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Summary record of the 1612th meeting

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reporting on the Committee's work with a view to continued co-operation between the two bodies.

41. The Committee's work on various topics of international law was of great value to the Commission and its Special Rapporteurs as source material for their own work on draft articles that would be proposed for acceptance by the international community as a whole. The Committee was to be commended for the work on which it had made definite progress in recent years, and particularly on the draft convention defining torture as an international crime.

42. He was also grateful to the observer for the Committee for referring to the technique of convening committees of experts to deal with complex and difficult topics. That technique might be used by the Commission in the future. The suggestion made by the observer concerning closer contacts between the Commission and the Committee was also an excellent one, to which effect should be given as soon as possible.

43. Mr. USHAKOV said that there were not only very close links between the Commission and the Committee; there was also competition between them, which could only benefit mankind, as would certainly be demonstrated by the parallel work being carried out by the two bodies on jurisdictional immunities. He wished the Committee every success in its future work.

44. Mr. RIPHAGEN, speaking on behalf of the western European members of the Commission, express appreciation to the observer for the Inter-American Juridical Committee for the overview he had provided of the Committee's work, from which the Commission could certainly benefit. Indeed, close co-operation between the two bodies would assist the development of international law as a whole, for the work of a regional legal institution like the Inter-American Juridical Committee complemented that carried out by the Commission.

45. Mr. SCHWEBEL also expressed appreciation to the observer for the Inter-American Juridical Committee for the informative report he had given on the Committee's substantive work and methods of operation.

The meeting rose at 1 p.m.

1612th MEETING

Monday, 16 June 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[1] (*concluded*)

1. Mr. SCHWEBEL (Special Rapporteur), summing up the discussion, said that at the 1607th meeting Mr. Reuter had raised the question of the scope of the draft articles and the meaning to be attached to the term "international watercourse system", and had suggested two possible approaches. Other possibilities had been suggested by other members of the Commission. His own preference was for the first alternative suggested by Mr. Reuter, namely, that the term "international watercourse system" should be used without commitment as to its full contours, which could better be decided upon as the Commission's work progressed. That solution would be wholly consistent with the other alternative suggested by Mr. Reuter, and by a number of States, of applying a particular definition to particular provisions, but at a later stage.

2. He also agreed with Mr. Reuter that the right to negotiate was an important and sensitive one. But, when that right was confined to a shared natural resource, it was not unduly daring to insist on it. In fact, the *Lac Lanoux* arbitration had recognized its existence in respect of international water resources.

3. He fully agreed with Mr. Šahović (*ibid.*) that the Commission should strain out customary international law from the treaties and jurisprudence on the topic. As to the difficulties involved in treating the technical aspects of the topic, they must be dealt with if the Commission was to go beyond the level of general principles. There was no need to tackle them at the current session, however, or in all probability, at the next session. Like Mr. Šahović, he believed that, at the present stage, the Commission should seek to achieve concrete results in devising general principles applicable to the uses of international watercourses as a whole.

4. He saw every merit in Mr. Evensen's suggestion (*ibid.*) that non-navigational uses and pollution should be referred to in appropriate terms. Although the Commission had always thought of giving pollution a special place, that did not exclude specifying it earlier in the draft articles as well. Unlike Mr. Evensen, he found the term "system State" quite apt, but he would give it further consideration.

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[1] For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.

5. While he sympathized with Mr. Ushakov's desire (*ibid.*) to clarify the meaning of the term "international watercourse system", he recommended that for the time being the Commission should defer taking a definite decision, since it would clearly be difficult to reach agreement on a genuine definition of the international watercourse. Mr. Ushakov's view that the development of a river whose surface waters were entirely in one State should not require the participation of another State whose contribution was confined to ground water was entirely understandable. But was it not desirable for the former State to involve the ground water State, whose pollution of, or other impact on, the waters it could then influence? Generally speaking, as Mr. Barboza had pointed out (1609th meeting), it was in the interest of the lower riparian to involve the upper riparian in joint notification, consultation and negotiation, and it was in the enlightened interest of the upper riparian to become so involved. However, its right to be consulted did not constitute a right of veto.

