

Document:-
A/CN.4/3085

Summary record of the 3085th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2011, vol. I

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and 58 of the report. That draft article was quite acceptable. If it proved necessary to alter it, it was up to the Drafting Committee to do so. The only amendment proposed in the section of the report from paragraphs 29 to 86 concerned draft article 39, which had likewise been debated at length in the Commission. In paragraph 84, the Special Rapporteur proposed a text which was a synthesis of all the opinions that had been expressed, including the minority view defended by Mr. Valencia-Ospina. It was a very good solution. He also fully agreed with the amendment of draft article 60 proposed in paragraph 107, which concerned only its form. He had hoped that draft article 44 would be amended. The Special Rapporteur had not submitted any proposals, but the Drafting Committee could look into the matter.

40. In conclusion, he was in favour of sending all the draft articles to the Drafting Committee. Since the text had been approved by the Commission on first reading after some lengthy debate, the Drafting Committee should concentrate on the comments and proposals made by States and international organizations and, if possible, it should not revisit questions that had been decided five or more years earlier. He fully agreed with Mr. Dugard and, like him, he hoped that the Special Rapporteur would flesh out the commentaries on draft articles which represented progressive development of international law.

The meeting rose at 11.30 a.m.

3085th MEETING

Friday, 6 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Later: Mr. Maurice KAMTO (Chairperson)

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the next two weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

* Resumed from the 3081st meeting.

Responsibility of international organizations (*continued*) (A/CN.4/636 and Add.1–2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

2. The CHAIRPERSON invited the Commission to resume its consideration of the eighth report on responsibility of international organizations (A/CN.4/640).

3. Mr. NOLTE, after welcoming Ms. Escobar Hernández to the Commission, said that he had little to criticize in the second part of the eighth report on responsibility of international organizations. He was in favour of retaining draft article 20 (Self-defence), particularly as the Special Rapporteur had indicated that the resorting by an international organization to self-defence was not a purely hypothetical situation. However, he agreed with other members that the limited likelihood of such an occurrence should be emphasized in the commentary to the draft article.

4. He expressed support for draft article 21 (Countermeasures), welcoming the suggestion in paragraph 67 of the report that some international organizations did exclude the possibility of countermeasures against their members. He found useful the distinction drawn between three contingencies which existed with regard to countermeasures: the relationship between an international organization and non-members; the relationship between an international organization and its members with respect to the members' rights; and the relationship between an international organization and its members in respect of treaties concluded by member States in a capacity other than as members of the organization. However, the Commission should not draw too great a distinction with regard to the latter category, for if a State was a member of an international organization it assumed additional responsibilities for supporting the organization, and those responsibilities could also affect treaties that it had concluded outside the context of its membership of the international organization.

5. A case in point was Switzerland, which upon joining the United Nations had agreed to abide by Article 2, paragraph 5, of the Charter of the United Nations, which set out a general obligation to support the Organization. Yet there were surely situations in which that provision could affect the interpretation of treaties concluded by Switzerland or the responsibility of Switzerland as a State, and from that perspective the country could not be viewed merely as a third party.

6. He was also in favour of draft article 30 (Reparation). With regard to draft article 31 (Irrelevance of the rules of the organization), he welcomed the emphasis placed in paragraph 77 of the report on the fact that international organizations could not be relieved by their rules from complying with their obligations. He supported the Special Rapporteur's balanced proposal in paragraph 84 of the report regarding draft article 39 (Ensuring the effective performance of the obligation of reparation). The Special Rapporteur had recognized the ambiguity that existed in the original version of draft article 39, which could be

taken to imply that there was an independent obligation on the part of member States to provide an international organization with financial means to fulfil its obligation of reparation, when such an obligation should in fact arise from the rules of the organization.

7. Nonetheless, he disagreed with Mr. Pellet that the obligation for member States to provide an international organization with the means to fulfil an obligation of reparation was a logical consequence of having conferred legal personality on the organization; under domestic legislation, for example, the establishment of a limited company did not give rise to responsibility. Similarly, he was not in favour of Sir Michael's suggestion that the wording of the proposed new second paragraph of draft article 39 should be softened by replacing "shall" with "should". The obligations in question were international legal obligations of the international organization itself that had no effect on the obligations of the State.

8. In conclusion, he commended the Special Rapporteur for his very balanced, subtle and thorough report, and in particular the second part of it.

