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Summary record of the 3169th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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(<http://legal.un.org/ilc/>)*

45. In draft article 1, the word “certain” should be deleted, as had been suggested. He agreed with the approach taken in draft article 2, although there was a need for terminological consistency throughout the text. Accordingly, the word “Criminal”, in draft article 2 (a) and (b), should be deleted. The expression “*ad hoc*” in draft article 2 (c) was unnecessary. Although that provision must be understood as excluding military personnel from the scope of the draft, that important issue should be dealt with in a separate paragraph.

46. The definitions of “criminal jurisdiction” and of “[i]mmunity from criminal jurisdiction” in draft article 3 (a) and (b) were superfluous and might not include all the important elements. For example, why did draft article 3 (b) refer only to the exercise of criminal jurisdiction by judges and courts? Such jurisdiction was also exercised by law enforcement agencies which were entitled to initiate stages in criminal proceedings such as pretrial detention. The phrase “which directly and automatically assigns them the function of representing the State in its international relations” in draft article 3 (c) could be deleted. He questioned the formulation of the entire phrase after the words “by State officials” in draft article 3 (d). It might be advisable for the Special Rapporteur to clarify the normative elements of immunity *ratione materiae* in her third report. As for draft article 5, paragraph 2 clearly overlapped with article 6 and could be deleted or the two draft articles could be merged.

47. He had no objection to the referral of the draft articles to the Drafting Committee.

48. Mr. VÁZQUEZ-BERMÚDEZ noted that the scope of the topic should be limited to immunity from foreign criminal jurisdiction, although where feasible, State practice regarding immunity from civil or administrative jurisdiction should be taken into consideration. While immunity before international criminal tribunals or courts lay outside the scope of the topic, that did not mean that interpretative principles based on their case law had to be ignored. Similarly, while specific regimes did not come within the scope of the topic, the Commission could bear them in mind when that would be useful for its work.

49. Draft article 1 should be streamlined and the “[w]ithout prejudice” clause should be deleted. The term “certain” was problematical and should be deleted, leaving just a general reference to officials, with the following draft articles to specify which officials enjoyed immunity, for which acts and during which time frame. The definition of the term “official” was vital and should not be linked to the person’s nationality. Indeed, the reference to nationality in draft article 4 should be deleted.

50. Draft article 2 should be reformulated as a “without prejudice” clause. It would be better to speak, not of “other *ad hoc* international treaties”, but of the application of *lex specialis*, which would cover all the regimes listed in draft article 2. The Drafting Committee should be allowed some flexibility when dealing with the definitions of “criminal jurisdiction” and “[i]mmunity from criminal jurisdiction” in draft article 3. The last phrase of draft article 3 (a) would be better placed in the commentary. He understood paragraph 45 (c) of the report to mean

that, while a State official who enjoyed immunity could not be prosecuted in the forum State, that person was not exempt from individual criminal responsibility, and he or she could be prosecuted once immunity *ratione personae* had been lifted or had ended. However, if the forum State’s criminal laws covered crimes against humanity, they could be applied in specific cases as limitations on immunity. At some point the Commission would have to discuss such crimes as factors limiting immunity from criminal jurisdiction.

51. Turning to paragraphs 47 to 53 of the report, he concurred with the distinction made between immunity *ratione materiae* and immunity *ratione personae*. He also agreed that the basis of the troika’s immunity *ratione personae* was their function as representatives of the State in international relations, which they exercised without any need to produce express authorization from the State they represented. The list of persons who had immunity *ratione personae* was exhaustive, and such immunity could not be extended to other State officials, even those who held high office, who also played a role in international relations or travelled frequently. The troika’s representative function, with its basis in international law, should be expressly recognized in the definition of immunity *ratione personae*.

52. He agreed with draft article 4, subject to the deletion he had mentioned earlier. Draft article 5, paragraph 1, had to be read together with draft article 6, paragraph 1. Draft article 5, paragraph 2, seemed to be redundant in the light of the contents of draft article 6.

53. He supported the referral of all six draft articles to the Drafting Committee.

The meeting rose at 1.05 p.m.

3169th MEETING

Thursday, 23 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. The CHAIRPERSON welcomed Ms. Patricia O’Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited her to inform the Commission members of developments since the previous session in legal areas of interest to the Organization.

2. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Sixth Committee had discussed with interest the report of the International Law Commission on the work of its sixty-fourth session.⁴³ Consideration of chapter IV of the Commission's report on the work of its sixty-third session (Reservations to treaties)⁴⁴ had been deferred until the sixty-eighth session of the General Assembly. In its resolution 67/92 of 14 December 2012, the General Assembly had provided guidance on the Commission's further work.

3. The Sixth Committee had pursued its consideration of various subjects of interest to the Commission. After a break of one year, the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 had resumed its work on measures to eliminate international terrorism, and there were plans to set up a Sixth Committee working group on that subject. The Secretary-General had prepared three reports containing Governments' views on "The scope and application of the principle of universal jurisdiction".⁴⁵ It was, however, still too early to determine what the final outcome of deliberations in that area would be. Work was also continuing on the item "Criminal accountability of United Nations officials and experts on mission", although it seemed that Member States were not yet ready to draft a binding instrument. The item "The rule of law at the national and international levels" was receiving increasing attention. A high-level meeting of the General Assembly which had been devoted to it at the initiative of the Sixth Committee had culminated in the adoption of the declaration contained in resolution 67/1 of 24 September 2012, which reaffirmed the importance of the rule of law for political dialogue and cooperation among States. The contribution made by the International Law Commission to advancing the rule of law through the progressive development and codification of international law had been commended on that occasion. The subject of the thematic debate of the Sixth Committee at the sixty-eighth session of the General Assembly would be "The rule of law and the peaceful settlement of international disputes".

4. The Office of Legal Affairs continued to provide active support for the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law and for the expansion of the United Nations Audiovisual Library of International Law. Some major developments had taken place with regard to the item "Administration of justice at the United Nations".⁴⁶ In resolution 67/241 of 24 December 2012, the General Assembly had recalled that the tribunals must have recourse to general principles of law and the Charter of the United Nations, within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances. Furthermore, it had requested the Secretary-General, in consultation with the Internal Justice Council and other relevant bodies, to prepare a code of conduct for legal representatives who were external to the Organization. Since 2009, the United Nations Dispute Tribunal

had issued more than 800 judgments and the United Nations Appeals Tribunal had delivered almost 300. Some judgments had affirmed, for example, that the Secretary-General could dismiss staff members who had been found guilty of engaging in sexual harassment and that procedural irregularities did not automatically render a selection flawed if the candidate challenging the process had no real chance of being selected. Those new precedents would have a significant impact on the development of the Organization's administrative and management policies and on the advisory role of the Office of Legal Affairs.

5. It was incumbent upon the Office of the Legal Counsel to advise the Secretary-General and other key Secretariat departments on various matters concerning international peace and security. It had thus played a central role in facilitating cooperation between the United Nations and the International Criminal Court while, at the same time, protecting the Organization's vital interests. The Court had delivered its two first decisions⁴⁷ in the previous 12 months and was expected to issue a third decision⁴⁸ in the coming months. In all three cases, which had concerned the Democratic Republic of the Congo, the United Nations had produced a considerable body of evidence and had likewise provided administrative and logistical support for investigators on the ground. The International Criminal Court, for its part, by bringing justice for countless victims of armed conflict was contributing to the efforts of the United Nations to foster peace, development and respect for human rights in the Democratic Republic of the Congo. The Court had been criticized for completing only two trials in the more than 12 years of its existence, but it had to be remembered that it was concerned with "live" conflicts, a factor which considerably complicated all aspects of the process. The United Nations, which had helped to set up five international criminal tribunals, knew how complex such cases were, if only on account of the huge geographical regions or the long periods involved. The Court was currently exercising its jurisdiction over eight conflict situations in the world and was accepted without reservations as the centrepiece of a global system of criminal justice through which the international community was endeavouring to end impunity and strengthen the rule of law.

6. Turning to the sanctions regimes established by the Security Council, she explained that the Council had adopted a number of resolutions which sought to ensure that the procedures for placing individuals and entities on sanctions lists and for removing them from those lists were fair and transparent. The post of an independent and impartial Ombudsperson, responsible for making recommendations on requests for delisting, had been created and that person's mandate had then been considerably strengthened. Nevertheless, a growing number of individuals and entities were lodging successful complaints with regional and national courts all over the world, in which they argued that their inclusion on the list established pursuant to resolutions 1267 (1999) and 1333 (2000) of 15 October 1999 and 19 December 2000, respectively, infringed their fundamental human rights, including their right to due process. The Office of

⁴³ *Yearbook ... 2012*, vol. II (Part Two).

