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New York

SUMMARY RECORD OF THE 32nd MEETING

Chairman:	Mr. ZARIF	(Islamic Republic of Iran)
later:	Mr. TOMKA (Vice-Chairman)	(Czechoslovakia)
later:	Mr. ZARIF (Chairman)	(Islamic Republic of Iran)
later:	Mrs. FLORES (Vice-Chairman)	(Uruguay)
later:	Mr. ZARIF (Chairman)	(Islamic Republic of Iran)

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The meeting was called to order at 3.15 p.m.

AGENDA ITEM 130: CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (continued) (A/C.6/47/L.10, A/C.6/47/L.11)

1. Mr. CALERO RODRIGUES (Brazil), Chairman of the Working Group, introducing the report of the Working Group (A/C.6/47/L.10) on jurisdictional immunities of States and their property, said that, after identifying the issues that remained controversial - in particular, the use of terms (art. 2), measures of constraint, and the cases in which State immunity could not be invoked - the members of the Working Group had tried to formulate proposals which, if they were not ideal, at least brought together the different points of view.

2. The Working Group presented its conclusions in paragraph 38. The main conclusion was that it would be desirable for the Working Group to meet again in 1993. The report had two annexes, the first containing the minutes of the meetings of the Working Group and the second containing a proposal on settlement of disputes. That question had not been considered by the Working Group, but most of its members believed that any convention should include provisions in that respect.

3. Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

4. Mr. YAMADA (Japan) welcomed the progress that had been made on the topic, both within the Working Group and in the International Law Commission. The latter had taken a practical approach of avoiding theoretical questions relating to the general principle of jurisdictional immunities of States, and the Committee should do the same if it wished to progress in its work on the topic.

5. It would be difficult to delete article 2, paragraph 1 (b) (ii), because constitutional and political systems varied from one State to another; he hoped that a draft acceptable to all States would be formulated on that point.

6. The next two subparagraphs, namely subparagraphs (b) (iii) and (iv), had elicited the most controversy both in the Working Group and in the written comments submitted by Governments. For Japan, certain concepts, for example "the exercise of the sovereign authority", needed to be clarified.

7. On the issue as to whether "political subdivisions" and "agencies or instrumentalities" should be treated differently in separate provisions or equally in a single provision, he believed that the Commission's view was that there were usually provisions under the internal law of a State stipulating the areas in which "political subdivisions" might perform acts in the exercise of sovereign authority and that therefore they were, under such provisions, "entitled" to act in the exercise of sovereign authority. On the other hand, "agencies or instrumentalities" might perform such acts only when empowered by a State to do so, on a case-by-case basis. Hence "political subdivisions" and

(Mr. Yamada, Japan)

"agencies or instrumentalities" were fundamentally and institutionally different, and it was for that reason that the two separate provisions had been formulated.

8. With regard to State enterprises, referred to in article 10, paragraph 3, as it related to "agencies or instrumentalities" of the State, his delegation believed that when certain requirements were met - including possession of an independent legal personality - a State enterprise should be treated in the same manner as a private enterprise. Therefore, a State which established a State enterprise would not in principle be obliged to assume liability for a proceeding relating to a commercial transaction engaged in by that enterprise and would be able to invoke State immunity if the proceeding was instituted against it. In that respect, the question had been raised as to the appropriate placement in the convention of the provision concerning State enterprises. For example, the view had been expressed that it should not be in article 10, paragraph 3, but in article 5, since it should be enunciated in the form of a general principle. His delegation hoped that, following a thorough consideration of the question by States and taking into account the Commission's position, a provision on State enterprises would be formulated.

9. With regard to the criterion determining whether a "commercial transaction" existed, under article 2, paragraph 1 (c), there were two views: for some countries, mainly developed countries, the nature of a transaction should be the sole criterion, while for others, mainly developing countries, the purpose of a transaction should also be taken into account. Among the former countries, some envisaged that problems would arise in respect of paragraph 2 of the same article and argued that judgements as to what should constitute "State practice" tended to be subjective and thus could leave private enterprises and persons which entered into a contract or transaction with a State in an uncertain and disadvantageous position. The Chairman of the Working Group had proposed a compromise formula, and his delegation felt that that was the right course to follow. In particular, it was not convinced of the wisdom of completely excluding the idea of considering the purpose of a contract or transaction.