9. Mr. McRAE, after welcoming Ms. Escobar Hernández to the Commission, said that he greatly appreciated the Special Rapporteur's response to the concerns raised by members earlier in the debate and his willingness to draft an introduction that would appear in the report on the work of the session, that would allay some of those concerns and contribute to the wider acceptability of the draft articles among States and international organizations as well as among the academic community.

10. Broadly speaking, he found the Special Rapporteur's responses to the comments of States and international organizations acceptable, and he therefore wished to focus on some of the issues raised by international organizations that had caused difficulty in the Commission in the past. In that regard, he noted that while the extensive comments of the Secretariat of the United Nations were helpful and informative, it was unfortunate that the Secretariat had waited until practically the end of the process before submitting them. The Commission would have benefited significantly had it been able to analyse those comments at an earlier stage.

11. Concerning draft article 20, he agreed with the Special Rapporteur that there was no need to reopen the question of self-defence. However, some further reflection might be needed with regard to draft article 21 (Countermeasures), although he would not go as far as Sir Michael by suggesting that the draft article should be replaced by a saving clause.

12. The treatment of countermeasures by the Secretariat highlighted the principle of speciality. Given the universality of the United Nations, countermeasures taken by or against the Organization would in most cases be actions taken by or against a Member State. However, such a situation was far less likely to arise when countermeasures were taken by or against the European Union, which interacted on a variety of levels with States that were non-members. Moreover, a decision by the United Nations to take countermeasures was effectively a decision taken by the vast majority of the

world's States, which gave the decision enhanced status and possibly greater credibility than the decisions of other international organizations.

13. Perhaps because of the particular position of the United Nations, the comments of the Secretariat had tended to focus on countermeasures in relation to a Member State. Yet there were two types of relationship between an organization and its member States, as Sir Michael and Mr. Nolte had noted: a relationship with the State in its capacity as a member and a relationship with the State independently of membership. In the case of the United Nations, the comprehensiveness of the Charter of the United Nations suggested that, with the possible exception of the conclusion of a headquarters agreement, it was hard to think of the relations between the United Nations and a Member State as being completely independent of the organization/membership relationship.

14. The primary source for the rules governing the relationship between a State and another State in its capacity as a member was the rules of the organization, a context in which it could be argued that rules relating to countermeasures had no place. Moreover, it was at that point that the analogy with States broke down: States were simply self-contained units, whereas international organizations were entities with an international legal personality composed of other international legal persons.

15. All of those considerations raised questions as to whether draft article 21, paragraph 2, and draft article 51, both of which dealt with countermeasures in respect of members, sufficiently reflected the distinction between members acting as members and members acting independently of membership, and whether they made it sufficiently clear that the relationship between an organization and its members was governed by the rules of the organization. It had to be made clear that the rules on countermeasures were not designed to give member States or member organizations greater rights than they would otherwise have under the rules of the organization. Although draft articles 21 and 51 had been the subject of extensive debate in the Commission and in the Drafting Committee, they perhaps warranted further attention. The Commission might wish to address the role of the rules of the organization in the organization/member relationships in greater depth in the commentary.

16. With regard to draft article 30 (Reparation), he observed that the United Nations practice of concluding bilateral agreements with States in whose territory peacekeeping units were based raised an important question about the extent of the obligation to make "full" reparation under that article. Presumably, international organizations could limit their responsibility to provide reparation by means of bilateral agreements. Since the conduct of military or peacekeeping operations was probably the area in which the likelihood of responsibility was greatest, it was not surprising that it was regulated by such agreements, and that practice needed to be taken into account in the draft article itself or at least in the commentary.

17. He welcomed the Special Rapporteur's proposal concerning draft article 39, yet in a sense both of the proposed paragraphs were unsatisfactory. However,

States had made it clear that they did not want a provision making them directly responsible for the wrongful acts of international organizations, including the responsibility to make reparation. And while that was understandable in the case of organizations with a large membership where decisions were not taken by unanimity, in the case of smaller organizations, where the actions of the organization were clearly those of a limited number of States acting collectively, the claim that member States should be exonerated from responsibility for the actions of the organization was less credible. He was not convinced by Mr. Nolte's analogy with limited liability companies.

18. The question of reparation offered a classic example of an area in which the diversity of international organizations meant that differentiated rules should be applied to them—in some cases, that implied obligations upon member States that were much more onerous than those imposed under the existing version of draft article 39. However, he would not press the point, as he knew that he was in a minority.