⁴⁴ *Yearbook ... 2011*, vol. II (Part Two), chap. IV, and *ibid.*, vol. II (Part Three).

⁴⁵ A/65/181, A/66/93 and Add.1 and A/67/116.

⁴⁶ Available from www.un.org/law/avl/.

⁴⁷ *Lubanga* and *Ngudjolo Chui* cases.

⁴⁸ *Katanga* case.

the Legal Counsel was closely monitoring those cases, especially the *Kadi* and *Nada* cases and was concerned about the impact which they might have on Member States' obligations under Chapter VII of the Charter of the United Nations and under international human rights law and, for European States, under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. Although sanctions regimes continued to give rise to concerns with regard to human rights, it was to be hoped that the improvements which had been made to them, the effects of which were already being felt, would greatly enhance fairness and transparency.

7. The previous year, the Office of the Legal Counsel had received numerous requests for advice in connection with peacekeeping operations. For example, after the Security Council's adoption of resolution 2098 (2013) of 28 March 2013 establishing an "Intervention Brigade" responsible for carrying out targeted offensive operations unilaterally or jointly with the *Forces armées de la République démocratique du Congo* (Armed Forces of the Democratic Republic of the Congo (FARDC)), Guatemala had expressed concern that the neutrality and impartiality of the Organization's peacekeeping activities might be compromised by those operations. The risk was that, through the tasks given to the Intervention Brigade, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) might become a party to the armed conflict in that country, in which case international humanitarian law would apply. That might mean that the military personnel of MONUSCO and any person participating directly in hostilities would lose their protected status under the Convention on the Safety of United Nations and Associated Personnel.

8. Security Council resolutions were making increasingly frequent reference to the human rights due diligence policy governing United Nations support for non-United Nations security forces, which had been introduced by the Secretary-General in 2011.⁴⁹ For example, in resolution 2098 (2013), the Council expressly called upon the Intervention Brigade strictly to comply with that policy in joint operations with the FARDC. The Office of the Legal Counsel, which had played a central role in formulating that policy, was continuing to provide advice regarding its application. By providing support for non-United Nations security forces, which was happening with growing frequency, the United Nations ran the risk of becoming unwittingly implicated in violations of international law, as events in the Democratic Republic of the Congo in 2009 had shown. In accordance with that policy, based on the Charter of the United Nations, the law of international responsibility and international humanitarian law, any United Nations entity which contemplated or decided to provide such support must assess the situation and, if there were any substantial grounds for believing that there was a real risk of a breach of humanitarian law, human rights law or refugee law and that it was not possible to eliminate or reduce that risk to an acceptable level, it must refrain from providing that support. If the entity concerned decided to furnish support, it must put in place measures

for closely monitoring the conduct of the non-United Nations security forces and if it then received information giving sufficient grounds for suspecting that members of those forces were committing violations of humanitarian law, human rights law or refugee law, it must take immediate steps in order to end, suspend or withdraw its support if those violations continued.

9. The year 2012 had been very busy for the Division for Ocean Affairs and the Law of the Sea, because a series of events had been organized to celebrate the thirtieth anniversary of the opening for signature of the United Nations Convention on the Law of the Sea. In the field of maritime security, acts of piracy off the coast of Somalia had decreased considerably and, in conformity with article 100 of the United Nations Convention on the Law of the Sea, States had cooperated in repressing piracy. The international community must, however, pursue its efforts because the legislation of many States still did not fully reflect the provisions of the Convention.

10. As for the activities of the Treaty Section, she said that three new instruments had been deposited with the Secretary-General: the Protocol to Eliminate Illicit Trade in Tobacco Products; the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change; and the Arms Trade Treaty. In 2013, the annual Treaty Event ceremonies would be held from 24 to 26 September and from 30 September to 1 October, during the sixty-eighth session of the General Assembly. At the ceremonies in 2012, 40 States had deposited 60 instruments of ratification, acceptance or accession.

11. As she would be taking up a new position in the near future, in conclusion she wished to say how enriching her experience as the United Nations Legal Counsel had been and how much importance she, as a lawyer, had attached to her annual visits to the Commission. In her future capacity of the Permanent Representative of Ireland to the United Nations Office at Geneva, she would continue to follow closely the Commission's work and would strive to promote it.