10. With regard to measures of constraint, and article 18, some States argued that the range of State property against which measures of constraint might be taken should be broader and that where State immunity could not be invoked and judgement was rendered, the State should in principle be of the same status as a private person. Other States, which supported article 18, noted that it was a compromise text designed to satisfy both those advocating absolute immunity and those advocating restrictive immunity. With regard to article 19, his delegation noted that some States wished to have clarification as to the categories of property listed as examples in that article against which measures of constraint would not be taken. As to the relationship between immunity from jurisdiction and immunity from measures of constraint, it was preferable once again to avoid becoming involved in dogmatic discussion and to take a practical approach by focusing efforts on defining in concrete terms the range of properties against which measures of constraint might be taken.

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11. It might be necessary to include a dispute settlement clause in the draft convention; the Working Group should start considering such a provision to be referred to an international conference. At all events, it was clear that the momentum existed for formulating an international convention on State immunity. In order to keep that momentum alive, practical solutions must be found to various issues, and the problems identified in the deliberations of the Committee in the previous year, in the written comments of Governments and in the Working Group must be considered. In that respect, his delegation was in favour of holding Working Group meetings at the beginning of the next session, but it hoped that each State would bring with it the results of its own consideration of the problems and proposals so that a compromise acceptable to all States might be found.

12. Japan expected that States and public bodies would increasingly emerge as parties to international transactions and that disputes arising between those States or bodies and Japanese private enterprises would increase accordingly. There were therefore advantages to be gained in the medium and long term by following the position on jurisdictional immunities of States reflected in the draft articles as a whole. His delegation therefore intended to participate actively in the drafting of the convention and in the work of the Working Group.

13. Mr. LIU Dagun (China) said that his delegation believed that the conclusion of a convention on jurisdictional immunities of States and their property was necessary for harmonizing domestic legislation and State practice concerning the subject-matter. As a whole, the draft articles adopted by the Commission on second reading were acceptable and could serve as a good basis. They affirmed jurisdictional immunities of States and their property as a principle of international law, while taking into account the actual needs for strengthening international exchanges, in particular in economic and trade relations. The draft articles also defined some exceptions to the principle of State consent.

14. The Chinese Government attached great significance to the fact that draft article 2 excluded from the definition of "State" those entities established by the State with separate legal personalities. In addition, article 10, paragraph 3, drew a legal distinction between "State" and "State enterprise". Those provisions would help to prevent the abuse of judicial proceedings against States.

15. Likewise, his delegation attached great importance to articles 18 and 19. Immunity of State property from measures of constraint was separate from jurisdictional immunity of the State, and consent to the exercise of jurisdiction did not imply consent to the measures of constraint. Frivolous recourse to measures of constraint against State property not only resulted in harassment of the State concerned but could also give rise to international tensions. From that point of view, articles 18 and 19 served as counterweights to exceptions to the immunities provided for in part III of the

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draft. However, it would be better if article 18 explicitly prohibited any form of pre-judgement measures of constraint against the property of a State and if its provisions applied solely to post-judgement measures of constraint. A number of other articles in the draft also needed to be improved.

16. In any event, his delegation would continue to participate actively in the consultations of the Working Group with a view to finding solutions to the existing differences and paving the way towards the conclusion of a convention.

17. Ms. SEAGROVE (Australia), speaking on behalf of Canada, New Zealand and Australia, said that she wished to focus on three issues, namely: the liabilities and property of separate State enterprises (art. 10, para. 3); the provisions relating to execution of judgements (art. 18); and a mechanism for the settlement of disputes.