19. He did wonder, however, whether the order of the proposed two paragraphs should not be inverted. The draft articles primarily concerned international organizations, and thus the obligation upon organizations should be stated before the obligations upon member States. Moreover, like Mr. Pellet and Mr. Nolte, he did not agree with Sir Michael that the wording in paragraph 2 should be changed from “shall take” to “should take”. The provision required only that the responsible international organization should take appropriate measures “in accordance with its rules”, and he did not consider that to be too great an interference in the budgetary autonomy of the General Assembly.

20. In conclusion, he recommended that all the draft articles be referred to the Drafting Committee.

Ms. Jacobsson (Vice-Chairperson) took the Chair.

21. Mr. NOLTE said that he wished to clarify his earlier comments. He had not meant to imply that international organizations were like limited liability companies; he had merely disagreed with the argument put forward by Mr. Pellet that it was a logical consequence that one was fully liable for what one created, as evidenced by the existence under domestic law of limited companies, which had limited liability.

22. However, he agreed with Mr. McRae that, in many cases, smaller organizations could act collectively yet not necessarily as international organizations. When considering the draft articles on responsibility of international organizations it was important to bear in mind that States were always responsible, whether they acted together or in parallel. A salient example was the action of certain members of NATO, who had emphasized that, particularly in their actions *vis-à-vis* third States, they were acting not as an international organization but as a group of States.

23. Mr. FOMBA, after welcoming Ms. Escobar Hernández and commending the Special Rapporteur for his introduction of the second part of his eighth report, said that he wished to recall his position of principle with regard to the topic under consideration. States were primary and

full subjects of international law and must therefore assume fully their international responsibilities, while international organizations were derivative subjects of international law, albeit no less important. *Prima facie*, issues relating to international responsibility should be considered in those terms. Although the entire legal regime of international organizations was governed by the principle of speciality, the approach to the issue of responsibility should be based not on the nature of speciality but rather on the degree of speciality. The problem lay in deciphering, in legal terms, the possible consequences of the principle of speciality and the derivative and functional nature of the legal personality of international organizations.

24. Where circumstances precluding wrongfulness were concerned, he believed that the overall analytical framework should be the same. The principal difficulty lay in correctly assessing the respective roles of codification and progressive development. The absence or lack of practice should not be a major reason for not considering the issues from the standpoint of reasonable progressive development, where necessary; accordingly, the Commission should not be afraid to tackle important and sensitive issues such as self-defence, countermeasures or reparation. In his view, the circumstances precluding wrongfulness listed in chapter V of Part Two as adopted by the Commission on first reading in 2009⁴⁰ should be retained, despite the reservations and concerns—some of them legitimate—expressed by States and international organizations.

25. Responding to some of the views expressed during the debate on the previous day, he suggested that the Drafting Committee might wish to consider Sir Michael's proposal concerning the treatment of countermeasures. The suggestion by Mr. Petrič that the Special Rapporteur elaborate on progressive development in the commentaries to the draft articles also warranted attention. He was in favour of referring all the draft articles to the Drafting Committee.

26. Mr. WISNUMURTI, commenting on the second part of the eighth report, said that the idea of an international organization having a right to self-defence had been controversial. He had entertained serious doubts about transposing the notion of self-defence from article 21 of the articles on responsibility of States for internationally wrongful acts to the draft articles on responsibility of international organizations,⁴¹ because an international organization could not be treated in the same way as a State Member of the United Nations. Moreover, if a United Nations peacekeeping force was attacked by an armed gang or rebel forces, its right to self-defence would emanate from the headquarters agreement concluded with the State in which the operation was deployed (which must be consistent with international law) and not from Article 51 of the Charter of the United Nations. He therefore supported the current version of draft article 20, since it represented a compromise solution reached after intense debate within the Commission.

⁴⁰ *Yearbook ... 2009*, vol. II (Part Two), pp. 21–22.

⁴¹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

27. In general, the Special Rapporteur had responded appropriately to the wide range of views and suggestions put forward with regard to draft article 24, concerning necessity as a ground precluding the wrongfulness of an act by an international organization. For example, in paragraph 71 of his report, he had accommodated the viewpoint expressed by Austria by offering to incorporate in the commentary a reference to practice that showed that international organizations considered the operational/military necessity principle to be a rule based first and foremost on customary law. Inclusion of that wording in the commentary would add clarity to the notion of necessity, even though, as the Special Rapporteur had noted, it pertained more to the primary rules governing the conduct of armed conflicts than to circumstances precluding wrongfulness.

