used to record minority views in the descriptions of the plenary debate prepared by the Secretariat. However, the Commission was currently discussing a text proposed for inclusion in the commentaries, which was a different exercise.

**Mr. Murphy** said that, in its commentaries, the Commission used various formulations to record minority views among its members. For example, in the commentaries to the draft articles on the topic “Expulsion of aliens”, as adopted on first reading, the phrase “some members” was used to record a minority view. In the paragraph under discussion, it might be simplest if the sentence in question began with the words “Views were expressed”.

**Mr. Jalloh** said that he was in favour of retaining the wording of the additional sentence as originally proposed by the Special Rapporteur.

**Sir Michael Wood** said that “the view” was preferable to “a view”.

**Mr. Tladi** (Special Rapporteur) said that, as a compromise, he was prepared to accept the words “the view”.

**Mr. Murphy** said that the text of the footnote requested by Mr. Nolte should begin with the words “See, for example”.

*Paragraph (6), as amended, was adopted.*

*Commentary to draft conclusion 8 (Evidence of acceptance and recognition)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Mr. Park** said that, in the last sentence, the words “the views of States” should be replaced with “the views of a very large majority of States”.

**Mr. Tladi** (Special Rapporteur) said that, as the paragraph concerned the materials that were relevant as evidence of acceptance and recognition, it was not necessary to qualify the number of States. He would prefer to leave the paragraph unchanged.

*Paragraph (2) was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted.*

*Paragraph (4)*

**Sir Michael Wood** said that, for the sake of accuracy, the words “concerning evidence for acceptance of law” in the first sentence should be replaced with “concerning forms of evidence of acceptance of law”. In the last sentence, the words “a belief” should be replaced with “acceptance and recognition”.

**Mr. Tladi** (Special Rapporteur) said that he could accept Sir Michael Wood’s proposals, although the word “belief” was in his view the most appropriate in the context. In addition, in the third sentence, the words “on the other hand” should be inserted after “purposes of the identification of customary international law”.

**Mr. Murphy** said that he, too, was in favour of replacing the word “belief” with “acceptance and recognition”. The first sentence could be simplified by inserting a comma after the words “draft conclusion 10” and replacing the word “concerning” with “which concerns”.

*Paragraph (4), as amended, was adopted.*

*Paragraph (5)*

**Mr. Nolte** said that it was somewhat misleading to claim that decisions of national courts were an expression of the views of States in the same way as treaties and resolutions adopted by States in international organizations or at intergovernmental conferences. Decisions of national courts could be overruled or be at variance with the views of Governments. For that reason, he proposed that the fourth sentence should be amended to read: “Decisions of national courts may also be a reflection of the views of States and have been relied upon in the determination of the peremptory character of norms.”

**Mr. Tladi** (Special Rapporteur) said that, in the text of footnote 98, a reference to the judgment of the International Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Mucić et al.* should be inserted in the second sentence, immediately after the words “See also”.

*Paragraph (5), as amended, was adopted, with minor editorial amendments to footnote 98.*

*Paragraph (6)*

**Sir Michael Wood** said that the words “acceptance and recognition” should be inserted to replace “the belief” in the second sentence and “a belief” in the last sentence.

*Paragraph (6), as amended, was adopted.*

*Commentary to draft conclusion 9 (Subsidiary means for the determination of the peremptory character of norms of general international law (jus cogens))*

*Paragraph (1)*

**Mr. Park** said that he wondered whether the last sentence could be deleted, as it was very similar to an earlier sentence in the same paragraph.

**Mr. Nolte** said that another way of addressing Mr. Park’s concern would be to amend the last sentence to read: “Draft conclusion 9 concerns some such subsidiary means.”

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Mr. Tladi** (Special Rapporteur) said that, in the light of discussions that he had held with Mr. Nolte and Mr. Murphy, the fifth and sixth sentences should be replaced with a single sentence that read: “In addition to serving as subsidiary means under Article 38 (1) (d) of the Statute of the International Court of Justice, decisions of national courts may also constitute primary evidence under draft conclusion 8.”