6. Mr. Ushakov had suggested that draft articles 4 and 5 could be better dealt with when more substantive principles had been agreed upon. That was a plausible position, but there seemed to be general agreement in the Commission that the problem of the diversity of watercourses was paramount and must be confronted. Perhaps the best way to proceed would be to address those draft articles provisionally, subject to the adoption of satisfactory substantive principles.

7. He shared Mr. Ushakov's view that the character of the international watercourse as a shared natural resource was self-evident. Nevertheless, it would be most useful to articulate that principle, since it provided sound ground for the development of more sophisticated principles. Like Mr. Riphagen, he did not believe that the principle of shared natural resources would be a Pandora's box; he hoped it might rather be something of an "open sesame".

8. With regard to Mr. Ushakov's comments on draft article 6, he acknowledged that, clearly, that article moderated and generalized the proposals in the Special Rapporteur's first report on the collection and exchange of information.[2]

9. He then summarized the statements of Mr. Sucharitkul (1608th meeting) and of Mr. Calle y Calle (*ibid.*).

10. He had considerable sympathy for the view Mr. Verosta had expressed (*ibid.*) that general principles should be derived from State practice, as evidenced by the cumulation of treaties on various non-navigational uses of international watercourses. To some extent, he was adopting that approach. For example, the principle of shared natural resources was shown to inhere in boundary waters treaties and could be shown to inhere in treaties on hydroelectric power and other uses. When it came to demonstrating the principles of equitable utilization and the use by a State of its own resources in such a way as to avoid injuring others, he intended to make full use of treaties on various uses. The bulk of the material already collected in support of those principles consisted of extracts from treaties. He hoped that if the Commission succeeded in agreeing on draft articles enunciating such very general principles, it would proceed therafter to scrutinize various specific uses, with a view to deriving principles—perhaps general, certainly particular—governing those uses.

11. He then summarized the statements of Mr. Quentin-Baxter (*ibid.*), Mr. Barboza (1608th and 1609th meetings), Mr. Riphagen (1609th meeting), Mr. Francis (*ibid.*), Mr. Yankov (*ibid.*), Mr. Pinto (*ibid.*), Mr. Tsuruoka (1610th meeting), Mr. Díaz González (*ibid.*), Mr. Tabibi (*ibid.*), Mr. Jagota (*ibid.*), Mr. Castañeda (1611th meeting), and Mr. Šahović (*ibid.*).

12. He noted that Mr. Jagota had objected to his construction of article 3 of the Charter of Economic Rights and Duties of States[3] as an exception to article 2, in para. 148 of his second report (A/CN.4/332 and Add.1), on the grounds that every riparian was entitled to do as it pleased with its share of the water, which was therefore "its" water. Mr. Jagota had maintained that, if the concept of shared natural resources meant that a riparian could not use its share of the water as it chose, then it was unacceptable—at any rate until an understanding of the term "shared" was reached.

13. The following conclusions could be drawn from the Commission's discussion:

First, it was generally agreed that the Commission should prepare a framework treaty, to be combined with specific agreements concluded by riparians, which might be called "system agreements".

Second, there was general agreement that the Commission should first seek to draw up general principles applicable to the uses of the water of international watercourses, though there was some difference of emphasis on the means to be used in deriving such principles.

Third, he believed that there was virtually unanimous acquiescence in adopting the term "international watercourse system" as a working term, on the understanding that its adoption would be without prejudice to the Commission's eventual decision on the scope of the international watercourse. One member, however, preferred not to speak of the international watercourse, but of the international river, which he defined as a river forming or traversing an international boundary, while another member recommended that the Commission take as its working definition "rivers

[2] Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para. 2, arts. 8–10.

[3] General Assembly resolution 3281 (XXIX).

and their tributaries as well as lakes and canals which traverse or divide international boundaries".

Fourth, there was general agreement that a "system State" should be defined us a State through whose territory water of an international watercourse system flowed.