28. With respect to draft article 30 (Reparation), it had been argued that the fact that international organizations did not generate their own financial resources might hamper their ability to make full reparation for an injury caused by an internationally wrongful act that they had committed. The Special Rapporteur had rightly countered that argument by emphasizing that, in practice, the principle of full reparation was often applied in a flexible manner. In that connection, there was merit in Mr. McRae's suggestion that the Commission should consider the inclusion of a reference, in the text of the draft article or in the commentary thereto, to the option of setting a limit to reparation in the headquarters agreement with the State in which the international organization was operating.

29. Several suggestions had been made for strengthening the provisions of draft article 39 by stressing member States' obligation to provide an international organization with sufficient financial means to make reparations. Since the existing text had been regarded as unclear, it was heartening to note that in order to build up that provision, the Special Rapporteur had returned to wording suggested by Mr. Valencia-Ospina, currently contained in paragraph (4) of the commentary, to the effect that it was the duty of the responsible international organization to take all appropriate measures in accordance with its rules to ensure that its members provided it with the means for effectively fulfilling its obligations. Inserting that wording in draft article 39, as suggested by the Special Rapporteur in paragraph 84 of his report, would reinforce the provisions aimed at ensuring the effective implementation of organizations' obligations regarding reparation.

30. States had generally approved of draft article 60, which dealt with the responsibility of a member State seeking to avoid compliance with one of its international obligations. Furthermore, paragraph 107 of the report made it plain that a State would not incur responsibility for conduct that was in accordance with the rules of the organization. He agreed with the Special Rapporteur's suggestion that, in order to avoid any overlap between draft article 60 and draft articles 57 to 59, the phrase "subject to articles 57 to 59" should be inserted at the beginning of draft article 60.

31. Draft article 65, concerning the individual responsibility under international law of any person acting on behalf of an international organization or State, was important. He agreed with the suggestion that it was

necessary to clarify in the commentary that the individual responsibility in question encompassed both criminal and civil responsibility.

32. He was in favour of retaining draft article 66 as a saving clause and therefore welcomed the Special Rapporteur's intention to allay the fears of the Secretariat of the United Nations mentioned in paragraph 121 of the report by making it clear that paragraph (3) of the commentary did not purport to exclude the United Nations from the scope of application of the draft article.

33. He was in favour of referring the draft articles to the Drafting Committee.

34. Mr. GAJA (Special Rapporteur) said that the Commission's views on some of the draft articles had been divided, as they had been at first reading. Mr. Fomba, Mr. McRae, Mr. Nolte, Mr. Petrič and Sir Michael had been in favour of retaining the provisions on self-defence, while Mr. Pellet, Mr. Perera and Mr. Wisnumurti had advised against it. As Mr. Perera had observed, the Secretariat had defended draft article 20 for the wrong reason, but it had been clearly in favour of keeping that provision. One possible option that the Drafting Committee might consider would be to turn draft article 20 into a "without prejudice" clause.

35. On the subject of countermeasures, which one speaker had described as "a necessary evil", he observed that Mr. Candioti, Mr. Dugard, Mr. Melescanu, Mr. Nolte and Mr. Pellet had defended the retention of draft articles 21 and 50 to 56. Mr. Perera and Mr. McRae had been more sceptical and Sir Michael had proposed their deletion or, alternatively, the introduction of a "without prejudice" clause with regard to the "question of countermeasures taken by an international organization in response to a breach by a member of the organization of a rule of international law that is binding on the member because of its membership". The substance of that proposal, which had received some support, was not far from that of the current text of draft article 21, paragraph 2 (a), which stated that countermeasures against members must not be "inconsistent with the rules of the organization". Under the current text, the admissibility of countermeasures in the relationship between an organization and its members was essentially decided by the rules of the organization. Unlike Sir Michael's proposal, that paragraph did not distinguish between countermeasures taken by an international organization against its members according to whether they related to a breach of an obligation under a rule binding the member because of membership; the paragraph reflected the view that the rules of the organization might or might not make such a distinction. The point had been made that, in the relationship between the European Union and its members and between the United Nations and its Member States, the possibility of adopting countermeasures might differ according to the breach giving rise to the countermeasure. If a "without prejudice" clause was introduced, or if paragraph 2 was recast to give more weight to the rules of the organization, it might be preferable to cover all countermeasures taken by an organization against its members. If an organization's rules did restrict countermeasures in situations in which the breach concerned a rule that was binding because of membership, the case would be covered by paragraph 1.