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

**Mr. Grossman Guiloff** said that, although it was stated in the last sentence of the paragraph that, in the *El Sayed* case, the Special Tribunal for Lebanon had referred to the decision of the Inter-American Court of Human Rights in the case of *Goiburú et al. v. Paraguay*, there was no corresponding footnote containing a full citation to that decision.

**Mr. Tladi** (Special Rapporteur) said that one way of addressing Mr. Grossman Guiloff’s concern might be to add to the last sentence a footnote containing a citation to the paragraph of the relevant decision of the Special Tribunal for Lebanon, in which reference had been made to the decision of the Inter-American Court of Human Rights in the case of *Goiburú et al. v. Paraguay*. It would probably appear as “Ibid.”.

**Mr. Murphy** said that, although State practice and scholarly writings were mentioned at the beginning of the paragraph, the only examples provided were those of international courts citing the decisions of other international courts. The reference to State practice and scholarly writings should therefore be deleted. Care should be taken not to advance propositions that were not substantiated by the sources cited.

**Sir Michael Wood** said that he agreed with Mr. Murphy’s comment. In the seventh sentence, the word “supplementary”, in the phrase “international courts and tribunals can be a supplementary means”, should be replaced with “subsidiary”.

**Mr. Tladi** (Special Rapporteur) said that he agreed to Mr. Murphy’s proposal. The amended first sentence would thus read: “There is an abundance of examples of decisions of international courts relying on other decisions of international courts and tribunals.”

*Paragraph (3), as amended, was adopted, with minor drafting changes.*

*Paragraph (4)*

**Mr. Nolte** said that “indelible” in the fifth sentence should be deleted, as it was not consistent with the Commission’s usual style.

**Sir Michael Wood** suggested that the list of advisory opinions and decisions of the International Court of Justice should include the case concerning *Questions relating to the*

*Obligation to Prosecute or Extradite (Belgium v. Senegal)*, as it was of particular relevance in the context.

**Mr. Tladi** (Special Rapporteur) said that the cases listed concerned decisions in which the Court had not expressly invoked peremptory norms. The case referred to by Sir Michael Wood was mentioned in the final sentence of the paragraph as a decision in which the Court had pronounced itself expressly on peremptory norms.

**Mr. Murphy** said that the mention, in the fourth sentence, of the International Court of Justice as being the only international court with “general jurisdiction” should be qualified by inserting “subject-matter” after “general”. The penultimate sentence should be recast to read: “When the International Court of Justice has pronounced itself expressly on peremptory norms, its decisions have been even more influential.” In the final sentence, the phrase “put beyond doubt” should be replaced with “confirmed”, as the peremptory status of the prohibition of torture had not been in doubt before the judgment referred to. Lastly, in footnote 109, the reference to the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* should be removed as it was not listed in the text and was not usually mentioned in propositions relating to *jus cogens*.

**Mr. Nguyen** said that the Court’s advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* should be included in the list, as it concerned the right of self-determination.

**Mr. Jalloh** said that he agreed that the description of the International Court of Justice as the only international court with “general jurisdiction” should be qualified. There were other courts and mechanisms that could allow States to initiate a dispute against other States, as would soon be the case in the African region, pursuant to the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). He suggested including, in addition to “subject-matter”, the words “open to all States” to emphasize the universal character of the International Court of Justice.

**Mr. Tladi** (Special Rapporteur) said that he agreed to the inclusion of “subject-matter” in the description of the Court’s jurisdiction, but was not sure about inserting the wording proposed by Mr. Jalloh. He could accept the other proposed additions. However, he would prefer to retain the reference to the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, as the Court’s reference therein to “intransgressible principles” had been interpreted by some commentators as referring to peremptory norms. In that connection, he could provide references in a footnote to literature in which the phrase from the advisory opinion had occurred.

