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Summary record of the 416th meeting

Topic:
State responsibility

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49. Mr. AMADO considered the Secretary's remarks most pertinent to the discussion. It was essential to avoid confusion as to the exact nature of the subject. The subject was not really worthy of the attempts to enlarge it that had been made by some members of the Commission. International responsibility was virtually nothing more than a question of damages, a pecuniary matter.

50. There being no rules on the question and hardly any international instruments, the only basis for a codification was case law. In such a situation it was pointless to discuss whether or not "fault" was a pre-requisite of responsibility. The first thing to do was to compile a digest of the main arbitral awards involving State responsibility, for until the Commission knew what case law had to offer its discussions were bound to be academic.

51. He therefore proposed that the Commission should briefly review the articles drafted by the Special Rapporteur, and request him to prepare, in the light of the discussion, a third report, to which the digest he had just mentioned would be attached.

52. He wished to emphasize the following points: that the important question of denial of justice would only arise when all local remedies had been exhausted; that State responsibility could be envisaged only in connexion with claims made in good faith, i.e., when the aggrieved party had "clean hands"; and that an injury to an individual did not necessarily constitute an injury to the State of his nationality—the latter was free to close its eyes to the incident, if it wished.

The meeting rose at 1.5 p.m.

416th MEETING

Thursday, 13 June 1957, at 9.30 a.m.
Chairman: Mr. Jaroslav ZOUREK.

State responsibility (A/CN.4/106) *(continued)*

[Agenda item 5]

GENERAL DEBATE *(continued)*

1. The CHAIRMAN invited the Commission to conclude the general debate on Mr. García Amador's report (A/CN.4/106).

2. Mr. SPIROPOULOS said that the very profound differences on questions of principle which had become apparent during the discussion were quite understandable. The Special Rapporteur had, naturally enough, introduced certain innovations. Since those innovations, which were to be found mainly in chapters III and IV of his report, raised certain substantive questions relating to the violation of fundamental human rights, non-performance of contractual obligations and acts of expropriation, which did not strictly come under State responsibility, the remarks made by certain speakers on that score were to some extent justified.

3. He agreed with Sir Gerald Fitzmaurice on the advisability of limiting the study to rules of a more or less procedural nature. To consider every possible violation of an obligation involving the responsibility of the State would, as Mr. Tunkin had rightly pointed out (415th meeting, para. 32), entail covering the whole field of international law. It was, however, very difficult to draw a clear dividing line between the procedural and the substantive.

4. Articles 1 to 4 and 10 to 12, dealt with in chapters I, II and V of the report, were, he thought, fully relevant to the question of international responsibility. Articles 5 and 6, on the other hand, though dealing with the very important subject of respect for fundamental human rights, were not. It would accordingly be better to omit them, and take up their study when international instruments had made respect for fundamental human rights the legal duty of all States.

5. Similarly, he was not in favour of pursuing the study of articles 7, 8 and 9 at that stage in the Commission's work. Though relevant to the question of State responsibility, they dealt with special problems, and there were many other special problems equally worthy of study.

6. He therefore proposed that the Commission adopt as its immediate programme of work on the subject of State responsibility, the matters dealt with in articles 1 to 4 and 10 to 12, together with the questions left out of account by the Special Rapporteur but which he proposed to study in his next report (A/CN.4/106, para. 3). The problem of indirect responsibility suggested by Mr. Ago (415th meeting, para. 42) might also be studied. Such a decision could be taken without prejudice to the question of considering at a later stage the substantive matters dealt with in chapters III and IV of the report.

7. Mr. EL-ERIAN, referring to the problem of the scope of the subject, remarked that, as Mr. Ago had pointed out (415th meeting, para. 39), there were three courses open to the Commission. The first was to confine its study to international claims involving State responsibility for injuries sustained by foreigners, and exclude the other cases of State responsibility to which the Secretary had referred (*ibid.*, para. 46-48); the subject would then be more or less synonymous with the law of procedure with respect to international claims. Clearly, if so narrow a view were taken, many questions which speakers had found occasion to raise would be irrelevant.

8. The second course was to codify, in addition to the procedural rules, the substantive rules of international law with respect to the treatment of aliens. Such a course would, however, hardly be in accordance with General Assembly resolution 799 (VIII), which referred solely to the "principles of international law governing State responsibility".

