



IRELAND

Statement by

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at the

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Agenda item 81:
The report of the International Law Commission on the Work
of its 63rd and 65th Sessions

PART 1 – Chs I-III (Introduction, Summary of Work, Specific Issues), Ch IV
(Subsequent Agreements and Subsequent Practice in relation to the interpretation of
treaties), Ch V (Immunity of State officials from foreign criminal jurisdiction) and Ch XII
(Other Decisions)

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Mr. Chair

1. At the outset, the Irish delegation thanks the Commission for the report of its Sixty-fifth Session and commends the considerable progress made. We thank the Chair of the Commission and the Special Rapporteurs for their presence here in New York and would like to congratulate Mr Marcelo Vázquez-Bérmúdez on his election to the Commission.
2. I will deal today with two issues, namely Subsequent agreements and subsequent practice in relation to the interpretation of treaties and the immunity of state officials from criminal jurisdiction.

Chapter IV – Subsequent agreements and subsequent practice in relation to the interpretation of treaties

3. Turning now to the first of these topics, “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, we extend our thanks to Special Rapporteur, Mr Georg Nolte, for his first report, in which he has provided us with a rich, yet concise, synthesis of the research and analysis contained in the reports of the Study Group, and for the draft Conclusions set out therein. We are grateful, too, to the Drafting Committee for the contribution it has made in fine-tuning the five draft Conclusions which have been provisionally adopted by the Commission.
4. Regarding draft Conclusion 1, we support the reproduction of the text of Article 31, paragraph (1) of the Vienna Convention on the Law of Treaties, given its overall importance to the topic and the fact that it reflects customary international law. We welcome the principle expressed in paragraph (5) of the draft Conclusion that interpretation of a treaty consists of a single combined operation. On the question of whether or not to include a reference in the draft Conclusion to the nature of the treaty, we do not believe that such a reference is necessary because Article 31, paragraph (1) of the Vienna Convention requires treaty terms to be interpreted in their context and in the light of the treaty’s object and purpose. We would tend to agree with the view that such a reference may lead to an unwelcome categorisation of treaties and a weakening of the unity of the approach to treaty interpretation.
5. My delegation agrees with the suggestion to repeat within draft Conclusion 2 the phrase, “being objective evidence of the understandings of the parties as to the meaning of the treaty”, taken from paragraph (15) of the 1966 commentary to Article 27 of the draft articles on the law of treaties, as we believe that this neatly encapsulates the significance of subsequent agreements and subsequent practice within the meaning of Article 31(3)(a) and (b) of the Vienna Convention.
6. We welcome the useful explanation provided in paragraph (4) of the commentaries on the inclusion of the term “whether or not” in draft Conclusion 3.
7. Ireland particularly welcomes draft Conclusion 4, as well as paragraphs (9), (10) and (11) of the Commentary, as providing an instructive explanation of the relationship between Article

31(3), paragraphs (a) and (b), and Article 32. We look forward to the Commission's further work on the circumstances in which a subsequent agreement between the parties is binding and under which circumstances it is merely one of a number of means of interpretation.

8. Whilst we agree with the principle that the distinction between agreed subsequent practice under Article 31(3)(b), as an authentic means of interpretation, and other subsequent practice, in a broad sense, under Article 32, implies that a greater interpretative value should be attributed to the former, we wish to stress the importance we attach to maintaining the flexibility currently exercised by international courts and tribunals in interpreting treaty terms or provisions in light of subsequent practice, in the broad sense, where this is considered appropriate or necessary. In this regard, we welcome the decision not to limit the scope of relevant conduct in draft Conclusion 5 to conduct attributable to a State "for the purpose of treaty interpretation".

Ch V – Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chair

9. Turning to the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction", in our previous statements my delegation has encouraged the Commission to afford this topic a degree of priority. It is very satisfying, therefore, to receive the second report of the Special Rapporteur, Ms Concepción Escobar Henrández, as well as the report of the drafting committee and the statement of its Chair, Mr Dire Tladi.
10. Since we met last year, it is clear that considerable progress has been made in starting to address this topic in the methodical, step-by-step approach favoured by the Special Rapporteur and supported by Ireland. In this context, we agree with the decision of the Special Rapporteur, set out in paragraph (17) of her report, to defer consideration of sections 1.2 and 1.3 of her work plan, dealing with the cross-cutting issues of immunity in the system of values and principles of contemporary international law and the responsibility of states and criminal responsibility of individuals respectively, for future reports.
11. Regarding draft Article 1, as stated at the 67th Session, 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. As a result, Ireland has a preference for retaining the words "... *the exercise of ...*" in paragraph (1) of draft Article 1 on the scope of the present draft articles. We believe that the inclusion of such words is valuable in making clear that the immunity referred to in the draft articles is immunity from the exercise of jurisdiction only, and not immunity from a state's prescriptive jurisdiction. My delegation welcomes the express intention to subject the term "officials" to further consideration in the context of immunity *ratione materiae*. We welcome also the drafting of Article 1 from the dual perspective of both its positive and negative elements, and we concur with the omission of any reference to "other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory".

12. As previously stated, Ireland regards immunity *ratione personae* as applying to Heads of State, Heads of Government and Ministers for Foreign Affairs, and we welcome the statement to this effect contained in draft Article 3. We agree with view of the Special Rapporteur, set out in paragraph (68) of her report, that any expansion of immunity *ratione personae* beyond the troika would constitute progressive development, but are open to considering carefully the possibility of such a development. We tend to agree with the view of the Drafting Committee that, as the troika does not enjoy immunity *ratione personae* as a function of nationality, it is better to omit the phrase "of which they are nationals" from the draft article.
13. Ireland welcomes draft Article 4, dealing with both the temporal and material scope of immunity *ratione personae* and commends the Special Rapporteur and the drafting committee for the clarity of each of the three paragraphs, as well as the commentary thereto. We support the decision to adopt the language of the ICJ in the *Arrest Warrant Case* by the use of the phrase "whether in a private or official capacity".
14. As a final remark, my delegation has taken careful note of the additional draft article contained in the report of Special Rapporteur dealing with definition of the terms "criminal jurisdiction", "immunity from foreign criminal jurisdiction", "immunity *ratione personae*" and "immunity *ratione materiae*". Whilst we have expressed support for our work on this topic to include the procedural aspects of asserting immunity and the significance of the pre-trial stage, we appreciate the concern regarding the necessity or usefulness of defining some of these terms. We look forward to further discussions on this, and other questions, during the course of our future work on this topic.

Thank you Mr Chair.