IRELAND

Statement by

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at the

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Agenda Item 83:

The Report of the International Law Commission on the Work of its 67th Session

PART 3 – Ch IX (Protection of the Environment in relation to Armed Conflicts), Ch X (Immunity of State officials from foreign criminal jurisdiction) and Ch XI (Provisional Application of Treaties)

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Mr. Chair,

Immunity of State Officials from foreign criminal jurisdiction

1. Regarding the topic "Immunity of State officials from foreign criminal jurisdiction", Ireland welcomes the fourth report of the Special Rapporteur, Ms. Concepción Escobar Hernández, which deals with the material and temporal scope of immunity *rationae materiae*, and the wealth of materials reviewed, as well as the provisional adoption by the Drafting Committee of draft article 2(f), defining the term "act performed in an official capacity", and draft article 6, defining the scope of immunity *rationae materiae*.

2. The concept of "an act performed in an official capacity" is central to this topic as a whole. We very much see the merit, therefore, in including a definition of this term, whilst at the same time recognising the importance of well-crafted commentaries in capturing the subtleties involved in such a definition. As expressed by the Special Rapporteur in paragraph 238 of the Commission's report, given the diversity in the existing case law, it is indeed questionable whether the term ought best to be regarded as an indeterminate legal concept that can be identified by judicial means. A definition, together with detailed commentaries, would, in our view, assist in achieving greater legal certainty. It would also serve to focus the mind on the core rationale of immunity, which is the protection of state sovereignty and ensuring the efficient performance of state functions, as opposed to benefitting individuals. This may help to guard against any unduly broad interpretations of the term.

3. It might be acknowledged, however, that the proposed definition has an element of circularity, and is general in nature. Accordingly, whilst the identification of an act as an "act performed in an official capacity" should be carried out on a case by case basis, we would nevertheless see value in including within the commentaries detail as to the criteria or characteristics that might be used in applying the definition in practice. We would, at this stage, retain an open mind as to whether such criteria might usefully be included within the definition itself.

4. As regards the proposed definition put forward, we agree that it is appropriate to follow the terminology used by the ICJ in the *Arrest Warrant Case*, namely "acts performed in an official capacity". We share the view that the concept of an act performed in an official capacity does not automatically correspond to the concept of *acta jure imperii*, and that an act performed in an official capacity may refer to some action *jure gestionis* performed by state officials while fulfilling their duties and exercising state functions. In addition, the concept of an act performed in an official capacity bears no relation to the lawfulness or otherwise of the act in question. For the reasons set out in paragraphs 208-209 of the ILC's Report, we support omitting the criminal nature of the act from the criteria for categorising an act as one

performed in an official capacity. We are pleased to note that the Special Rapporteur intends to focus in her next report on the important question of limitations on, or exceptions to, immunity *rationae materiae*. We look forward to this report, including its consideration on how best to deal with the relationship between the definition of acts performed in an official capacity, and limitations and exceptions to immunity *rationae materiae.*

5. Finally, Mr. Chair, we commend the Special Rapporteur and the Drafting Committee for the careful consideration afforded to the complex issues dealt with in draft article 6, which sets out the material and temporal scope of Immunity *rationae materiae* in a clear and precise manner.

Provisional Application of Treaties

6. Ireland aligns itself with the statement delivered by the European Union in relation to the Provisional Application of Treaties, and would like to offer the following additional observations.

7. Ireland thanks the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his third report and in particular for the detailed comparative analysis contained therein. The multiple examples provided of the provisional application of treaties, in a variety of scenarios, are very helpful in contextualising our discussions. We also wish to thank the Secretariat both for its Memorandum on the negotiating history of Article 25 of the Vienna Convention on the Law of Treaties between States and International Organisations, and for the non-exhaustive list of multilateral treaties which provide for provisional application, annexed to the Special Rapporteur's report.

8. My delegation welcomes the twin focus in this year's report on the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties, and on provisional application with regard to international organisations.

9. With regard to the first theme, we agree with the need to stress the conceptual distinction between the expression of consent to be bound by a treaty with a view to its entry into force and the provisional application of a treaty for a period preceding its entry into force, albeit that the means of expressing consent to be bound by a treaty, as provided in Article 11 of the Vienna Convention, may also be used to agree to its provisional application. We agree, too, that provisional application is very different from any supposed exceptional modality for entry into force. As stated last year, Ireland shares the view that provisional application does produce legal effects. In this regard, we support the conclusion of the tribunal in the *Yukos* case, cited in paragraph 66 of the Special Rapporteur's report, that a treaty must not allow domestic law to determine the content of an international legal obligation as regards provisional application, "unless the language of the treaty is clear and admits no other interpretation". We would, however, support the suggestion that further analysis be undertaken as to the precise nature of the legal effects created by provisional

application, and the extent to which they differ, if at all, from the effects created by the entry into force of the treaty. This might include a consideration of whether there are any differences in the termination and suspension processes for both regimes.

10. As regards the second theme, the analysis undertaken provides firm support for the conclusion that legal regime of provisional application of treaties between states and international organisations, or between international organisations is, *mutatis mutandis*, the same as that relating to treaties between states. The example provided of the provisional application of amendments to the Convention on the International Maritime Satellite Organisation raises a number of interesting issues which, we would suggest, may benefit from some further examination. In particular, whether, in the absence of any explicit provision in a constituent agreement of an organisation, states parties to that agreement may decide to provisionally apply amendments thereto and, if so, how such decisions are to be taken.

11. Finally, we of course thank the Special Rapporteur for the proposed draft guidelines, and the Drafting Committee for their careful consideration of a number of these at its current session. We can support the provisionally adopted draft guidelines 1 and 2, on scope and purpose. My delegation would also concur with the proposal to suppress from draft guideline 3 any reference to the internal law of the state or the rules of international organisations, and to track the language of Article 25 of the Vienna Convention as closely as possible. We welcome the Special Rapporteur's intention to consider, in his next report, the question of the termination and suspension of provisional application, as well as the interplay between provisional application and reservations to treaties.