12. The CHAIRPERSON thanked the United Nations Legal Counsel for her statement and invited the members of the Commission to make comments, or ask questions.

13. Sir Michael WOOD said that the Audiovisual Library of International Law was indeed a valuable source of information which deserved as much support as possible. He wished to know if the Office of Legal Affairs often referred to the draft articles on the responsibility of international organizations adopted by the Commission in 2011.⁵⁰ Lastly, he suggested that in 2014 the Treaty Section should celebrate the tenth anniversary of the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property, in order to encourage ratification of that instrument.

14. Ms. JACOBSSON said that she approved of the choice of the subject of the thematic debate "The rule of

⁴⁹ A/67/775-S/2013/110.

⁵⁰ *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88; the articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are reproduced in the annex to General Assembly resolution 66/100 of 9 December 2011.

law and the peaceful settlement of international disputes”, which was of particular interest to the Commission, since this was a topic that the Commission might want to address in the future. She asked whether, in that respect, the United Nations Legal Counsel could provide further information which would be of assistance to the Commission when it responded to the General Assembly resolution on the rule of law.

15. Mr. PETER wondered if there was a custom whereby the United Nations could perform certain of its activities which had legal consequences without a written rule, in accordance with an oral tradition, and what the actual practice was. He also wished to know if it was normal that the rules and regulations issued by the United Nations applied retroactively. Lastly he enquired about the legal status of the International Law Seminar.

16. Mr. HASSOUNA asked the United Nations Legal Counsel what had been the biggest challenge that she had encountered during her term of office, what had been the achievement of which she had been proudest and what, in her view, were the strong points and the weak points of the Commission.

17. Mr. PETRIČ asked why work on the convention against terrorism was progressing so slowly when terrorist acts were still being committed all over the world. He noted that, in her statement, the United Nations Legal Counsel had spoken at length about the International Criminal Court and wondered if the fact that many *ad hoc* tribunals were coming to the end of their work might contribute to the Court’s universal reach.

18. Ms. O’BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the draft articles on the responsibility of international organizations were extremely important and useful and that the Organization had already referred to them when examining complaints regarding cases of cholera in Haiti. She knew of no United Nations activities which were conducted without rules, nor of any retroactive application of rules and regulations concerning individual rights. The International Law Seminar had been in existence for more than 50 years and its legal basis could be regarded as secure. International law lay at the heart of all the Organization’s strategic and political activities. Throughout her term of office, at the express request of the Secretary-General, she had participated in all meetings concerned with strategic and political issues and she considered that to be proof of the importance which the Organization attached to the development of international law. The number of situations in which the opinion of the Office of Legal Affairs had been requested at an early stage had increased since 2009, and had concerned, for example, the bombing of Gaza, the flotilla incident, chemical weapons in the Democratic Republic of the Congo, Libya, Mali and Syria, as well as the changing nature of peacekeeping and the basic role of the United Nations.

19. One of the achievements of which she was particularly proud was the human rights due diligence policy in the context of support provided by the United Nations to non-United Nations security forces. The fact that those principles had already become an integral part of

the Organization’s action was having a very beneficial impact on its whole *modus operandi*. On the question of international criminal justice and, more precisely, how the United Nations applied the principles of the rule of law within the Organization and how it secured respect for international criminal justice despite the tensions which existed between peace and justice, the guidance on contacts with persons subject to an arrest warrant or summons issued by the International Criminal Court,⁵¹ promulgated recently by the Office of Legal Affairs, established that United Nations officials must not have any relations with such persons, unless it was absolutely essential for the performance of their duties. That principle was very difficult to apply. To understand the problem, it was sufficient to think of the situation in Kenya, where the United Nations had an office and where Mr. Kenyatta and Mr. Ruto, both of whom had been charged with crimes against humanity by the International Criminal Court,⁵² had been elected President and Vice-President respectively. It was, however, essential that the United Nations complied with the principle.

