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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,
SIXTY-NINTH SESSION, AGENDA ITEM 78,
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-SIXTH SESSION: PART II (A69/10)
CHAPTER VI (THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*), CHAPTER VII (SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES), CHAPTER VIII (PROTECTION OF THE ATMOSPHERE) AND CHAPTER IX (IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION)

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Mr Chairman,

I shall now address the second cluster of topics. Turning first to the **Obligation to extradite or prosecute** (*aut dedere aut judicare*), the United Kingdom thanks the Chairman of the Working Group, Mr Kriangsak Kittichaisaree, and all the members of the Working Group, for their excellent report. The United Kingdom welcomes the adoption of the report by the Commission, which is an appropriate conclusion to the work on this topic.

The United Kingdom continues to believe that the obligation to extradite or prosecute arises from treaty obligations. The crimes in respect of which the obligation arises and the precise nature of the obligation to extradite or prosecute are governed by the terms of the relevant treaty.

The United Kingdom welcomes the Commission's extensive survey of extradite or prosecute provisions in multilateral instruments, which is based on the excellent 2010 Secretariat Survey of multilateral conventions and which reflects in part the recent judgment of the ICJ regarding *Questions relating to the Obligation to Prosecute or Extradite (Senegal v Belgium)*. The United Kingdom agrees with the Commission's assessment that it would be futile to attempt to harmonise the diverse arrangements put in place by States to fulfil their obligations to extradite or prosecute.

The United Kingdom welcomes the Commission's work to identify lacuna in the present conventional regime on the prosecution or extradition of crimes of international concern, notably in respect of crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflicts. The United Kingdom agrees that the existence of international criminal tribunals should be taken into account in considering the obligation to prosecute or extradite.

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Mr Chairman,

Turning to the topic of **Subsequent agreements and subsequent practice in relation to the interpretation of treaties**, the United Kingdom welcomes the Special Rapporteur's second report on this topic and the Commission's further five draft conclusions with accompanying commentaries.

As with the previous work on this topic, the United Kingdom supports the approach taken by the Commission in producing draft conclusions together with supporting commentaries. In particular, the United Kingdom welcomes the depth of analysis and practical examples provided in the commentaries through a careful analysis of relevant practice and case law.

The United Kingdom has detailed comments on the draft articles which are contained in an annex to the written copy of its statement. I do not, therefore, intend to set these out in my oral intervention today but would like them to be reflected in the record as the formal position of the United Kingdom on the draft articles.

The United Kingdom welcomes the draft conclusions, in particular draft conclusions 6, 7, 9 and 10; the United Kingdom is concerned that draft conclusion 8 as currently drafted is too prescriptive which does not reflect the intention behind it.

The United Kingdom considers that explaining the difference between "interpretation" of a treaty and "application" of a treaty is key and welcomes this being clearly explained in draft conclusion 6.

The United Kingdom is also particularly pleased that in relation to diverging views of states on what constitutes a subsequent agreement, the United Kingdom's position that Memoranda of Understanding do not amount to legally binding agreements has been reflected.

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Mr Chairman,

On the topic of **Protection of the atmosphere**, the United Kingdom notes with appreciation the summary provided of the Special Rapporteur's first report and the Commission's consideration of that report. This recognises the challenges associated with finding a role for contributing to global endeavours to protect the environment within the context of the 2013 understanding. On the basis of these challenges, and given that we are in a crucial period of political negotiations on established legal arrangements, including on climate change and alternatives to ozone-depleting substances, the United Kingdom would continue to question whether this is a useful topic for further consideration by the Commission. In any event, it is essential that the understanding continues to be fully respected.

However, if the Commission decides to proceed, the United Kingdom does not think it would be appropriate for the concept of "common concern of humankind" to be considered in relation to this topic. The concept appears in the first preambular paragraph of the UN Framework Convention on Climate Change and in the preamble to the Convention on Biological Diversity. However, it does not appear in the Vienna Convention or its Montreal Protocol, which aside from the UN Framework Convention is the main international agreement dealing with atmospheric protection. Indeed, the United Kingdom is concerned about the consequences of importing this concept from the preambles to conventions which deal with specific and narrowly defined issues into a subject such as the protection of the atmosphere which is much wider in scope.