**Sir Michael Wood** said that he did not think that it would be correct to add the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* to the list that appeared in the paragraph, since, as had been made clear by the President of the International Court of Justice when responding to questions during his recent visit to the Commission, the Court had deliberately avoided addressing, in that advisory opinion, the peremptory norm status of the right of self-determination. He noted that reference was made to that advisory opinion in other parts of the commentaries, where it was no doubt appropriate to do so.

**The Chair**, noting that the Special Rapporteur had agreed to most of the proposed amendments, suggested that it would be preferable to keep the list of cases and the footnotes as they currently stood. He took it that the Commission was agreeable to that suggestion.

*Paragraph (4), as amended, was adopted.*

*Paragraph (5)*

**Mr. Nolte** said that, in the fourth sentence, the word “usually” should be inserted between the words “less weight should” and “attached” because the work of the Commission, for example, which was an expert body, might sometimes have slightly more weight than a decision of a national court, which could, for instance, be appealed. His proposal would not be in contradiction with what was stated in the draft conclusion.

**Sir Michael Wood** said that, while he agreed with the thought behind Mr. Nolte's proposal, he believed that even saying "should usually" was going too far. The phrase in question could perhaps be amended to read "indicates that less weight may attach to works of expert bodies", in order to avoid making a general proposition.

**Mr. Tladi** (Special Rapporteur) said that he agreed with the amendment proposed by Sir Michael Wood.

**Mr. Murphy** said that, in the fourth sentence, the words "and tribunals" should be inserted after the phrase "decisions of international courts".

*Paragraph (5), as amended by Sir Michael Wood and Mr. Murphy, was adopted.*

*Paragraph (6)*

**Mr. Ouazzani Chahdi** said that he did not understand why the Institute of International Law and the International Law Association were mentioned in the penultimate sentence of the paragraph, which dealt with the works of expert bodies; the mention should either be deleted or included in a separate paragraph that dealt with the works of highly qualified publicists or other relevant institutes or associations.

**Mr. Tladi** (Special Rapporteur) said that the paragraph dealt with expert bodies in the same manner as had been done in commentaries to draft conclusions on other topics. The sentence in question emphasized that the work of expert bodies other than those dealt with in the paragraph could also be relevant and that their work was covered elsewhere.

*Paragraph (6) was adopted.*

*Paragraph (7)*

**Mr. Murphy** said that, although the paragraph supposedly concerned State practice, only one of the several cases referred to was a national court case, the other references being to findings of international courts and bodies. It should therefore be reformulated accordingly.

**Mr. Grossman Guiloff** said that the paragraph did not concern State practice as such, but sought to indicate that reliance on other materials needed to be supported by State practice.

**Sir Michael Wood** said that, in the third sentence, the definite article "the" before "advisory opinion" suggested that there was only one such opinion or that the opinion was particularly well known. It would be preferable to use the indefinite article "an". He wondered whether the report of Mr Kooijmans, which was referred to in the final sentence, had indeed been written when the latter was no longer Special Rapporteur; if not, the word "former" before the words "Special Rapporteur" was not necessary.

**Mr. Nolte** said that he agreed with Mr. Murphy that most of the paragraph did not concern State practice; it should be reformulated to include mention of more cases from national courts.

**Mr. Murphy** said that, in the first sentence, the words "State practice" could be replaced with "courts", which better reflected the content of the paragraph.

**Mr. Tladi** (Special Rapporteur) said that he would reformulate the paragraph in line with Mr. Nolte's proposal.

*Paragraph (7) was left in abeyance.*

*Paragraph (8)*

**Mr. Murphy** said that the final sentence, which indicated that the Commission had considered including mention of its own work in draft conclusion 9 (2) but had decided against doing so, was perhaps unnecessary; it could be deleted.

