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Summary record of the 2467th meeting

Topic:
<multiple topics>

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SECTION XI (Law of armed conflicts/disarmament)

68. Mr. ROSENSTOCK, noting that each section contained a reminder of relevant topics already taken up at some point or another by the Commission, said he believed that the Commission had studied questions relating to the law of armed conflict in the past. If so, that should be indicated.

69. The CHAIRMAN said that that would be checked. If he heard no further comments, he would take it that section XI was adopted.

Section XI was adopted.

SECTION XII (Settlement of disputes)

70. Mr. VILLAGRAN KRAMER said that resolution 50/50 which had recently been adopted by the General Assembly, on United Nations Model Rules for the Conciliation of Disputes between States, was directly linked to the section under consideration. Perhaps the Commission should take that into account as a possible future topic.

71. The CHAIRMAN recalled that paragraph 2 of the introduction clearly stated that some of the proposed topics had been taken up by other bodies.

72. Mr. MIKULKA noted that, in the draft articles on State responsibility, the Commission had proposed provisions relating to dispute settlement for the first time, whereas, in the past, its practice had been to let diplomatic conferences deal with that question. It might consider the possibility of systematically including such provisions in its codification drafts in future.

73. Mr. PELLET said that the second topic under heading 2, "Model clauses for the settlement of disputes relating to application or interpretation of codification conventions" would meet Mr. Mikulka's concern. For the sake of greater clarity, the word "future" should be added before the words "codification conventions".

It was so decided.

Section XII, as amended, was adopted.

The meeting rose at 6.10 p.m.

2467th MEETING

Tuesday, 23 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney,

Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (concluded) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT ON THE LONG-TERM PROGRAMME OF WORK (concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the report of the Working Group on the long-term programme of work (ILC(XLVIII)/WG/LTPW/2/Rev.1).¹

ADDENDUM 1 (Diplomatic protection)

Addendum 1 was adopted.

ADDENDUM 2 (Ownership and protection of wrecks beyond the limits of national maritime jurisdiction)

Addendum 2 was adopted.

ADDENDUM 3 (Unilateral acts of States)

Addendum 3 was adopted.

2. Mr. VILLAGRÁN KRAMER said he had not wished to block the adoption of addendum 3, which contained timely proposals and was well drafted. He did wish, however, to place on record a number of observations. It was extremely unfortunate that the Commission had made very little tangible progress in its work on reservations to treaties, despite the excellent second report placed before it by Mr. Pellet (A/CN.4/477 and Add.1 and A/CN.4/478).² If that slow pace were maintained, it was to be feared that the Commission's only contribution on the topic would be a doctrinal study, instead of a legal instrument in line with the Commission's mandate for the codification and progressive development of international law.

3. Mr. SZEKELY pointed out that he had strong reservations about the removal, from the list of possible topics for the Commission's future work, of the topic of representative government.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the

¹ See 2465th meeting, footnote 1.

² *Yearbook . . . 1996*, vol. II (Part One).

report of the Working Group on the long-term programme of work.

It was so agreed.

The report of the Working Group on the long-term programme of work, as amended, was adopted.

5. The CHAIRMAN suggested that the report of the Working Group should be annexed to the report of the Commission to the General Assembly.

6. Mr. TOMUSCHAT said that that was usually done with documents the Commission itself had not considered. In the current instance, however, it had adopted the report of the Working Group, which could therefore be considered a constituent element of the Commission's work and should be incorporated in the body of its report.

7. After a procedural discussion in which Mr. BOWETT, Mr. CALERO RODRIGUES and Mr. THIAM took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to identify the report as having been produced by the Planning Group and adopted by the Commission and to incorporate it in an annex to its own report to the General Assembly.

It was so agreed.

Draft report of the Commission on the work of its forty-eighth session (continued)*

8. The CHAIRMAN invited the Commission to continue its consideration of the draft report on the work of its forty-eighth session, and specifically, chapter III, on State responsibility, and the commentaries to articles 42 (para. 3), 47, 48 and 51 to 53.

CHAPTER III. State responsibility (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

9. Mr. TOMUSCHAT suggested that all the articles of parts two and three, together with the commentaries, should be reproduced in the report of the Commission to the General Assembly for ease of reference.