20. The Office of Legal Affairs was committed to giving all the requisite support to the Commission. Although the golden age of codification might perhaps be over, that was certainly not true of progressive development on which it should focus, since it was essential for the rule of law. Currently it would probably be wise to promote the Commission’s work and to give it greater publicity, because, in a troubled economic context, there seemed to be growing scepticism about its efficiency and credibility. The problem with the convention against terrorism was not legal but political, because States had still not managed to agree on a definition of terrorism and there was nothing to indicate that they might do so in the foreseeable future. As for the International Criminal Court and the *ad hoc* tribunals, financial constraints and the prospect of genuinely international justice did not encourage the international community to establish new tribunals of that kind, although it might prove necessary one day. As *ad hoc* tribunals were reaching the end of their mission, the International Criminal Court was currently the only permanent international criminal court, and it was very encouraging to see non-Member States cooperating with it. However, the African Union had decided to set up a new criminal court which would have jurisdiction over crimes under the Rome Statute of the International Criminal Court and also over the crime of being a mercenary and the crime of an unconstitutional change of government, although the latter element was highly controversial. The establishment of that tribunal was already raising a number of issues regarding the future of international criminal justice.

21. The CHAIRPERSON thanked the United Nations Legal Counsel whose visits had always been very useful and enriching, and he wished her every success in her new position.

Ms. O’Brien (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) withdrew.

⁵¹ A/67/828-S/2013/210.

⁵² The *Kenyatta and Ruto* cases.

Organization of the work of the session (continued)*

[Agenda item 1]

22. The CHAIRPERSON said that he took it that the Commission wished to re-establish the Study Group on the most-favoured-nation clause, which had previously been chaired by Mr. McRae.

It was so decided.

23. Mr. FORTEAU, in the absence of Mr. McRae, read out the names of the Commission members who would form the Study Group on the most-favoured-nation clause: Mr. Cafilisch, Ms. Escobar Hernández, Mr. Hmoud, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez and Sir Michael Wood.

The meeting rose at 11.35 a.m.

3170th MEETING

Friday, 24 May 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)**

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)**

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) thanked the members of the Commission for their comments and expressed her satisfaction at the high level of the debate. In order to adequately summarize the debate and respond to the questions raised by Commission members, she said that she would divide her statement into two parts, dealing first with a number of general matters raised and then with the comments directly related to the draft articles she had submitted to the Commission.

* Resumed from the 3166th meeting.

** Resumed from the 3168th meeting.

3. Turning first to general matters, she cited three sets of cross-cutting issues that had been brought up in relation to the report as a whole, namely (a) methodological aspects; (b) the treatment of international crimes in the draft articles and how they related to limits or exceptions to immunity; and (c) the definition of “official”.

4. In relation to the first issue, she recalled that her methodological approach had been broadly supported by the members of the Commission and in the debates of the Sixth Committee of the General Assembly. She pointed out, in particular, that the members of the Commission had expressed their support for continuing to approach the topic from the dual perspective of *lex lata* and *lex ferenda*, taking into consideration the Commission’s dual mandate of progressive development and codification of international law. However, she noted that nuanced views had been expressed with regard to the degree of emphasis that should be placed on the *lex lata* perspective. She herself had concluded that it was not possible to dissociate the two perspectives, given the special nature of the topic.

5. Still on the issue of methodological questions, she also drew attention to the debate that had again arisen at the current session on how the values and principles of international law should be dealt with under the topic of the immunity of State officials from foreign criminal jurisdiction. On that point, she noted that, although no members of the Commission had expressed outright opposition to taking values and principles into account, some had expressed concern that doing so would complicate the Commission’s work, or had pointed out that values *per se* could not be taken into consideration, as that would necessitate addressing their inclusion in existing international law. Other members of the Commission, meanwhile, had reiterated that the values and principles of contemporary international law were elements that should be taken into account in order to ensure that the outcome of the Commission’s work did not contradict current trends in contemporary international law. That group, representing the majority of Commission members, had pointed out that values and principles were not merely *desiderata* and expressions of will without any legal basis, but rather were reflected in existing norms. The debate had arisen in particular in connection with the question of how international crimes should be addressed under the topic and in respect of the existence of international criminal tribunals. Particular emphasis had been placed on the need to deal with the principle of combating impunity, which was undeniably linked to respect for human rights. Similarly, it had been pointed out that maintaining stable and secure international relations was in itself a value that should be preserved. In any event, the members of the Commission who had participated in the debate on those issues had pointed to the need to approach such values and principles in a balanced manner.

6. Third, she noted that the majority of Commission members had expressed their support for the step-by-step approach based on the successive identification and analysis of sets of issues which, although they were interrelated, needed to be considered separately. In particular, she said that quite a few members of the Commission had expressed the view that such an approach had already yielded tangible