Fifth, there was apparent acceptance of the proposition that system States should, where necessary, seek to conclude system and sub-system agreements; it was also recognized that draft article 4 should be recast to express that proposition in terms that were not mandatory.

Sixth, there was general agreement on the complementary right of system States to participate in the negotiation and conclusion of system agreements to the extent of their real interests.

Seventh, there was predominant, but not unanimous agreement on the need for a draft article providing for the collection and exchange of data.

Eighth, there was also predominant, but not unanimous, agreement on the principle that the waters of international watercourse systems should be treated as a shared natural resource.

Ninth, and last, most members believed that the draft articles should be referred to the Drafting Committee with a view to the submission of some articles to the General Assembly at its thirty-fifth session.

14. In connexion with those conclusions, two key issues were the international watercourse system and the meaning of shared natural resources. In regard to the former, there appeared to be three possible choices. The first was to adopt the definition of an international river laid down by the Congress of Vienna in 1815. In his view, that was not a valid choice, since it would represent the regressive development of international law, would be a retreat from contemporary treaty-making and modern scholarship, would run counter to scientific fact and would invite the ridicule, rather than the support, of knowledgeable people all over the world. The second possibility was to adopt Mr. Yankov's suggested approach (1609th meeting), confining the scope of the draft articles essentially to the river and its tributaries. While that suggestion merited consideration, the best solution, in his view, would be to adopt the admittedly amorphous term "international watercourse system", at least for the time being, since it would not commit the Commission to a course that was divisive or unworkable. Eventually, that term could be given the content which Mr. Yankov had suggested or some other broader content; alternatively, different terms could be used for different articles.

15. With regard to the question of shared natural resources, it was not his intention to suggest that, if that concept were embodied in the draft articles, the commentary should reflect the argument advanced in paragraph 148 of his report, namely, that article 3 of the Charter of Economic Rights and Duties of States constituted an exception to article 2. He cound not, however, agree with Mr. Jagota's interpretation of that argument. He had never said that a State could not treat its share of the waters of an international watercourse as it pleased, but simply that it could not, in law, act as though the shared natural resource of the waters of an international watercourse were its waters alone. That had no bearing on what it might or might not do with its equitable share. The way to settle that particular difference, however, was to avoid it, for it should not be allowed to impair the virtually unanimous agreement in the Commission on the need to recognize, as the first general principle to be applied, that the waters of an international watercourse system were to be treated as a shared natural resource.

16. He suggested that the draft articles be referred to the Drafting Committee for consideration in the light of the suggestions made. He trusted that draft articles 1 and 7, in particular, could be accepted, and that progress could be made on the other draft articles.

17. Mr. JAGOTA said he wished to explain how he had interpreted paragraph 148 of the Special Rapporteur's report.

18. As he read that paragraph, the Special Rapporteur considered that article 2 of the Charter of Economic Rights and Duties of States did not have wide support, and that article 3 incorporated an implied exception to article 2. That was because, according to the Special Rapporteur, article 2 referred to the permanent sovereignty of a State over "its" natural resources, and where water was treated as a natural resource to be shared between two or more States, it was not the water of any one State; hence no one State could have permanent sovereignty over the waters which flowed through its territory.

19. If that interpretation was correct, the paragraph in question would be unacceptable to him, since he could not agree that a State traversed by an international watercourse whose waters were treated as a shared natural resource was not covered by the terms of article 2 of the Charter of Economic Rights and Duties of States. In other words, the concept of shared natural resources should not run counter to that article.

20. On the other hand, he would have no objection to paragraph 148 if it were interpreted to mean that water, when treated as a shared natural resource, had to be shared equitably with the other States of the watercourse system. A State would thus enjoy a sovereign right to regulate the portion of the water which flowed through its territory, subject to the principle of equitable apportionment and to the rule of international law that no State should so use its water as to cause injury to another State.

21. Mr. USHAKOV said that many of the details that had not been considered by the Commission could be examined by the Drafting Committee.