10. Mr. BENNOUNA concurred that that would be useful, especially for discussion in the Sixth Committee, and added that a separate document containing the same material, to be made available to researchers and international law specialists, should also be produced.

11. Mr. LEE (Secretary to the Commission) said the secretariat's intention had been to issue a document comprising all the articles in parts one, two and three of the draft on State responsibility. Footnotes to each article would direct readers to the commentary. The commentaries to parts one and two alone were extremely voluminous, and incorporating them in the report of the Com-

mission in time to meet the September deadline for submission of documents to the General Assembly would be extremely difficult. He would give the Commission a more precise indication of the financial implications at a later stage.

D. Draft articles on State responsibility (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)

Commentary to paragraph 3 of article 42 (Reparation) (A/CN.4/L.528/Add.3 and Corr.1)

Paragraph (8) (a)

12. Mr. ROSENSTOCK said the commentary should indicate that some members of the Commission believed that article 42, paragraph 3, was a profound mistake and a serious departure from the law on the situation and that, at a minimum, provision should be made for the inapplicability of the limitation set out in the paragraph to circumstances in which the injured State would suffer if full reparation was not made. At the current stage of first reading, it was both traditional and proper to indicate in the commentaries the existence of dissenting views—as there most assuredly were dissenting views on article 42, paragraph 3.

13. Mr. ARANGIO-RUIZ said he agreed and thought that the commentary should specify the need for very careful interpretation of paragraph 3, to ensure that the injured State was in no way damaged.

14. Mr. CALERO RODRIGUES said that, at the current late stage in the Commission's work, any changes to the commentaries should be proposed in the form of specific amendments; otherwise, the Commission would never be able to complete its work.

15. Mr. KABATSI said it was his understanding that the Commission had decided not to incorporate in the commentaries, at the current stage, any references to dissenting views. He had no objection, however, to the point raised by Mr. Rosenstock and Mr. Arangio-Ruiz.

16. Mr. BOWETT suggested that the difficulty might be overcome by deleting the first five sentences of the commentary, together with the word "Accordingly" that began the sixth sentence.

17. Mr. VILLAGRÁN KRAMER said that, though the proposal amounted to radical surgery, he could accept it. He had initially been in favour of paragraph 3 of the article, for its purpose had been to guarantee essential means of subsistence. One had only to think of, for example, the fate suffered by Finland after the Second World War, when it had been subjected to extremely severe terms and conditions for compensating the Union of Soviet Socialist Republics, a situation that had adversely affected its economic development. Paragraph 3, however, spoke not of "essential", but of "its own", means of subsistence. It would be useful if a reference to the "essential" nature of the means of subsistence could be included in the commentary.

18. Mr. BENNOUNA said that he understood Mr. Bowett's "surgical" proposal but did not think that amputation was the proper remedy for whatever might be wrong with paragraph (8) (a). The sentences being

* Resumed from the 2465th meeting.

proposed for deletion made it clear that paragraph 3 of the article applied only to extreme cases in which *erga omnes* obligations of States came into play. It would be a pity to lose that important element of clarification. He would have no objection to seeing Mr. Rosenstock's point reflected in the commentary, although he did not share the view expressed.

19. Mr. ROSENSTOCK proposed the addition of the following text to paragraph (8) (a):

“Some members disagreed with the inclusion of paragraph 3. They were of the view that the provision was inappropriate and that in any event the provision should not apply where the population of the injured State would be similarly disadvantaged by a failure to make full reparation on such grounds.”

He was in favour of Mr. Bowett's proposal.

20. Mr. TOMUSCHAT said that the new provision in paragraph 3 was, in his view, appropriate and represented a very welcome addition to article 42. He agreed with Mr. Bennouna that the first few sentences of the commentary, which explained that the provision applied only to extreme situations, should be maintained. The idea of placing a limit on the notion of full reparation was firmly rooted in current-day positive international law. The Security Council's decision that Iraq should pay only 30 per cent of its oil revenues as reparations was an obvious example. It was, of course, quite natural that making reparation should have some adverse impact on the wrongdoing State, but that was not what the provision meant. As for the point raised by Mr. Rosenstock, the interests of the injured State were quite clearly taken care of by the provision as it stood.