36. He suggested that Sir Michael's proposal regarding a "without prejudice" clause and Mr. Pellet's proposal to limit countermeasures by an international organization to those adopted "within the framework of its functions" should be considered by the Drafting Committee. Presumably, the latter proposal was intended to convey the idea that an international organization might not exceed its functions when taking countermeasures.

37. Sir Michael's critical position on the draft article on necessity, which did not appear to be shared by any other States or speakers, was that if the article was retained, international organizations would be placed in a position similar to that of States. The Commission's intention was in fact to restrict the possibilities open to international organizations of pleading necessity. He also disagreed with Sir Michael's view that the requirement that the act in question should be the only means whereby an international organization could safeguard an essential interest against a grave and imminent peril constituted a very strict test. While Mr. Perera had expressed some doubts about the current text of draft article 24 and would like to see it fleshed out, he had also been in favour of restricting the ability of international organizations to rely on necessity.

38. The second set of rules addressed in the debate concerned reparation. The principle of full reparation had been defended by Mr. Melescanu, Mr. Nolte and Mr. Pellet. In that context, some speakers had wondered whether General Assembly resolution 52/247 of 26 June 1998, which concerned claims against the United Nations arising from peacekeeping operations, also covered claims under international law. That question could be left open in the commentary. Mr. McRae and Mr. Wisnumurti had referred to the impact of bilateral agreements. He had difficulty, however, in understanding how the impact of such agreements should affect the wording of draft article 30, since it was clear that States and international organizations could modify the rules laid down in the draft articles. Perhaps a general statement should be made to that effect in the commentary. The Commission's intention was not to lay down peremptory rules that a State or international organization could not modify.

39. The proposal that he had made in paragraph 84 of his eighth report regarding a revision of draft article 39 had met with general, albeit not unanimous, approval. Mr. Candioti, Mr. Dugard, Mr. McRae, Mr. Melescanu, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Valencia-Ospina and Mr. Wisnumurti agreed to add a new paragraph to that draft article, which would read:

"The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this chapter."

Sir Michael wished the word "shall" to be replaced with "should", while Mr. Pellet would prefer to see members' obligation strengthened, although he had not suggested any wording. The overall impression he had gathered from the debate was that the proposed text of the draft article was acceptable, subject to some fine-tuning by the Drafting Committee, which could also consider

Mr. McRae's proposal to invert the order of the two paragraphs. In addition, Mr. McRae had stressed the element of speciality and drawn a distinction between international organizations based on the size of their membership. He wondered whether that point was relevant to draft article 39, or whether it might be better dealt with in the commentary to draft article 61.

40. As far as draft article 44 (Admissibility of claims) was concerned, he had been pleased to hear the former Special Rapporteur on diplomatic protection, Mr. Dugard, suggest that functional protection, which was essentially protection extended by an international organization to one of its agents against a State, should be studied by the Commission as a separate topic. It would not be an easy topic, since functional protection could also be provided by States.

41. Mr. Dugard would like draft article 44 to specify that the requirement of nationality did not apply to claims relating to human rights violations. That point was already set forth with regard to claims made by States other than injured States or by international organizations in draft article 48, paragraph 5, which referred only to draft article 44, paragraph 2, and not to draft article 44, paragraph 1. This constituted an improvement on the articles on State responsibility, which drew no such distinction. El Salvador had indicated that the Spanish text of draft article 44 was ambiguous in that regard and the Drafting Committee should therefore review the text from that standpoint.

42. Sir Michael Wood had suggested the deletion of draft article 60 (Responsibility of a member State seeking to avoid compliance) because it had no equivalent in the articles on State responsibility, despite the fact that the same situation might arise in relations between one State and another. While it was true that a similar situation might occur in relations between States, it was far from being the same, since in the case contemplated in draft article 60 a State might take advantage of the separate legal personality of the international organization of which it was a member. In that capacity it could directly influence the organization, while the organization was unlikely to be under the same obligations as the member State.

43. Although the wording of draft article 60 had been well received by States, it could no doubt be improved. In paragraph 106 of his eighth report he had listed various proposals from States that should be examined by the Drafting Committee. The Committee should likewise study Sir Michael's proposal to replace the word "prompting" with "causing" in paragraph 1 of the draft article.