18. With regard to the first issue, article 10, paragraph 3, provided that the immunity of a State itself was not abrogated because a separate State corporation entered into a commercial transaction. It followed from that also that it would not be possible to attach the assets of a State or of other State entities in respect of the liabilities of the particular State entity that had entered into the transaction in question. Strictly speaking, that was not an issue of State immunity but an issue of the recognition of the separate existence of State corporations under the relevant law. However, it was important to include some provision dealing with that issue both because it was of great practical importance and because misunderstanding about it might otherwise prejudice the acceptance of the draft articles as a whole. Canada, New Zealand and Australia believed that draft article 10, paragraph 3, stated a principle that was generally applicable in the area of State immunity and was not limited to the topic of commercial transactions. They therefore strongly supported the proposal of the Chairman of the Working Group, referred to in paragraph 31 of the report of the Working Group, that article 10, paragraph 3, should be stated as a generally applicable principle in part II of the draft articles, or as a savings clause in part V. That principle should also extend to the constituent units of a federal State. It should not be possible to sue the State itself in respect of transactions concluded by one of its constituent units, and vice versa.

19. Canada, New Zealand and Australia considered part IV of the draft articles, which dealt with measures of constraint, to be the least satisfactory part of the draft articles. The purpose of the draft articles - which was to give effect to a regime of limited immunity from jurisdiction - would not be achieved in practice unless there was sufficient assurance that there would be compliance with judgements duly given pursuant to the draft articles. As currently drafted, the provisions of part IV made the enforcement of final judgements too difficult. Canada, New Zealand and Australia had welcomed the substantive discussions in the Working Group on that topic, and they took note in particular of the proposal of the Chairman of the Working Group, referred to in paragraphs 21 and 22 of the Group's

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report, that a distinction should be made in article 18 between pre-judgement enforcement on the one hand and post-judgement execution on the other. Such a distinction was fully justified. Considerably more protection was justified at the level of interim measures, where both the jurisdiction of the local court to deal with the merits of the case, and the merits themselves, might still be contested.

20. In terms of the possibility of post-judgement enforcement, the Chairman's proposal to remove the restriction that the property needed to have a connection with the underlying claim or the agency involved was an interesting one. However, even with that restriction removed the conditions for execution would still be such that the possibility of enforcement would be excluded in many cases.

21. In addition, if the draft articles were embodied in an international convention, the convention should contain some mechanism for the resolution of disputes between States parties concerning its proper interpretation and application. Indeed, in any case in which a domestic court assumed jurisdiction over a foreign State, a genuine disagreement could arise between the foreign State and the forum State as to whether the foreign State was entitled to immunity or to particular privileges under the convention. If the dispute could not be resolved by negotiation, there was a likelihood that the foreign State would boycott the proceedings and refuse to recognize any judgement given against it. If the foreign State had no assets in the territory of the forum State, the judgement might remain unsatisfied. If execution were levied against commercial property of the foreign State situated in the territory of the State of the forum, the defendant State might take retaliatory action against assets of the forum State located in the defendant State's territory. That would defeat the purpose of the convention.

22. It was also essential that the dispute settlement mechanism should be speedy and effective and should permit disputes to be resolved at a preliminary stage, before determination of the merits or the giving of judgement. On the other hand, the situation should be avoided in which every domestic proceeding under the convention was preceded by proceedings on the international plane to determine the effect of the draft articles. Australia had, for example, proposed to refer disputes to the chamber of summary procedure established under article 29 of the Statute of the International Court of Justice. That issue should in any case be considered by the Working Group rather than be left for consideration by a diplomatic conference. In that regard, the delegations of Canada, New Zealand and Australia agreed that it was appropriate to defer until 1993 the question of whether to convene a diplomatic conference to conclude a convention. The draft articles should remain subject to consideration by the Working Group of the Sixth Committee until all outstanding issues of principle were settled, including that of a mechanism for the settlement of disputes. Moreover, if the Working Group was able to reach agreement on a final text, there would be no need for a diplomatic conference: the draft convention could instead be submitted directly to the General Assembly for adoption.

23. Mr. ROGACHEV (Russian Federation), noting that the draft articles on the jurisdictional immunities of States and their property were a compromise text, said that there was no need to consider whether the text was more favourable to those who advocated limited immunity or those who favoured absolute immunity. On the other hand, it was important to ensure that a balance was established which served the interests of the international community as a whole by removing the possibility of inter-State tension and by ensuring that State immunity or the limitation thereof had no negative economic consequences. The future instrument on jurisdictional immunities should contain precise legal norms but should also be sufficiently flexible as to be able to take account of contemporary international realities and, to a certain extent, of the specific characteristics of national legislation. That was the only way to persuade the largest possible number of States to accede to the future convention, which would serve a purpose only if it was of a universal character.