21. Mr. ROBINSON said that, for his part, he was prepared to subscribe to paragraph (8) (a) of the commentary without any change. However, if Mr. Bowett insisted on shortening the paragraph, he would suggest that only the first four sentences should be deleted and that in the fifth sentence the words “These are of course extreme cases” should be replaced by the words “It was generally agreed that this paragraph only applies to extreme cases”.

22. Mr. PAMBOU-TCHIVOUNDA said that he also considered paragraph 3 to be a useful addition to article 42, in particular as a practical help to the judge or arbitrator in deciding the amount of reparations in a given case. Paragraph (8) (a) of the commentary was acceptable and he would not subscribe to any proposal to curtail it.

23. Mr. ARANGIO-RUIZ said that he agreed with the suggestion made by Mr. Robinson, which placed additional stress on the extreme nature of the cases covered by the provision in paragraph 3. He proposed that the expression “means of subsistence” should be replaced, in the commentary at least, by the expression “vital needs”, which could include moral interests as well as physical needs. It would be recalled that the expression had been used in connection with crimes.

24. Mr. VILLAGRÁN KRAMER said he endorsed that proposal.

25. Mr. CALERO RODRIGUES pointed out that the reference to the wrongdoing State appearing in the passage in brackets in the sixth sentence of paragraph (8) (a) was inappropriate; a reference to the injured State would be more to the point in the context. The whole passage could be deleted without any loss of meaning. In his opinion, the Commission should not attempt to change the wording of paragraph 3 itself but should confine itself to explaining in the commentary what was meant by the words “the population of a State” and “means of subsistence” or “vital needs”.

26. The CHAIRMAN suggested that the text proposed by Mr. Rosenstock should be added to paragraph (8) (a) and that, in accordance with Mr. Bowett's proposal, the second and third sentence of the paragraph should be deleted. The first sentence had a certain usefulness and should be maintained, as should the remainder of the paragraph from the fourth sentence onwards. The expression “means of subsistence” should be replaced by “vital needs”, and the passage in brackets in what was now the sixth sentence of the paragraph should be deleted.

It was so agreed.

Paragraph (8) (a), as amended, was adopted.

Commentary to article 47 (Countermeasures by an injured State)

Paragraphs (1) and (2)

27. Mr. LUKASHUK proposed that the sixth sentence of paragraph (1) should be deleted.

28. Mr. ROSENSTOCK proposed that the whole of paragraphs (1) and (2) should be deleted. He was not opposed to lengthy commentaries as such, but the paragraphs in question contained nothing necessary for the interpretation of article 47. Furthermore, the drafting of the paragraphs, and particularly of paragraph (2), was unsatisfactory. The commentary to article 47 would still be quite long enough.

29. Mr. ARANGIO-RUIZ said that he thought the system was indeed rudimentary, and that the fact needed stating somewhere in the commentary.

30. Mr. VILLAGRÁN KRAMER said he disagreed. When the Security Council authorized countermeasures, it did so within a highly centralized legal order which was far from rudimentary. He supported the proposal to delete paragraphs (1) and (2).

31. Mr. PAMBOU-TCHIVOUNDA said that paragraphs (1) and (2) were relevant to an understanding of paragraph 1 of article 47. On a drafting matter, he would suggest that the words *État fautif* in the French text should be replaced by *État auteur du fait illicite* throughout the commentary to article 47.

32. The CHAIRMAN said that it would be necessary to check whether the expression *État fautif* was employed in the commentary to part one of the draft. If so, its use in the commentary on article 47 was justified; otherwise, it should be replaced, as suggested.