22. He noted that there had been much discussion of the concept of international watercourses as shared natural resources—a concept which seemed quite simple from the physical point of view, but was highly complex from the legal point of view. In paragraph 90 of his second report, the Special Rapporteur had quoted at length the draft principles of conduct in respect of shared natural resources. That text, which had been drafted from the general point of view of environmental protection, related primarily to the conservation of natural resources shared by two or more States; it applied only secondarily to the utilization of such resources. The concept of conservation was broader than that of utilization, for the problem of conservation arose even in the absence of utilization. The Commission would have to decide whether its field of investigation included the conservation of international watercourses as such, or was limited, as he thought it should be, to conservation necessitated by utilization.

23. The Commission must also bear in mind that, if it decided to treat international watercourses as shared natural resources, the watercourses would be only part of the subject-matter to be dealt with, since the scope of the draft articles would have to be extended to cover ground water as well.

24. He considered it most important for the Commission to determine clearly whether the use of the concept of shared natural resources meant that it intended to rely on already existing rules on shared resources or whether it wished to draft its own rules applicable to international watercourses; in the latter case, it would not have to use the concept of shared natural resources, since the rules it formulated would stand by themselves.

25. He was in favour of referring the draft articles to the Drafting Committee despite the many problems of detail which the Commission had not been able to deal with during its general debate, such as the legal consequences of the geographical location of a State in relation to an international watercourse.

26. Mr. VEROSTA said he considered it essential for the Commission to draw on State practice. If he had understood correctly, however, the Special Rapporteur did not intend to deal with that matter until 1982. He wondered, therefore, from what sources the general principles applicable to the non-navigational uses of international watercourse systems would be derived, and would like to know the Special Rapporteur's proposed programme of work for the next two years.

27. Mr. DÍAZ GONZÁLEZ said it was established practice for the Commission to refer any set of draft articles submitted by a Special Rapporteur to the Drafting Committee. That Committee had a broad mandate, which permitted it to consider questions of substance raised by the draft articles and to propose new wording. The Special Rapporteur had himself pointed out that State practice and precedent were of little use, because of the significant developments in the uses of water in recent years; and as had rightly been said, the United Nations Conference on the Law of the Sea would have made no progress at all if it had had to rely on State practice and precedent.

28. In the circumstances, he considered that the Commission, having fully discussed the subject, should refer the draft articles to the Drafting Committee with a view to the preparation of texts on the basis of the broad outlines set out in the Special Rapporteur's report.

29. Mr. ŠAHOVIĆ observed that at the previous meeting he had said he was not in favour of referring the draft articles to the Drafting Committee. But after hearing the Special Rapporteur, although he still thought the Commission had not settled all the preliminary questions, he would not oppose reference of the texts to the Drafting Committee. His great confidence in the Chairman of the Drafting Committee justified the hope that the Committee would not formulate any proposals contrary to State practice in the matters under study, which was particularly old-established and well developed.

30. Mr. SCHWEBEL, replying further to points raised, said he did not think there was any practical difference of consequence between Mr. Jagota's interpretation of the concept of shared natural resources and his own.

31. Mr. Ushakov had again raised some very interesting points, which, he trusted, would be dealt with to his satisfaction by the Drafting Committee.

32. With regard to Mr. Verosta's remarks, it was his intention, when dealing with the articles on equitable utilization and the *sic utere* principle, to refer widely to State practice, particularly as it was reflected in treaties, and possibly also in the operations of river commissions. His idea was that those two principles could be dealt with at the Commission's thirty-third session, after which the specific uses could be considered, when it would again be necessary to draw on State practice. It had been suggested that the examination of State practice might not be very instructive, but on that point he would reserve judgement. Certainly, there would be no difficulty in extracting from State practice certain general principles: for instance, that States had treated the water of international watercourses as a shared natural resource, and had recognized an obligation to act in such a manner as to afford others a right to equitable utilization. In the case of particular principles, it was less certain what could be derived from State practice. He entirely agreed, however, that full account should be taken of State practice both by the Commission and by the Drafting Committee.

33. The CHAIRMAN, noting that there were no further comments, suggested that the draft articles presented by the Special Rapporteur should be referred

to the Drafting Committee for consideration in the light of comments made.