24. The draft articles under consideration still contained certain weaknesses, particularly with regard to the formula by which immunity was extended to the "constituent units of a Federal State", which lent itself to varying interpretations. The Working Group should pursue its work on the topic in order to arrive at a consensus formulation. More in-depth consideration should also be given to the question of the immunity of the bank accounts of a State used for both commercial and non-commercial transactions. Furthermore, it was regrettable that a common definition had still not been found for the notion of "commercial transactions".

25. The question also arose as to whether, in some cases, national courts, or, in other words, national laws, were being given an exaggerated role by being allowed to decide unilaterally, and with no possibility of appeal, questions relating to the sovereignty of a foreign State. Extrajudicial and amicable settlement mechanisms could be strengthened, for instance, through recourse to the vast array of methods of peaceful settlement and the establishment of effective systems of guarantees. The mechanism of measures of constraint should also be improved. The harmful consequences of the implementation of such measures could undermine all the positive effects of the scheme, with which many States were hardly familiar.

26. The Russian delegation supported the proposal to recommend to the General Assembly that approximately two weeks should be set aside at the beginning of the forty-eighth session so that the Working Group could fully discharge the mandate conferred on it in Assembly resolution 46/55. The Russian delegation invited the many States which had not yet done so to submit written comments and observations on the draft articles and the discussions in the Working Group at the current session.

27. Mr. Zarif (Islamic Republic of Iran) resumed the Chair.

28. Mr. SALEEM (India), reviewing the history of the consideration by the Commission and the Sixth Committee of the draft articles on jurisdictional immunities of States and their property, drew attention to draft articles 10, 18 and 19. In his view, draft articles 18 and 19 helped to clarify the scope and nature of the immunities of States and their property in connection with legal proceedings concerning their commercial activities. In particular, the draft articles did not provide for any obligation of a State to post a bond in connection with proceedings in a foreign State, which was often a matter of great concern to developing countries. The draft articles did not exclude the possibility of States providing certification in accordance with their domestic laws and practice.

29. The Indian delegation welcomed the important contribution which the Commission had made in finalizing a set of pragmatic and progressive draft articles; by clarifying the law to a large extent, the draft articles would promote the development of international commercial transactions which took into account the interests of developing countries. Accordingly, his delegation supported the convening by the United Nations of an international conference to adopt an international convention on the subject.

30. The Indian delegation was not in favour of any further amendment to the draft articles being worked out in the Sixth Committee to enable the General Assembly to take a positive decision on the convening of a diplomatic conference. In his delegation's view, the draft articles represented the most balanced position, and any further attempt to shift it one way or another would endanger the prospects of consensus.

31. Ms. BARRETT (United Kingdom) said that, in her Government's view, there were five issues of principle which remained to be resolved in order to pave the way for a generally acceptable convention, namely: the definition of the term "State", the scope and definition of the term "commercial transaction", the concept of segregated State property, measures of constraint and mixed funds. In approaching those key issues, it should be clear that the old rule of absolute immunity was obsolete, and that some of the provisions should be redrafted in that light. Before considering the question of convening a diplomatic conference which would have reasonable prospects of culminating in the conclusion of a generally acceptable convention on the subject, it would be necessary to reach agreement on those parts of the text which appeared to be the most controversial.

32. The discussions in the Working Group had cleared the way for a better understanding of the concerns of delegations. Thus, with regard to draft article 10, paragraph 3, some delegations would prefer, with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise, for any attachment of assets to be carried out solely against the property of the enterprise itself and not against the property of the State. Those delegations were also concerned about high litigation costs. Her delegation shared that concern, and likewise agreed that State immunity could not be invoked in a proceeding against a State enterprise which operated on

(Ms. Barrett, United Kingdom)

its own behalf. In practice, however, matters were not always that simple. When a private party wished to sue a State enterprise, it did not always have sufficient information to determine whether that enterprise operated on its own behalf or as part of the State. Under those circumstances, it would be reasonable to initiate proceedings against both the enterprise and the State. It should be possible, as it was in the United Kingdom, for the court to decide in limine litis which party was the proper defendant; that would have the advantage of limiting the costs from the outset.