33. Mr. BARBOZA said that he thought the system was rudimentary, but would have no objection to dropping paragraphs (1) and (2) of the commentary.
34. Mr. ROSENSTOCK emphasized that his proposal was designed to save time and avoid confusion. As to Mr. Pambou-Tchivounda's point, paragraph (3) of the commentary did all that was necessary with regard to paragraph 1 of article 47.
35. Mr. ROBINSON commented that since the Commission had avoided using the words "right" or "entitlement" in article 47 itself, it should perhaps try to avoid using those words in the commentary as well.
36. Mr. ARANGIO-RUIZ said that paragraphs (1) and (2) should be maintained, with the omission of any words or sentences the Commission regarded as superfluous. The main object was to stress that the existing system was not ideal and entailed a certain measure of inequality. The paragraphs in question summed up the debate as it had taken place, not only within the Commission but also in the Sixth Committee; in particular, he could recall a very eloquent statement on the subject made by Mr. de Saram (2457th meeting). Paragraphs (1) and (2) threw light on the commentary that followed, and for that reason should be maintained.
37. Mr. BENNOUNA endorsed that view. Commentaries to articles adopted on first reading were supposed to reflect what had taken place, which was precisely what paragraphs (1) and (2) did. Both paragraphs, along with the footnotes, should be maintained.
38. Mr. BOWETT said that he supported the idea of deleting paragraphs (1) and (2). With regard to the point raised by Mr. Robinson, the word "entitlement" in the first line of paragraph (3) could be replaced by the word "option" and the words "The right of", at the beginning of paragraph (4), by the words "Any decision by".
39. Mr. VILLAGRÁN KRAMER said that the Commission seemed to be acting as the theoretical exponent of legal ideas that were not shared by all its members. Those ideas related, on the one hand, to the question whether the system governing countermeasures was or was not rudimentary and, on the other hand, to the question whether recourse to countermeasures was or was not an entitlement or a right. On the first point, he pointed out that in the case of countermeasures the injured State was not applying sanctions against a culprit State but was simply inducing, through the acts or omissions of which the countermeasures consisted, the wrongdoing State to cease the internationally illicit act and to compensate the injury caused. He could not agree that the system which governed that process was a rudimentary one. It was simply a system whereby a State still enjoyed certain privileges. As for the more philosophical issue of the right or entitlement to take countermeasures, any *faculté* recognized and regulated by international law was, by that token, a right. Whether or not the Commission amended the text as suggested by Mr. Bowett—whose solution was the correct one—it could not ignore that fact.
40. Mr. KABATSI, agreeing that paragraphs (1) and (2) could be deleted, said that countermeasures became a right once a State had met certain preconditions and, in that sense, an option to do something was also a right.
41. Mr. ROBINSON said that his main concern was to ensure consistency between the article and the commentary. Historically, a very delicate compromise had been built into article 47, the main point being that the term "right" was not used. The commentary should not therefore state anything that was in opposition to the content of the article. In the light of that consideration, he supported Mr. Bowett's proposed amendment to paragraph (4) of the commentary. So far as paragraph (3) was concerned, it might perhaps be possible to redraft the opening clause of the first sentence to read "The basic notion is that the injured State does not comply".
42. Mr. TOMUSCHAT said that he could live with paragraphs (1) and (2) or, alternatively, could accept their deletion. As a compromise solution, however, paragraph (1) could perhaps be deleted and paragraph (2) placed at the end of the commentary to show that some members disagreed on account of the inherent dangers of countermeasures.
43. Mr. ROSENSTOCK said that he would prefer by far to delete paragraphs (1) and (2), but was prepared to accept that suggestion.
44. Mr. CALERO RODRIGUES said he was inclined to think that the notions reflected in paragraphs (1) and (2) should be included in the commentary despite the very poor drafting of those paragraphs. As there was no time to prepare a suitable alternative, however, he would agree to Mr. Rosenstock's suggestion, though he regretted the omission of the ideas reflected in the two paragraphs.
45. Mr. ARANGIO-RUIZ said that he failed to see why the Commission should decide, at a time when many members were absent, to remove something that had formed part and parcel of the whole debate on countermeasures. The job of the Commission, after all, was not only the codification but also the progressive development of international law. Should it not therefore at least call the attention of Governments to the fact that countermeasures were not the ideal system for enforcing the law in international society?
46. Mr. BENNOUNA said that, contrary to what Mr. Calero Rodrigues had said, the commentary was both balanced and well drafted. If the Commission set about deleting parts of it, that would only disturb the balance. Should Mr. Rosenstock insist on his point, some members, including himself, would feel bound to point out that the most difficult and controversial aspect of the whole regime of State responsibility was at issue and that a number of members had even proposed deletion of the entire chapter on countermeasures. The Commission must decide what it wanted, but the wisest course would be to retain the commentary as drafted, for otherwise the matter would not be settled for ages.
47. Mr. PAMBOU-TCHIVOUNDA said that the Commission would be wrong to delete paragraphs (1) and (2), both of which had a valid place in the commentary. They not only recorded the debate on countermeasures,

but also contained a statement of positive law in the matter.