9. Incidentally, since some members of the Commission had been taxed with introducing extraneous elements into the subject, it was interesting to note that much the same questions had been raised during the discussion of the Special Rapporteur's first report at the Commission's eighth session. Sir Gerald Fitzmaurice, for instance, had suggested that attention should be devoted to "the treatment of aliens in the broadest sense of the term—i.e., with regard not only to their persons, but also to their property, commercial interests and the like", justifying his suggestion on the ground that "to a large extent, international intercourse depended for its smooth flow on clearly formulated rules", and adding that "a code on that topic that would reconcile the different points of view and find general acceptance would be of real benefit".[1] There could, therefore, hardly be

[1] *Yearbook of the International Law Commission, 1956, Vol. I* (United Nations publication, Sales No.: 1956. V.3, Vol. I), 370th meeting, para. 52.

any objection to other members drawing attention, on the same grounds as Sir Gerald Fitzmaurice at the previous session, to certain problems on which some principles existed but no clearly defined rules. He agreed with the Chairman that a broader approach to the subject would raise many difficult questions, but he had never intended to suggest that the Commission should consider all international obligations from the standpoint of international responsibility. Nor had he ever confused the subject with the question of the rights and duties of States, a mistaken impression which, as the Secretary had pointed out (415th meeting, para. 46), had been dispelled in the debates in the Sixth Committee at the eighth session of the General Assembly.

10. The third course was to study international responsibility, leaving questions already included in the Commission's list of topics out of account, but dealing with any new principles enunciated in the Charter on which no clear rules of international law existed.

11. Now that all the various aspects and implications of the subject had been pointed out, the Commission could embark on a discussion of the articles drafted by the Special Rapporteur, setting aside those substantive rules relating more or less to the status and treatment of aliens. While considering it essential to take into account the "dynamics" of international law when seeking to codify it, he appreciated that it might be more advisable for the moment to concentrate on the law of international claims, which would mainly involve considering such questions as denial of justice, the exhaustion of local remedies and the nationality of claims.

12. Faris Bey EL-KHOURI remarked that in neither of his reports had the Special Rapporteur explained fully why injuries to aliens should be accorded a special legal treatment not accorded to injuries to a State's own nationals, although the same type of wrong and the same State responsibility were involved. He failed to see the point of converting personal claims into international claims in the case of aliens. Any text which accorded such special privileges to the claims of aliens would make a most unfortunate impression in his own country, and indeed throughout the Near East. The customary rules on the subject were based on the nineteenth century practice, imposed by the imperialist Powers. The state of affairs that had given rise to that practice no longer existed, and, with so many new and small States established under the aegis of the Charter of the United Nations, it would be unwise to codify a system which enabled personal claims to be transferred to the field of international responsibility.

13. Mr. YOKOTA was opposed to undue limitation of the scope of the Special Rapporteur's next report. In particular, he doubted the advisability of deciding to leave the question of the violation of fundamental human rights out of account after so brief a discussion. Even among those members who had raised objections to that question, some had been in favour of retaining certain points at least. Mr. François, for instance, though urging the deletion of article 6, was in favour of retaining article 5. It should be borne in mind, too, that the question of fundamental human rights was brought in not for its own sake but because it was closely connected with the question of the protection of foreigners and thus with international responsibility, even in its procedural aspects. He was in favour of including article 5 among the matters to be elaborated in the Special Rapporteur's next report. It was by no means impossible that when the Commission came to discuss that report it might decide to retain the article.

14. The CHAIRMAN pointed out that, if Mr. Spiropoulos's proposal were adopted that would by no means mean that the Commission would definitely forego the study of chapter III, concerning the violation of fundamental human rights, and chapter IV, on the non-performance of contractual obligations and acts of expropriation: it would merely defer consideration.

15. Sir Gerald FITZMAURICE said that, whereas chapter IV, which was concerned with the purely substantive question of treatment of foreigners in the matter of contracts, might well be left out of account, he agreed with Mr. Yokota in doubting the advisability of treating even part of chapter III in the same fashion. The section of article 5 which dealt with the important point of national treatment of aliens involved the concept of the international standard of justice, which, in turn, was inseparable from the subject of State responsibility. Though the point was, admittedly, one of substance, it had some bearing on the procedural question of denial of justice.