33. With regard to the definition of the term "commercial transaction", her delegation endorsed the compromise solution proposed by the Working Group, whereby a court could take into account, in determining whether a contract or transaction was a commercial transaction, the purpose agreed to by the parties at the time of its conclusion.

34. With regard to measures of constraint, draft articles 18 and 19 should be reconsidered since, as currently worded, they were hardly compatible with the concept of limited State immunity. In principle, where a State had lost a case on the merits and where immunity from jurisdiction did not apply, the successful claimant was entitled to a guarantee that the judgement would be satisfied, if necessary, by enforcement, if the defendant State refused to fulfil its obligation. Of course, exceptions should be made for property used by a State for other than government non-commercial purposes, and the categories of property which were immune from measures of constraint should be clearly defined. Accordingly, draft articles 18 and 19 would benefit from substantial recasting.

35. Ms. KOFLER (Austria) welcomed the constructive exchange of views in the Working Group which had contributed to the identification of areas in which general agreement could be reached. Such consultations should be continued at the beginning of the forty-eighth session of the General Assembly with a view to the promotion of general agreement, but they should take place in a concentrated manner within a limited time-frame. At the same time, that consultative process, which would prepare the ground for generally acceptable results, should not detract attention from the objective, properly speaking, which was the convening of an international conference of plenipotentiaries to examine the draft articles and to conclude a convention on the subject.

36. The Working Group should, at the forty-eighth session, consider the question of the convening of such a conference, in order to prepare the ground for a decision by the General Assembly on the subject. For its part, Austria was fully prepared to host such a conference, as it had a tradition of hosting United Nations codification conferences.

37. Mrs. Flores (Uruguay), Vice-Chairman, took the Chair.

38. Mr. FISSENKO (Belarus) said that the draft articles under consideration had achieved a proper balance between the proponents of the absolute and the restrictive theories of immunity. His delegation supported the Working Group's efforts to reach agreement on the various paragraphs and subparagraphs of draft article 2. The formulas which the Group had proposed were fuller and more specific. His delegation was prepared to support the new, more specific wording of draft articles 10, 11 and 18, subject to their consideration by his Government.

39. With regard to the settlement of disputes relating to the application and interpretation of the future convention, the convention should provide for the establishment of a mechanism of consensus. That mechanism should be used prior to the phase of direct negotiations between the countries concerned; those countries could, where appropriate, resort to the good offices of a third party, provided that each stage of the applicable procedure was expressly agreed to by each of the parties to the dispute. In that connection, Belarus could not endorse the Australian proposal concerning draft articles 23 and 24. Belarus would prefer for the provisions on the settlement of disputes which were included in the future convention to be worded in a manner similar to that worked out by the Commission.

40. The Belarusian delegation supported the proposal by the Chairman of the Working Group concerning the procedure for the consideration of the question by the Sixth Committee (A/C.6/47/L.10).

41. Mr. SHIN (Myanmar) welcomed the fact that the draft articles took account of State enterprises and multinational companies, which were a reality of international commerce. State enterprises, which were governed not by public international law but by laws of their own - in particular, commercial law and corporate law - had legal personality and could sue or be sued in a court of law. In commercial contracts with multinational companies, State enterprises were bound to discharge their obligations under the law governing commercial contracts. However, privity of contract existed only between multinational companies and State enterprises and not between multinational companies and the State.

42. In recognizing the jurisdictional immunity of ships owned or operated by a State and used exclusively for non-commercial purposes, article 16 endorsed a custom long established in international law and confirmed in 1982 by articles 32 and 96 of the United Nations Convention on the Law of the Sea. State-owned commercial ships belonged to a different category and therefore came under the jurisdiction of the court of the forum State. It should be noted that paragraph 3 of the draft articles listed only certain forms of operation of a ship, to which such other forms as towage, maritime liens, flags of convenience, charter parties and bills of lading should also be added. The same applied, by analogy, to the operation of aircraft, which, however, were not covered by the draft articles. His delegation considered that the subject of ships and aircraft should be discussed in greater detail in the light of shipping law and air and space law.

(Mr. Shin, Myanmar)

43. With regard to the settlement of disputes, he remarked that in view of the existence of numerous arbitration regimes corresponding to different legal systems, it would be useful to carry out an in-depth comparative study before choosing a particular regime.