48. Mr. ROSENSTOCK said he could not agree more with Mr. Calero Rodrigues that the two paragraphs were badly drafted. He suggested, by way of compromise, that the first sentence of paragraph (1) should be retained, that the remainder of paragraph (1) and the whole of paragraph (2) should be deleted and that a brief paragraph should be added at the end of the commentary to reflect the views of some members.

49. Mr. ARANGIO-RUIZ said that, despite the importance of the issue involved, the Commission was once again engaged in the game of converting a majority into a minority. It was an absurd situation when Mr. Bennouna, Mr. Pambou-Tchivounda, he and other members, too, found themselves in a minority when the Commission had originally accepted, almost universally, the views they espoused. A comparison of the summary records of the Commission's session two or three years ago with those of the current session left the impression that matters were now all topsy-turvy. One reason was that many members were not present at a time when the Commission was adopting, on first reading, one of the most important drafts to come before it for the past 45 years. He wished to voice a protest and would request that it appear clearly in the summary record.

50. The CHAIRMAN pointed out that the Commission was still at the stage of first reading, when a measure of flexibility, allowing for different points of view to be reflected, was permissible. Had it been at the stage of second reading, when firmer decisions were required, the position would have been different. He suggested that a small group of members should meet to consider the matter and draft a form of words that would take account of the various points of view.

51. Mr. THIAM said that he agreed with the views expressed by Mr. Bennouna and Mr. Pambou-Tchivounda.

52. Mr. LUKASHUK, expressing his support for the Chairman's suggestion, said the danger was that, even if a very good commentary were drafted, the draft as a whole would not be adopted.

53. Mr. EIRIKSSON said he would suggest, as a way out of the impasse, that there should be a general introduction to chapter III (Countermeasures) of part two, along the lines of the introduction to chapter IV (International crimes), consisting of the existing paragraphs (1) and (2) of the commentary and setting out the various views. Paragraph (3) of the commentary to article 47, which basically described what a countermeasure was, would then become the first paragraph in that commentary. That might bridge the gap between the different viewpoints.

54. Mr. BENNOUNA said that he could agree to Mr. Eiriksson's proposal, provided that it involved merely a question of placement and that it took account of all points of view.

55. Mr. ARANGIO-RUIZ said that, if the intention was that the two paragraphs in question should form the *chapeau* to the chapter on countermeasures, he would

have no objection. From the standpoint of procedure, however, it was somewhat odd that, simply because Mr. Rosenstock did not like paragraphs (1) and (2), Mr. Bennouna, Mr. Pambou-Tchivounda and he himself should be invited to draft something different. Those two paragraphs were what Mr. Bennouna, Mr. Pambou-Tchivounda and he himself wanted and, if Mr. Rosenstock disagreed, it was for him and those who supported him to do any further drafting. The paragraphs in question had been prepared by an able draftsman, Mr. Crawford, so why demolish them? It was all so strange that he no longer recognized the Commission.

56. The CHAIRMAN, appealing for calm, urged members not to personalize the debate. Mr. Rosenstock's proposal had in fact received the support of several members.

57. Mr. TOMUSCHAT and Mr. KABATSI supported Mr. Eiriksson's proposal.

58. Mr. FOMBA said that he agreed with Mr. Arangio-Ruiz and Mr. Bennouna as to substance but, to overcome the difficulties, would agree to Mr. Eiriksson's proposal.

59. Mr. AL-BAHARNA said that he supported the commentary as drafted.

60. Mr. EIRIKSSON said a reference to article 30 should perhaps also be included as a second sentence in the introductory paragraph.

61. The CHAIRMAN suggested that Mr. Eiriksson should be asked to hold consultations with a view to submitting a firm proposal for the Commission's final decision later.

It was so decided.

Mr. Kusuma-Atmadja took the Chair.

Paragraph (3)

62. Mr. FOMBA said that the words *à prendre* in the French version of the last sentence of paragraph (3) should be replaced by *prise*.

63. Mr. CALERO RODRIGUES recalled Mr. Bowett's proposal that, in the first line of the paragraph, the word "entitlement" should be replaced by "option".