44. He appreciated Mr. Wisnumurti's support for retaining draft articles 65 and 66 and developing the commentary. In general, Commission members seemed to be in favour of enriching the commentaries. He would therefore welcome any suggested additions, especially texts that would show how certain principles established in the articles on State responsibility were also applicable to international organizations.

45. By way of conclusion, he proposed that all draft articles that had not yet been sent to the Drafting Committee should be referred to it.

Mr. Kamto resumed the Chair.

46. The CHAIRPERSON said he took it that the members of the Commission wished to refer draft articles 19 to 66 to the Drafting Committee.

It was so decided.

The meeting rose at 11.05 a.m.

3086th MEETING

Tuesday, 10 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction⁴² (A/CN.4/638, sect. F, A/CN.4/646⁴³)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR⁴⁴

1. The CHAIRPERSON invited Mr. Kolodkin (Special Rapporteur) to present his second report.

2. Mr. KOLODKIN (Special Rapporteur), presenting his second report on the immunity of State officials from foreign criminal jurisdiction, said that the report, which should have been considered at the previous session, but which had not been examined because its presentation had been delayed, concerned a fundamental aspect of the topic, that of the scope of that immunity. Three reports, the preliminary report,⁴⁵ the second report and a third report (A/CN.4/646) dealing with the procedural aspects of immunity, which would be presented during the second part of the current session, covered almost all the issues that needed to be studied at the preliminary stage of work on the topic.

3. As almost three years had elapsed since the preliminary report had been examined in 2008, the second report outlined

⁴² At its fifty-ninth session (2007), the Commission decided to include the topic in its programme of work and named Mr. Roman Kolodkin Special Rapporteur (*Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 376). At its sixtieth session (2008), it discussed the preliminary report of the Special Rapporteur (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601) and also examined a memorandum by the Secretariat (A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session)). The Commission could not discuss the topic at its sixty-first or sixty-second sessions, in 2009 and 2010, respectively (*Yearbook ... 2010*, vol. II (Part Two), chap. IX).

⁴³ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

⁴⁴ Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

⁴⁵ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

the history of the consideration of the topic and summarized the contents of the first and second parts of the preliminary report. A summary of the second report was to be found in its last paragraph. In order to put Commission members completely in the picture, he had taken the liberty of having a summary of the third report distributed informally to them exclusively for their information. Members would thus have a comprehensive view of the key issues and of the Special Rapporteur's approach to them.

4. The second report drew extensively on the Secretariat memorandum.⁴⁶ In most cases, the citations of legal writings and court decisions contained in the memorandum were mentioned, but not reproduced *in extenso*. Since the second report had been drafted, some additional court decisions had been delivered and new strands of legal opinion of relevance to the topic had appeared. For example, the Supreme Court of the United States had delivered a decision in the *Samantar v. Yousuf et al.* case which was of interest not only in itself but also, and to a greater extent, on account of the position adopted by the Government of the United States on the case. A British court had recently issued a decision in the *Gorbachev* case. Unfortunately, the *Yearbook* of the Institute of International Law containing the preparatory work leading up to the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted by the Institute at its session in Naples in 2009,⁴⁷ had not been published before the second report had been written. Those documents and the resolution itself were of interest in the context of the questions examined in that report.

5. He would pick out only the most important points of his report. It analysed the scope of immunity *de lege lata*. His starting point had been the notion of immunity in positive international law, as reflected in the decisions delivered by the ICJ in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases.

6. The report was premised on the idea that the personal or functional immunity of State officials from foreign criminal jurisdiction was a rule of general international law requiring no proof, whereas it was necessary to prove that there were exceptions to that immunity.

7. The report also proceeded on the assumption that functional immunity was in essence State immunity. It covered all the official's acts performed in an official capacity. Those acts encompassed all illegal acts, however serious they might be, *ultra vires* acts and non-public acts. The category of acts performed by officials in their official capacity was broader than that of acts falling within official functions. As all those acts were official, they were attributed to both the official and the State. In his view, the attribution of conduct for the purposes of immunity was no different from the attribution of conduct

⁴⁶ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

⁴⁷ Institute of International Law, *Yearbook*, vol. 73 (2010), Session of Naples (2009), Parts I and II, Third Commission, "The fundamental rights of the person and the immunity from jurisdiction in international law", pp. 3 *et seq.*, and resolution on "The immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", p. 226 (available from www.idi-iil.org, resolutions).