44. Mr. FONBAUSTIER (France) said that his Government had, from the outset taken a favourable view of considering the possibilities of codification of the law of jurisdictional immunities of States and their property, a highly technical legal topic of obvious interest to States. The subject was, of course, a difficult one, being situated at the borderline between private and public international law, and it gave rise to controversies as to both doctrine and jurisprudence. Furthermore, customary international law in that field was somewhat limited; such conventions as existed had not received a large number of ratifications; and national laws on the subject varied a good deal. All those factors militated in favour of codification.

45. His delegation considered that the draft in its present version could be viewed as generally satisfactory as regards both substance and design. Some amendments, however, remained desirable, in particular on the question of immunity from measures of execution. His delegation also favoured the convening of an international conference which would be held in 1994 or later and which should be prepared with care.

46. His delegation agreed that the Working Group should continue its work for two full weeks at the beginning of the next session, an arrangement that should enable the Committee to complete the detailed consideration of the draft articles and to decide at the next session upon the holding of a diplomatic conference and its date.

47. Mr. POLITI (Italy) said that some of the Special Rapporteur's proposals on the draft articles on jurisdictional immunities of States and their property, especially those concerning paragraph 2, as well as the ideas and formulations suggested in connection with draft articles 18 and 19, deserved special attention. A number of issues still remained outstanding, however, and should be given careful consideration with a view to resolving existing differences.

48. His delegation welcomed the decision to re-establish the Working Group of the Sixth Committee at the forty-eighth session in order to continue consideration of the topic of jurisdictional immunities. It also supported the idea of setting aside the first two weeks of the next session for that purpose. The elaboration of a convention would greatly contribute to the codification and progressive development of international law, and all efforts should be made to define a regime that could obtain the widest possible support.

49. Mr. Zarif (Islamic Republic of Iran) resumed the Chair.

50. Mr. KOROMA (Sierra Leone) expressed surprise at the reopening of the discussion on matters which had appeared to be settled. Most of the arguments advanced had already been heard and answered in the International Law Commission as well as in the Committee. It was, of course, always possible to improve a text, but the draft articles represented a compromise the balance of which ought not to be disturbed. His delegation, for its part, accepted the draft although certain articles, such as that dealing with measures of constraint, failed to satisfy it fully. He invited other delegations to refrain from reopening the debate.

51. His delegation accepted the idea of holding a session of two weeks during the forty-eighth session of the General Assembly to consider the draft articles, and also favoured the convening of a diplomatic conference to conclude a convention on the topic.

Draft decision A/C.6/47/L.11

52. Mr. CALERO RODRIGUES (Brazil), speaking as the Chairman of the Working Group established under General Assembly resolution 46/55, introduced the draft decision contained in document A/C.6/47/L.11 and read out its main provisions.

53. Mr. CHATURREDI (India), explaining his position, said that he saw no point in devoting two weeks to working on the topic of jurisdictional immunities of States. His delegation considered that an international conference should be convened with a view to concluding a convention on the subject.

54. Mr. KOROMA (Sierra Leone), also speaking in explanation of position, associated himself with the Indian representative's remarks, adding that not all delegations could be represented in the Sixth Committee at the very beginning of the session, so that a certain imbalance might result.

55. The CHAIRMAN said that he understood it to be the wish of the Committee to adopt the draft decision under consideration without a vote.

56. Draft decision A/C.6/47/L.11 was adopted.

AGENDA ITEM 135: ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS (continued) (A/C.6/47/L.9)

57. Mrs. FLORES (Uruguay), introducing draft resolution A/C.6/47/L.9 in her capacity as chairperson of the informal consultations on the preparation of an additional protocol on consular functions to the Vienna Convention on Consular Relations, read out the operative part of the draft resolution.

58. Mr. CHATURREDI (India), explaining his position, expressed regret that the draft resolution did not mention the report of the Chairman of the Working Group.

59. The CHAIRMAN said that he understood it to be the wish of the Committee to adopt the draft under consideration without a vote.

60. Draft resolution A/C.6/47/L.9 was adopted.

The meeting rose at 5.30 p.m.