64. Mr. BOWETT said that his suggestion had been made as an alternative to the amendment made earlier by Mr. Robinson.

65. Mr. ROSENSTOCK said that the use of euphemistic language was merely doing a disservice to the work of the Commission. If the members wished to use the word "option" instead of "entitlement", a choice he would go along with reluctantly, that did not change the fact that an injured State could with impunity choose not to comply with one or more of its obligations towards the wrongdoing State. It was that point that had to be highlighted in paragraph (3) and Mr. Robinson's proposed amendment failed to do that.

66. Mr. PAMBOU-TCHIVOUNDA said that the expression *État fautif* in the French text was not consistent with the wording used throughout the commentaries and should be changed accordingly. He endorsed paragraph (3) as it stood.

67. Mr. TOMUSCHAT said that he preferred to keep paragraph (3) as it stood. The version proposed by Mr. Robinson was not acceptable because it did not emphasize the legality of the action of the injured State in taking a countermeasure.

68. Mr. CALERO RODRIGUES said that he preferred the text in its current form, but it should be remembered that during the debate on article 47 many members had objected to the word "entitlement".

69. Mr. THIAM said that he was in favour of replacing "entitlement" by "option". In fact, the word "entitlement" should be replaced wherever it appeared in the articles on countermeasures.

70. Mr. ARANGIO-RUIZ said that he would go along with a consensus to use the word "option".

71. Mr. KABATSI said that Mr. Robinson's proposal obviated the need to use either "entitlement" or "option".

72. Mr. TOMUSCHAT said that he endorsed paragraph (3) as it stood. The word "entitlement" appropriately described the legal situation referred to in article 47.

73. The CHAIRMAN said that, since none of the proposed amendments had received much support, he would take it that the Commission agreed to adopt paragraph (3) as it stood.

Paragraph (3) was adopted.

Paragraph (4)

74. Mr. LUKASHUK said that the last sentence of paragraph (4) contradicted the first sentence of paragraph (8) of the commentary to article 54. The penultimate sentence of paragraph (4) should be deleted, along with the word "only", in the last sentence.

75. Mr. ROSENSTOCK said that he could accept Mr. Lukashuk's proposal, although he would prefer to keep the penultimate sentence and delete the last sentence of paragraph (4). The second sentence was confusing and parts of it were completely inaccurate with regard to article 47. It should read: "State practice indicates that in resorting to countermeasures the injured State may seek the cessation of the wrongful conduct as well as reparation in a broad sense."

76. Mr. TOMUSCHAT said that he agreed with the proposal made by Mr. Lukashuk. In addition, the word "punishment", in the last sentence, should appear in quotation marks. It was regrettable that the draft did not deal with the important practical issue of whether the injured State was entitled to take justice into its own hands and, as reparation, to take what it considered was due to it.

77. Mr. de SARAM said it had never been the Commission's intention to attribute a punitive purpose to countermeasures. Such measures were strictly coercive. For that reason, he would delete the last sentence of paragraph (4).

78. Mr. VILLAGRÁN KRAMER said that he agreed with Mr. Tomuschat. It was none the less important to distinguish between reprisals taken against a State and reprisals taken against a State's nationals. In the latter case, the persons involved would be better off combating the countermeasures to which they were subjected by using the legal remedies available in the injured State. It was one matter to freeze assets, which was a legal act, and another matter to seize assets, which was not legal.

79. Mr. ROSENSTOCK said that in his view, the right to take countermeasures extended to obtaining reparation. Article 48 strongly suggested that a State could take interim measures of protection pending the outcome of negotiations and could go further following the negotiation phase. Thus, the distinction between interim measures of protection and countermeasures was, in fact, the distinction between freezing assets and seizing assets. The implication was that a State taking countermeasures could do so not only to oblige the other State to comply with its obligations but also to award itself compensation.

80. Mr. BOWETT said that the draft articles did in fact deal with the issue referred to by Mr. Tomuschat: in the case where a State taking countermeasures did so by taking reparation into its own hands, the remedy of compulsory arbitration was available. He was in favour of deleting the last two sentences of paragraph (4).

81. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to delete the last two sentences.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraphs (6) to (8)

82. Mr. BENNOUNA suggested that paragraphs (6) to (8) of the commentary to article 47 should be merged into one paragraph.

83. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to adopt paragraphs (6) to (8) as a single paragraph.

Paragraphs (6) to (8), as amended, were adopted.

Paragraph (9)

Paragraph (9) was adopted.

The meeting rose at 1.05 p.m.