



IRELAND

Statement by

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at the

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Agenda Item 79:

The Report of the International Law Commission on the Work of its 63rd
and 64th Sessions

PART 3 – Ch VI (Immunity of State Officials), Ch VII (Provisional Application of
Treaties), Ch VIII (Formation of Customary International Law), Ch IX (Extradite
or Prosecute), Ch X (Treaties over Time) and Ch XI (Most Favoured Nation
Clause)

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Ch VI – Immunity of State Officials from Foreign Jurisdiction

Mr. Chair

1. As this is the first occasion on which Ireland has addressed in detail the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, we wish to record our thanks and appreciation for the scholarly work carried out by Mr. Roman Kolodkin, as the former Special Rapporteur, as well as for the extremely comprehensive and helpful Memorandum prepared by the Secretariat. There is no doubt but that this body of work will continue to assist our efforts on this complex and sensitive topic.
2. We must, of course, also express our deep thanks to Special Rapporteur Concepción Escobar Hernández and commend her for her excellent report, which we believe will provide a firm basis from which to transition to the next phase of our work. As stated by my delegation last year, Ireland wishes for this topic to be given continued priority by the Commission, and we welcome and support the Special Rapporteur's detailed workplan for the current quinquennium.
3. My delegation shares the belief of the Special Rapporteur that, given the multiplicity of issues in need of consideration, it is appropriate to adopt a step-by-step approach, considering particular questions in turn. We also welcome the intention, expressed at paragraph 76 of the Special Rapporteur's report, to continue to update the Memorandum prepared by the Secretariat on an ongoing basis. We believe that this will be an important aid for our discussions.
4. As regards Irish state practice, Ireland has not enacted legislation dealing with the topic of immunity of foreign state officials, but rather the courts apply the rules of customary international law in the field of state immunity. In contrast to immunity from the civil jurisdiction, there has been no occasion on which the Irish courts have had to apply immunity in the context of a criminal prosecution against a foreign head of state, head of government or foreign minister, nor as against a foreign state official. To my delegation's knowledge, there has been only one occasion on which a member of the public has applied to court seeking to have a warrant issued for the arrest of a foreign state official, namely a deputy prime minister. As the application was refused on other grounds, the question of immunity was not considered.
5. Ireland is of the view that the immunity of foreign state officials is procedural only, and not substantive or material in that it does not absolve an official from the obligation to respect the laws of a foreign state in which he or she is present.
6. Ireland considers that immunity *ratione personae* applies to the troika of head of state, head of government and foreign minister. We consider it an important part of the Commission's work on this topic to clarify the extent to which such immunity may apply to any other persons. As regards immunity of other state officials, my delegation concurs that it would be particularly useful to have an internationally agreed definition of "state official" for the purposes of applying the law in relation to immunities. In this regard, we note the

observations of the International Court of Justice in paragraphs 181-200 of its judgment in the case of *Djibouti v France* which highlight, in our view, the importance of procedural aspects of asserting immunity for foreign officials and the significance of the pre-trial stage. We also note the Court's comments on the linkages between the assertion of immunity over the acts of a state official and the assumption of state responsibility for those same acts, and we encourage the Commission to give detailed consideration to this concept.

7. Turning then to methodological considerations, one of the reasons that this topic is both complex and sensitive is that it is situated at the epicentre of tensions arising from the competing interests of the international community that are not static, but evolving over time. Our work on this topic addresses what was identified in the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case* as one of the challenges of present day international law: "to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights". As a consequence, Ireland agrees that it is particularly important that transparency be maintained throughout our work by clearly distinguishing between determinations involving codification and proposals comprising progressive development of the law. Whilst acknowledging that there is not always a clear divide between the two, my delegation sees the value in having an initial focus on the current state of the law, and moving from there to assess propositions involving progressive development. This, in our view, provides a conceptual clarity that should assist in maintaining the greatest possible degree of transparency.
8. Finally, my delegation agrees with an approach which maintains a distinction between the law of immunity and the law governing jurisdiction. As the ICJ stated in the *Arrest Warrant Case*, jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Nevertheless, it seems clear that the topic of immunity of foreign state officials involves a number of concerns which are also relevant to discussions on the exercise of universal jurisdiction. As we stated last year, Ireland is of the view that referring the topic of universal jurisdiction to the ILC could be a fruitful approach, allowing for a detailed and expert analysis which, if necessary, could be followed by additional discussion by States in the framework of the Sixth Committee.

Ch VII – Provisional Application of Treaties

9. I now turn to the topic of "The Provisional Application of Treaties". Ireland congratulates Mr Juan Manuel Gómez-Robledo on his appointment as Special Rapporteur for this topic and very much looks forward to reading his first report. We welcome the decision to request from the Secretariat a memorandum bringing together previous work undertaken on this topic and believe that this will be a valuable aid to our discussions. My delegation regards the issues identified in paragraph 151 of the Commission's Report on its Sixty-Fourth Session as being highly pertinent and welcomes further elaboration on these questions. We agree that the relevance of the provisional application of treaties in the formation of

customary international law might best be considered in the context of the Commission's work on that separate topic.

Ch VIII – Formation and Evidence of Customary International Law

10. Turning to "The Formation and Evidence of Customary International Law", Ireland warmly welcomes the Note by Special Rapporteur Michael Wood. In particular, Ireland welcomes the Special Rapporteur's intended scope for the topic, namely that it should cover both the method for identifying the existence of a rule of customary international law as well as the possible sources of such information. Ireland supports the Special Rapporteur's suggestion not to include the issue of *jus cogens* in the present study at the initial stage, with the option of reverting to the issue at a later point. Ireland is of the view that in many ways *jus cogens* is a distinct topic, presenting its own complexities in terms of formation, evidence and classification

Mr Chair,

11. My delegation considers it important to work towards an outcome that is both practical and useful in order to provide guidance, not only to those practicing at the international level, but also those acting in the domestic sphere. We agree that a set of propositions or conclusions with commentaries would be a suitable final outcome, and that such conclusions should not be overly prescriptive. Ireland welcomes the ambitious plan of work for the quinquennium and very much looks forward to reading the first report from the Special Rapporteur.

Ch IX – The Obligation to Extradite or Prosecute

12. Ireland looks forward to the forthcoming working paper by the Chairman of the Working Group on the topic of "The Obligation to Extradite or Prosecute". In particular, we support the Commission's in-depth analysis of this topic in light of the recent judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

Ch X – Treaties Over Time

13. Finally, my delegation wishes to welcome the appointment of Mr. Georg Nolte as Special Rapporteur on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" following his extensive work as chair of the study group on "treaties over time". We especially welcome the addition of six further reformulated preliminary conclusions to the nine presented in last year's report.

Thank you, Mr Chair.