16. Mr. SPIROPOULOS explained that his remarks had referred to chapters III and IV as a whole. He agreed that the question of the international standard of justice was a very important one, and was relevant to that of international responsibility. The Special Rapporteur, therefore, might well deal with it in his next report, but not under the heading of fundamental human rights; to the best of his knowledge, tribunals had never described the international standard of justice as being based on the concept of fundamental human rights.

17. Mr. MATINE-DAFTARY said that he was not opposed to the provisions of articles 5 and 6 as such. On the contrary, he had described them in his previous statement (414th meeting, para. 19) as the keystone of the whole edifice. If he had advised the Commission against including chapter III in the subjects for further elaboration by the Special Rapporteur, it was because the question of human rights was already being studied by the Commission on Human Rights.

18. Mr. GARCIA AMADOR, Special Rapporteur, expressed his thanks to the members of the Commission for their kind remarks, and even more for their constructive criticism. He found himself, nonetheless, in an unenviable position because of the contradiction between certain criticisms. On the one hand, he had been commended for abandoning the somewhat revolutionary approach of his first report (A/CN.4/96) in favour of a more realistic attitude. On the other, he had been taxed with introducing revolutionary elements belonging to the sphere neither of codification nor of development of international law, but to municipal law. Equally disconcerting was Mr. Ago's observation that he had neglected to consider the penal element in State responsibility. For the Commission would recall that in his previous report he had devoted a whole chapter to criticizing the limitation of the concept of State responsibility to civil liability, and had reluctantly excluded the penal element at the express request of the Commission.

19. Various speakers had dwelt on the political aspects of the problem, and it must be said that there were few subjects in international law where political considerations intervened so persistently. On the other

hand, there was none that was entirely free from them; even the comparatively harmless question of diplomatic privileges and immunities had, somewhat to his surprise, proved to possess political undertones. But the fact that the question of State responsibility was beset by such difficulties was no reason for abandoning the task of seeking out its basic principles.

20. A further source of perplexity was the variety of distinctions drawn in an endeavour to delimit the topic, distinctions between substantive and procedural rules and between State responsibility on the one hand, and the obligations of States and the status and treatment of aliens on the other. He must confess, however, that in all his preparatory studies of the background to the subject he had never come across such clear-cut distinctions. Differences there undoubtedly were, but none such as to justify the distinctions established during the discussion. The treatment of aliens, for instance, was an age-old subject, which had gradually moved from the sphere of private into that of public international law, and was now passing into a new sphere, that of the international respect for human rights. As Mr. Verdross had pointed out in a lecture on the subject at the Academy of International Law, the question of international responsibility arose not at all on some points but constantly in connexion with others.

21. As far as the distinction between international responsibility and the obligations of States was concerned, he considered it impossible not to refer to obligations in connexion with the question of imputability, international responsibility being invariably the consequence of a breach or non-performance of an obligation.

22. He could not avoid the impression that the discussion had complicated the question unnecessarily by introducing notions and distinctions totally absent from the texts on the subject produced by the Institute of International Law and the Harvard Law School, and in connexion with the Conference for the Codification of International Law held at The Hague, in 1930. For his first report, it was he himself who had been guilty of introducing complications. Now the position appeared to be reversed, for, with the exception of chapter III, his report was a faithful reproduction of the principles of previous codifications. He would nonetheless follow the Commission's instructions to the best of his ability.