**Mr. Tladi** (Special Rapporteur) said that the reference had been intended to reflect the general discussion that had taken place in the Drafting Committee and the plenary, during which some members had expressed the view that, in the development of

peremptory norms, the Commission had had a particular influence, perhaps more so than in other areas.

**Mr. Šturma**, speaking as a member of the Commission, said that he considered it justified to refer to the work of previous members of the Commission, especially in respect of *jus cogens*.

**Mr. Murphy** said he had no objection to the reference in the penultimate sentence to the Commission's work being able to contribute to the identification of peremptory norms of general international law. However, he questioned the need to refer to the Commission's internal discussions.

**Mr. Grossman Guiloff** said that he agreed with Mr. Murphy that the final sentence should be deleted.

**Mr. Jalloh** suggested, as a compromise, that the phrase "given its particular role in the emergence and development of *jus cogens*" could be moved to the preceding sentence and inserted between the words "the Commission's own work" and "may thus contribute".

**Mr. Tladi** (Special Rapporteur) said that, while he understood the intention behind Mr. Jalloh's proposal, it would give the impression that the Commission's role in the emergence and development of *jus cogens* was the only reason for its being able to contribute to the identification of peremptory norms of international law. He therefore preferred to delete the final sentence.

*Paragraph (8), as amended by the Special Rapporteur, was adopted.*

*Paragraphs (9) and (10)*

*Paragraphs (9) and (10) were adopted.*

*Part Three (Legal consequences of peremptory norms of general international law (jus cogens))*

*Commentary to draft conclusion 10 (Treaties conflicting with a peremptory norm of general international law (jus cogens))*

*Paragraph (1)*

**Mr. Murphy** said that the second part of the third sentence should be reformulated to read "so much so that it has been questioned whether it remains operative".

**Sir Michael Wood** said that, for the sake of readability, the final clause of the last sentence should be recast to read "even though it has rarely been applied".

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Mr. Murphy** said that none of the examples cited in footnote 123 supported the proposition that the General Assembly had recognized the invalidity of treaties on account of conflict with peremptory norms. The whole of the third sentence of the paragraph and footnote 123 should therefore be deleted.

**Mr. Tladi** (Special Rapporteur) said that he did not agree with Mr. Murphy's proposal. While the resolutions mentioned in the footnote did not mention *jus cogens* explicitly, they provided for the validity of particular agreements to be subject to consistency with certain inalienable rights or rules. For instance, General Assembly resolution 36/51 called on States to terminate investment agreements in Namibia and to declare them to be illegal on account of their being in conflict with the right of Namibians to self-determination. He had the previous day proposed language that was intended to avoid discussion of specific examples that Commission members might find uncomfortable; even if no agreement was expressed as to the content of a particular example, it could be accepted, at least from a methodological perspective, that certain agreements were not valid because they were inconsistent with certain other rules.

**Mr. Murphy** said that it was not a question of discomfort with the examples but rather the fact that the examples cited in the footnote did not support the proposition in the sentence. There was certainly no reference to *jus cogens*; nor was there a reference to invalidating a treaty. The General Assembly did not have the power to invalidate a treaty. For instance, the first resolution cited in the footnote, General Assembly resolution 34/65 B, said nothing in its paragraph 2 about either *jus cogens* or invalidity of treaties.

**Mr. Grossman Guiloff** said, in respect of unilateral declarations by States, as referred to in the second sentence, that there was no mention of the success or otherwise of those declarations. He shared Mr. Murphy's doubts concerning the value of mentioning the General Assembly resolutions without further qualification. Some of the issues raised had merit but the paragraph needed to be reformulated.

**Mr. Nolte** said he agreed with Mr. Grossman Guiloff. It might be useful if the Special Rapporteur and the interested parties were to discuss the matter informally.

**The Chair** said he took it that the Commission wished to leave paragraph (2) in abeyance until the next meeting.

*It was so decided.*

*Paragraph (2) was left in abeyance.*

*The meeting rose at 1.05 p.m.*