It was so decided.[4]

State responsibility (*continued*)* (A/CN.4/318/Add.5 and 6, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

Draft articles submitted by Mr. Ago

Article 33 (State of necessity)

34. The CHAIRMAN said that for over a decade the Commission had had the benefit of the skilled guidance and profound scholarship of Mr. Ago as it pursued its study of the topic of State responsibility. Mr. Ago, first as Special Rapporteur and then as a friend of the Commission, had created the grand design for the work and pioneered its execution. With the completion of his eighth report, the Commission was entering the final stage of its consideration of part 1 of the topic, to which the General Assembly had repeatedly accorded high priority.

35. He invited Mr. Ago to introduce the most recent sections dealing with chapter V of the draft articles on State responsibility, which were found in addenda to his eighth report (A/CN.4/318/Add.5 and 6), and more specifically draft article 33 (*ibid.*, para. 81), which read:

Article 33. State of necessity

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if the State had no other means of safeguarding an essential State interest threatened by a grave and imminent peril. This applies only in so far as failure to comply with the obligation towards another State does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard.

2. Paragraph 1 does not apply if the occurrence of the situation of "necessity" was caused by the State claiming to invoke it as a ground for its conduct.

3. Similarly, paragraph 1 does not apply:

(*a*) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law, and in particular if that act involves non-compliance with the prohibition of aggression;

(*b*) if the international obligation with which the act of the State is not in conformity is laid down by a conventional instrument which, explicitly or implicitly, precludes the applicability of any plea of "necessity" in respect of non-compliance with the said obligation.

36. Mr. AGO said that if the two latest sections of his eighth report were particularly long, that was because they dealt with two questions, state of necessity and self-defence, each of which could, by itself, form the subject of a separate codification. It had therefore been necessary to consider those two questions in depth and document them as fully as possible.

37. The concept of state of necessity must be clearly distinguished from other circumstances precluding wrongfulness. Such delimitation of the subject-matter was all the more necessary because the various circumstances precluding wrongfulness had often been confused, both in doctrine and in practice. In that connexion, he had wished to avoid the error against which the Analytic school so wisely warned, of believing that the terms used in language had a proper meaning that was natural and innate, and fixed for all time. The meaning terms acquired was nearly always the result of a convention. It was nonetheless true that it was desirable to use terminology as precise and consistent as possible, to avoid disputes that arose only because of differences in the meaning attributed to the same terms.

38. At its previous session, the Commission had studied the concepts of *force majeure* and fortuitous event, both of which related to circumstances involving a decisive element of an unintentional nature. In the case of *force majeure*, an external circumstance beyond the control of a State made it materially impossible for that State to act in conformity with an international obligation. In the case of fortuitous event, an unforeseen external circumstance made it impossible for the person whose acts were attributed to the State to realize that these acts were contrary to what was required by an international obligation; it was the fact that the conduct was not in conformity with the international obligation, if not the conduct itself, which was "involuntary".

39. On other hand, the Commission had already had occasion to differentiate between a situation of distress and a state of necessity. In distress, natural persons, acting on behalf of the State, found themselves in a situation that endangered their lives, so that it could not be held that they were acting voluntarily and deliberately. Indeed, the volition of a person who acted in a certain way because it was the only way to save his life was nullified. A state of necessity, on the other hand, implied conduct freely and voluntarily adopted: it was not the persons acting on behalf of the State, but the State itself which then found itself in a situation jeopardizing one of its fundamental interests, and it acted accordingly.

40. Self-defence, which would be the subject of the next draft article, was also distinct from state of necessity, even though practice and doctrine had, on more than one occasion, confused the two terms. The concept of self-defence had appeared at the same time as the prohibition of the use of armed force, to which it was now a kind of acknowledged exception. However, whereas the conduct engaged in in self-defence was a

[4] For consideration of the texts proposed by the Drafting Committee, see 1636th meeting, paras. 24 *et seq.*

* Resumed from the 1601st meeting.

form of resistance to the most serious of internationally wrongful acts, namely, armed agression, state of necessity involved an act that injured, in its rights or interests, a State which might not even have done anything wrongful. That act was in fact justified only by the necessity for the State inflicting it to protect one of its essential interests that would otherwise be sacrificed. It followed that a distinction could also be made between action taken in a state of necessity and action taken in applying a countermeasure or sanction against a State that had committed an internationally wrongful act.