23. Mr. AGO felt there was some misunderstanding. When the Special Rapporteur referred to the "penal element" of responsibility, he was evidently thinking of the question of the possibility of punishing the person who had committed the act which had given rise to the international responsibility of the State. What he himself had had in mind when speaking of the punishable or penal consequences of an illicit international fact was something quite different. The authors who had dealt with the question of State responsibility had always been doubtful whether, when an unlawful international fact gave rise to such responsibility, the only course open to the injured State was to ask the responsible State to make reparation for the injury, either by restoring the *status quo ante* or, if the *status quo* could not be restored, by equivalent reparation, or whether, on the contrary, it was also open to the injured State, particularly when no reparation could be obtained, to punish the State responsible for the violation of its subjective right; it was that latter possibility that he had had in mind when he had spoken of the punishable or penal consequences of an unlawful international fact (413th meeting, para. 63), or the "penal" aspect of international responsibility. The matter might perhaps be of less importance in connexion with the subject the Commission was discussing than with the study of the question of international responsibility as a whole. In any event, however, the problem remained to be solved, in particular if no reparation was made by the responsible State. In that connexion he recalled that certain authors, including Kelsen, in his view rightly, considered that the reprisals to which States might resort in such a case would be a form of sanction, and thus in that sense a "penal" consequence of the illicit fact committed by the responsible State.

24. With regard to the question of imputability, all he and, he thought, Sir Gerald Fitzmaurice had wished to say was that those articles in which the question was dealt with should be considerably amplified rather than modified. Mr. Spiropoulos, he thought, had had the same idea in mind in proposing that the Commission should leave aside chapters III and IV and concentrate on elaborating the very general principles that were laid down in chapters I and II.

25. Mr. VERDROSS pointed out that the scope of the draft articles was determined by the title of the report, which referred specifically to the "responsibility of the State for injuries caused in its territory to the person or property of aliens". Those members of the Commission, however, who criticized the trend of the draft articles were considering "State responsibility" in general, regardless of the sphere in which the violation of international law occurred. The Commission must therefore decide whether it wished to alter the entire scope of the subject it was considering, or whether to continue along the same lines.

26. Mr. SPIROPOULOS observed that General Assembly resolution 799 (VIII) referred only to State responsibility, without specifying what was meant by that term. When the Commission had first come to discuss it, it had seen how the term could be interpreted in such a way as to embrace a very large part, if not the whole, of international law. It had accordingly decided to follow the example set by the 1930 Codification Conference and limit the subject to the special problem of the responsibility for injuries sustained by aliens. He did not think the Commission could now consider redefining the subject and thus changing its entire scope. He therefore maintained his proposal that it should decide to leave chapters III and IV aside provisionally—on the understanding that it might have to consider including some provision on the international standard of justice—and confine itself to studying the remaining articles. It might well find that many of them could, in fact, apply to other cases of State responsibility (i.e. other than those arising out of the protection of aliens), but there would be no difficulty about that; in fact it would facilitate the Commission's subsequent task.

27. Mr. EL-ERIAN said he could not agree with Mr. Ago if he meant that the Commission should deal with reprisals and other hostile measures short of war. Even if there had been some ambiguity in the Covenant of the League of Nations as to whether such measures were legal or not, there was no such ambiguity in the United Nations Charter. If a State which had suffered an injury failed to get satisfaction from the State responsible for the injury, the issue between the two States became an international dispute which must then be settled by one of the many means for the peaceful set-

tlement of disputes mentioned in Chapter VI of the Charter.

28. Mr. BARTOS felt that Mr. Ago had been perfectly right to raise the question of reprisals. It was, however, necessary to distinguish between compensation for injury done to a person or to his property, and the reparation due to a State. As regards the latter type of case, where for example a national flag was violated, reparation might take the "penal" form referred to by Mr. Ago; but he doubted whether that would ever happen in the event of injury inflicted on an alien or his property. On the other hand, there was undoubtedly a tendency on the part of arbitral tribunals to award increased compensation in cases where they felt it was desirable to emphasize that the responsible party was not only responsible but guilty—if, for example, he had been acting in bad faith. Similarly, in the treaties concluded with Nazi Germany's allies after the Second World War, the amount of reparations to be paid had been determined to some extent at least by the degree of "fault" that was found to reside in their actions. He was not defending that tendency, but it was, nonetheless, sufficiently widespread for it to be desirable that the Commission should take it into account.

29. Although the Special Rapporteur had therefore been right to leave such matters out of account, if one considered the question solely from the point of view of the decision which the Commission had taken at its previous session, Mr. Ago was also right in contending that the Commission should not ignore the question of penal consequences—even if he (Mr. Bartos) interpreted that term somewhat differently.

