



IRELAND

Statement by

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at the

Sixth Committee
United Nations General Assembly
69th Session

Agenda Item 78:

The Report of the International Law Commission on the Work of its 66th Session

**PART 2 – Ch VI (Obligation to Extradite or Prosecute),
Ch VII (Subsequent Agreements and Subsequent Practice in relation to
the Interpretation of Treaties), Ch VIII (Protection of the Atmosphere) and
Ch IX (Immunity of State Officials from Foreign Criminal Jurisdiction)**

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Mr Chair,

Thank you for the opportunity to comment on the second cluster of issues contained in the ILC's report. I will speak today on three topics: subsequent agreements and subsequent practice in relation to the interpretation of treaties, immunity of state officials from foreign criminal jurisdiction and extradite or prosecute. A fuller version of my delegation's views will be submitted in writing to the Secretariat.

Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties

1. Regarding the topic "Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties", Ireland thanks the Special Rapporteur, Mr. Georg Nolte, for his comprehensive and detailed second report, which we found to be most informative, as well as for his six draft conclusions. We also thank the Drafting Committee for their careful and precise consideration of these draft conclusions. We very much welcome the five draft articles provisionally adopted by the Commission, and the commentaries thereto, and would like to offer the following observations.
2. My delegation supports the decision to distinguish between subsequent practice under Articles 31 and 32 of the Vienna Convention respectively, by including separate paragraphs within each of draft Conclusions 6, 7 and 8 dealing exclusively with subsequent practice under Article 32, while at the same time making clear in the commentary that this is not to be taken to call into question the unity of the process of interpretation.
3. We note that, as explained in paragraph (19) of the commentary, the final sentence in paragraph (1) of **draft Conclusion 6** is merely illustrative. We would suggest that this may be made clearer in the text of the draft article by including the words "for example" after the words "This is not normally the case". Without an indication in the draft conclusion that the two instances referred to are illustrative and non-exhaustive, there may be a risk that this final sentence is read as a more definitive statement, and that an exaggerated importance may be conferred on these two examples.
4. We would wish to consider further the statement in paragraph (3) of **draft Conclusion 7** that "The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognised", which the Chairman of the Drafting Committee has described as a descriptive rather than a normative proposition. The commentary to the paragraph makes clear this is a complex question, noting, for example, that the case law of the European Court of Human Rights suggests that a treaty may permit the subsequent practice of the parties to have a modifying effect, and suggesting that "ultimately, much depends on the treaty or the treaty provisions concerned". We wonder whether the conclusion summarised in paragraph (35) of the commentary is fully reflected in paragraph (3) of draft Conclusion 7.
5. My delegation supports the reformulation of draft **Conclusion 8**. In particular, we tend to agree with the view that the use of the formula, "common, concordant and consistent"

posed a potential danger of being understood in an overly prescriptive manner. The commentary to this draft article highlights the various factors involved, and is particularly helpful in providing what the Chairman of the Drafting Committee describes as “practice pointers to assist the interpreter in his or her endeavours”.

6. Regarding draft **Conclusion 9**, we wonder whether, through a slight drafting amendment, the meaning of the final sentence might be made clearer. The use of the word “though” at the beginning of the sentence might appear to suggest some conditionality or contingency. It would seem that the intent of the sentence, as described in paragraph (9) of the commentary, might be captured by stating, for example, that: “Such an agreement need not be legally binding in order for it to be taken into account”.
7. Finally, regarding draft **Conclusion 10**, we would query the inclusion of the final sentence in paragraph (2). We find this sentence to be potentially confusing in this context and would suggest that it might better be addressed in the commentary. Similarly, while understanding the intention, we find the inclusion of the reference to “including by consensus” in paragraph (3) to be slightly unclear and would suggest that it might either be dealt with in the commentary alone, or clarified by way of a drafting amendment.

Immunity of State Officials from Foreign Criminal Jurisdiction

8. Turning the topic, “Immunity of State Officials from Foreign Criminal Jurisdiction”, my delegation commends the Special Rapporteur, Ms Concepción Escobar Hernández, on her excellent third report and welcomes the valuable work of the Drafting Committee in contributing to the production of the further two draft articles, namely draft Article 2(e), which defines the term “State official”, and draft Article 5, which sets out the subjective scope of immunity *ratione materiae*.
9. It is noted at the outset that there are natural limits to what extent these new draft articles can be analysed at this juncture, due to the fact that both provisions will interrelate significantly with the provisions dealing with the material and temporal scope of immunity *ratione materiae*, which have yet to be developed. We would ask that our comments on these two draft articles be considered with this caveat in mind.

Mr Chair,

10. In Ireland’s statement to the Sixth Committee on this topic in 2012, we supported the inclusion of a definition of “State official” in the draft articles, and so we warmly welcome the new **draft Article 2(e)**.
11. Ireland agrees with the use of the term “State official” in favour of the alternatives considered by the Special Rapporteur and the Drafting Committee, in particular “State organ”. Our own understanding of the term “State organ” would be that it is more naturally applicable to inanimate entities rather than human persons. We would acknowledge the

Special Rapporteur's reservations with the term "official" on the grounds that the term is predominantly associated with those who serve in administrative as opposed to political or other State roles. Nonetheless, it would appear to be the best of the generic terms available to us to identify the subjective scope of immunity *ratione materiae*.

12. We recognise that the definition of "State official" needs to be broad, in order to cover the wide range of individuals who may enjoy immunity. However, we would query whether the definition proposed in draft Article 2(e) may be overly broad. Any individual who "represents the State" or who exercises "state functions" is a State official according to the draft definition. These terms are themselves very broad and may themselves require to be further defined.
13. Turning to **draft Article 5**, Ireland is satisfied that this provision provides an accurate general statement on the subjective scope of immunity *ratione materiae*.
14. We look forward to further discussions on these issues we have raised and on other issues related to this important topic.

The Obligation to Extradite or Prosecute

15. Finally, Mr. Chair, we note with appreciation the conclusion of the Commission's work on the topic of "Extradite or Prosecute" and we thank it, and the Working Group under the chairmanship of Mr. Kriangsak Kittichaisaree in particular, for the very useful final report, which will undoubtedly serve as a valuable resource for any future consideration of this area by relevant national authorities and others.
16. On previous occasions, Ireland has suggested that the Sixth Committee's ongoing consideration of the "Scope and Application of the Principle of Universal Jurisdiction" would benefit from the technical expertise of the Commission. In the debate on that item at this year's Session, it was notable that many delegations drew a connection between universal jurisdiction and the obligation to extradite or prosecute. We would express the hope that the Commission's conclusion of its work on the latter topic will not lessen the likelihood of it making a contribution to the consideration of Universal Jurisdiction.

Thank you, Mr. Chair.