41. Before going to the heart of the matter, it was important to clear away the vestiges of natural-law theories that had done much to foster misunderstanding of the concept of state of necessity. Instead of looking to international practice for the basis of that concept, which existed in all internal legal orders, some people had sought it in an asserted right to self-preservation—that was to say, in one of those fundamental rights of States frequently mentioned in the late nineteenth century. The theory of fundamental rights had since been abandoned, but traces of it remained. It should not be thought, either, that a state of necessity created a conflict between two rights of two States, two rights of which the less important should be sacrificed to the more important; for the case of a state of necessity in fact assumed only a single right, that of the other State, which the act committed in a state of necessity failed to respect. That act was not the exercise of a right. The State that committed it had no "right" to act as it did; it only had an obligation. Consequently, the expression "right of necessity", which had been used by some authors, must also be avoided. Necessity was a *de facto* situation in which a State, bound by an international obligation to another State, refused to fulfil that obligation because by doing so it would injure one of its vital interests.

42. The problem could not be arbitrarily simplified. To any question limited to asking whether, in general, necessity always excluded wrongfulness of a State's conduct not in conformity with an obligation, the answer would have to be negative. For a State could not be released from compliance with an international obligation merely because one of its vital interests was endangered by that compliance. A number of conditions had to be satisfied.

43. First, the excuse of necessity was valid only if it was of an absolutely exceptional nature. Some had held that the vital interest to be protected must be the interest of the State in its existence. That view must be rejected, because, on the one hand, it was too restrictive, and on the other, it would justify what was not justifiable. A State would thus be able to claim that, in order to justify its own existence, it need not comply with the obligation to respect the territorial sovereignty of another State, whereas there was no necessity that could justify the failure to respect that obligation. The necessity of protecting the existence of a State had, moreover, nearly always been invoked following an invasion of its territory or a violation of its neutrality. On the other hand, other essential interests that did not affect the existence of the State but might, for example, be of an ecological or economic nature could be invoked in support of an excuse of necessity. The threat must also be extremely grave and imminent and must not be attributable to the State invoking it. Otherwise, a State wishing to evade an international obligation might be tempted itself to create a threat which it could invoke for that purpose.

44. The action not in conformity with an international obligation must also be the only available means of protecting the essential interest threatened. And the State must not go beyond what was strictly necessary to safeguard that interest: any excess, either in proportion or in time, must be regarded as wrongful. As soon as such action was no longer "necessary", no excuse of necessity could justify it. Lastly, the interest protected by the right that was injured must be clearly less important than the interest protected by the State acting in a state of necessity.

45. It was self-evident that a state of necessity could not be invoked to excuse the breach of an international obligation established by a peremptory rule of international law, for that was a rule from which no derogation was permitted, even by agreement between States. It would thus be absurd to maintain that such an obligation could be breached for reasons of necessity, when even the consent of the injured State did not suffice to excuse the breach. Those remarks were all the more essential because the concept of a state of necessity had been studied mainly in certain aspects, to the exclusion of others. The cases taken into consideration had frequently been those in which the international obligation breached was the obligation not to use force against another State, its territorial integrity or its political independence—and, in all such cases, the obligation derived from the most indisputably imperative rule of international law. Hence it was important to state the principle that a state of necessity could not excuse the breach of a peremptory rule.

46. At the same time, it was obvious that although the existence of a state of necessity could lead a State not to fulfil an international obligation towards another State, so that the wrongfulness of its conduct was precluded, an obligation to compensate for possible damage could still arise for the State *ex facto licito*. Moreover, such an obligation was often spontaneously recognized by the State invoking the state of necessity.

47. Like most of the other draft articles, draft article 33 called for a study of State practice. This study would be the subject of his statement at the next meeting.

The meeting rose at 6 p.m.