30. Mr. AGO said that his purpose in raising the question of the punishable or penal consequences of an unlawful international fact had been to ensure that the Commission did not overlook it. He had been careful to avoid giving any reply to the question whether and in what circumstances such sanctions were legitimate. He had certainly not intended to say, for example, that military reprisals were always a legitimate form of reaction to an unlawful international fact, in the light also of the United Nations Charter.

31. Sir Gerald FITZMAURICE thought that Mr. El-Erian had over-simplified the matter by taking "reprisals" as involving the use of force or something very akin to force. On the contrary, "reprisals" was a very general term covering many different types of counter-action, some of which could be, and were, undoubtedly peaceful and legitimate; although the Charter forbade the use of force, it had nothing to say on recourse to such peaceful types of counter-action at all. Of course the Charter provided machinery for the peaceful settlement of disputes without recourse to reprisals; but the whole difficulty lay in the fact that one party could always refuse to use that machinery, and there was at present no means of compelling it to do so. Even if the other party took the dispute to the United Nations and the United Nations made some recommendation concerning it, there was no means of compelling either party to comply with such recommendation. Until the present international machinery had been made more effective, therefore, recourse to peaceful sanctions remained a legitimate form of counter-action.

32. Mr. SPIROPOULOS said that, in his view, the problem of reprisals had nothing to do with the problem the Commission was discussing. The Commission was concerned solely with the consequences of a violation of international law, whereas an act of reprisal was not a consequence but the reaction of the injured state.

33. Mr. AGO said he could not agree with Mr. Spiropoulos either that the matter was irrelevant or that any reprisals resorted to by the injured State might not be regarded as a consequence of the violation of international law committed by the guilty State. Mr. Spiropoulos had rightly spoken of a "reaction" by the injured State. Legally, however, such a reaction was not possible except precisely because of the fact that it was the consequence of a wrong suffered. In other words, the consequence of the unlawful act committed by one State was to make lawful on the part of the injured State, a reaction which would otherwise itself have been unlawful.

34. The CHAIRMAN said that the whole question of penal consequences, damages, and the related matters referred to by Mr. Ago and Mr. Bartos, was extremely interesting, but the Special Rapporteur had already indicated that his next report would cover, amongst other things, the entire subject of the form and scope of reparation. The Commission would therefore undoubtedly have the opportunity of reverting to those questions at its next session, and any discussion of those questions would be premature at the current session.

35. Turning to the question of procedure, Mr. MATINE-DAFTARY said that the Special Rapporteur's draft was an indivisible whole, and he was therefore opposed to discussing some parts of it and leaving others aside, as Mr. Spiropoulos had proposed. He was also opposed to simply referring the draft back to the Special Rapporteur without giving him any clear directives on points of principle.

36. He proposed, therefore, that the Commission should discuss and decide certain points of principle, in particular, first, whether it wished to confine the draft solely to the question of the protection of aliens, or whether it wished to extend it to cover responsibility for the violation of all types of international obligation; and secondly, whether it could accept the principle that aliens should be treated in the same way as nationals.

37. The CHAIRMAN felt that the first question of principle referred to by Mr. Matine-Daftary was already settled, since the title of the draft referred only to injury to the person and property of aliens; it went without saying that the study of that question was only the first stage in the study of the whole subject. He also felt that a discussion on questions of principle such as Mr. Matine-Daftary proposed might lead nowhere. In his view, it would be better, when the general debate was concluded, to consider the text of the draft articles themselves and reach some conclusion on them even if it was only a provisional one, subject, of course, to later redrafting when the whole draft was put together. Disagreements on the treatment of aliens could best be discussed in connection with the text of the articles and the amendments proposed by the members of the Commission.

38. Mr. GARCIA AMADOR, Special Rapporteur, said that, in the two or three days available to it, the Commission could not hope to discuss all the articles exhaustively. Article 1 could well be left aside, since it clearly depended on the eventual form of the remainder. Articles 2 and 3 stated simple, elementary rules of international law, and should not cause much difficulty. Arti-

cle 4 raised a difficult and fundamental question on which it would be useful to have a full discussion. Regarding articles 5 and 6, the Commission must make up its mind whether it was in favour of the approach he proposed or not; if not, it would have to choose between the principle of an international standard of justice and that of the equality of nationals and aliens; but the whole question was one on which members of the Commission might wish to reflect for another year, for it was indeed the crux of the whole draft. Articles 7, 8 and 9 had been described as substantive law, but they had been discussed at length at the 1930 Codification Conference, and had always been regarded as an integral part of State responsibility; he himself had no doubt that they should be retained in the draft, and it would be desirable for them to be discussed at the current session if time allowed. Unfortunately, time would almost certainly not allow discussion of the one fundamental question raised in articles 10, 11 and 12, namely, the question of negligence. Even so, discussion of the remaining points he had referred to should give him invaluable guidance in revising the draft articles for further consideration at the next session.

39. Mr. PADILLA NERVO expressed the view that, in considering the draft articles, the Commission should not vote on them or on any amendments submitted to them but merely discuss, in a general manner, the various points that were raised, especially those to which the Special Rapporteur had just drawn particular attention.

40. Mr. SPIROPOULOS said he was quite willing that the Commission should proceed to discuss the draft articles, beginning with article 2, as suggested by the Chairman and the Special Rapporteur, since he did not think it would reach chapter III anyway.

41. Mr. MATINE-DAFTARY said he did not insist on his proposal, (para. 36 above) since the procedure suggested by the Chairman would in practice amount to the same thing.

The Commission decided to discuss the draft (A/CN.4/106, annex) article by article, beginning with article 2.

The meeting rose at 1.5 p.m.

417th MEETING

Friday, 14 June 1957, at 9.30 a.m.
Chairman: Mr. Jaroslav ZOUREK.

Co-operation with international bodies

1. The CHAIRMAN invited the Commission to consider the contents of a letter dated 27 May 1957 addressed to the Secretary of the Commission by the Acting Secretary of the Asian Legal Consultative Committee, and drew attention in that connexion to article 26 of the Commission's Statute, relating to consultation with international or national organizations, and to the resolutions on co-operation with inter-American bodies adopted by the Commission at its sixth, seventh and eighth sessions.

2. Mr. LIANG (Secretary to the Commission) stated that he wished first of all to report to the Commission regarding the resolution adopted by the Commission in 1956 on the subject of co-operation with inter-American bodies. Under that resolution the Commission requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, as an observer, the fourth meeting of the Inter-American Council of Jurists to be held at Santiago, Chile, in 1958.[1] He had, however, been informed that, owing to the need for further preparatory work by the Inter-American Juridical Committee of Rio de Janeiro, the meeting would have to be postponed until 1959. No further action by the Commission was required in that connexion.

3. He then went on to explain that the Asian Legal Consultative Committee, described by its Acting Secretary as an "intergovernmental committee of legal experts", had been established on 15 November 1956 for an initial period of five years by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. According to article 3 of the Committee's Statute, one of its objects was "to examine the questions under consideration by the International Law Commission and to arrange for its views to be placed before that Commission." At the Committee's first meeting at New Delhi from 18 to 27 April 1957, it had instructed its Acting Secretary to get in touch with the Commission with a view to establishing consultative relations.

4. The CHAIRMAN proposed that the Commission authorize the Secretary to reply to the Asian Legal Consultative Committee on the following lines:

(1) The Commission will ask the Secretary-General of the United Nations to put the Asian Legal Consultative Committee on the list of organizations which receive the Commission's documents (see article 26, paragraph 2, of the Commission's Statute).

(2) The Commission requests the Consultative Committee to send, whenever it sees fit, any observations it may wish to make on questions under study by the Commission.

(3) The Commission has pleasure in acknowledging the Committee's letter, and expresses a keen interest in its work. The Commission would welcome any information on the development of its programme.

It was so agreed.

Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) *(continued)*[2]

[Agenda item 1]

5. The CHAIRMAN recalled that the Commission, after adopting its draft convention on arbitral procedure at its fifth session, had recommended to the General Assembly, under article 23, paragraph 1, of its Statute, that the Assembly recommend the draft to members with a view to the conclusion of a convention.[3] Under resolution 989 (X) adopted by the Assembly on 14 December 1955, the Commission was invited to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session. The Assembly had also decided to place on the provisional agenda for its thirteenth

[1] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9*, para. 47.

[2] Resumed from 404th meeting.

[3] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, paras. 53-55.