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Mr Chairman,

Turning to the topic **Immunity of State officials from foreign criminal jurisdiction**, the United Kingdom is grateful to the Commission for the progress that has been made on this topic.

As the United Kingdom has previously noted, this topic is of genuine practical significance. It also increasingly attracts comment and scrutiny from a variety of perspectives, and so a clear, accurate and well documented statement of the law by the Commission is likely to be very valuable.

The United Kingdom notes that the Commission's work to date encompasses elements that reflect existing law as well as elements that represent a progressive development of the law. In these circumstances, the United Kingdom takes the view that the appropriate form for the outcome of the Commission's work is likely to be a treaty to the extent that it contains proposals for the progressive development of the law in this area. The success of such an approach will depend on how far the text is generally acceptable to States. The United Kingdom therefore encourages the Commission to work towards an outcome that reflects a high degree of consensus.

The United Kingdom has noted the texts of the draft Articles that were provisionally adopted this year, and reviewed the commentaries on them.

The United Kingdom welcomes the Commission's provisional adoption of **Article 5.**

In respect of **paragraph (e) of Article 2,** the United Kingdom shares the view of those members of the Commission who consider that it is unnecessary to define the term 'State official' for the purposes of the draft Articles.

In any event, the United Kingdom considers it important that the effect of the text should be that all acts performed by state officials in an official capacity

are subject to immunity *ratione materiae* from foreign criminal jurisdiction. The United Kingdom notes that the distinction between acts performed in an official capacity and acts performed in a private capacity is not the same distinction as is drawn between *acta jure imperii* and *acta jure gestionis* in the context of state immunity from civil jurisdiction. In defining "state officials", the United Kingdom welcomes the confirmation in the commentary to Article 2(e) that the terms "who represents" and "state functions" in that paragraph are to be given a broad meaning. The United Kingdom nonetheless considers that greater clarity could be achieved in the text on this point. The United Kingdom would therefore ask that the Commission give this matter further consideration when it returns to these draft provisions.

The United Kingdom notes that important aspects of the draft Articles are yet to be developed, including those relating to possible exceptions from immunity and the procedures for asserting and waiving immunity. The United Kingdom's comments on the Articles so far adopted must necessarily be regarded as provisional until the full text of all the Articles is available.

In respect of the question of exceptions to immunity *rationae materiae*, the United Kingdom recalls the well-known decision of the House of Lords in the *Pinochet* case, which found that, for those States that had ratified it, the UN Convention against Torture constituted a *lex specialis* or exception to the usual rule on immunity *ratione materiae* of a former head of State because under the Convention definition of torture it could only be committed by persons acting in an official capacity. The United Kingdom is not aware of similar reasoning in judgments in respect of other treaties which require the criminalisation of certain conduct and the assertion of extra-territorial jurisdiction. The United Kingdom also recalls another criminal case in which immunity of state officials was considered, the *Khurts Bat* case, which suggests that a plea of immunity *ratione materiae* would not operate in respect of certain criminal proceedings for acts of a State official committed on the territory of the forum State.

Furthermore, in respect of immunity *rationae personae* from the exercise of foreign criminal jurisdiction of those identified in draft Article 3, the United Kingdom considers that the current state of international law requires a highly restrictive approach to the question of possible exceptions. In this context, it is important to note that the topic concerns immunity from national jurisdiction, and therefore does not extend to prosecutions before the International Criminal Court or the ad hoc tribunals.

The United Kingdom stresses the importance of analysing with great care State practice and case law in this field. In this context, the Memorandum by the Secretariat of 31 March 2008, which contained a study of state practice, provided a very useful aid to the work of the Commission on this subject. Since that Memorandum is now more than 6 years old, the Commission might wish to consider whether an updated version of that study would assist their work.

Thank you, Mr Chairman.

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Annex to United Kingdom statement on the topic of **Subsequent agreements and subsequent practice in relation to the interpretation of treaties**

In relation to **draft conclusion 6** the United Kingdom wonders whether the reference in commentary (22) to inaction by States might include a cross-reference to draft conclusion 9, commentary (13) and subsequent, where this concept is explored in helpful detail.

The United Kingdom also welcomes **draft conclusion 7**, in particular the use of the word “contribute” in paragraphs 1 and 2 of draft conclusion 7 (as this stresses that all appropriate mechanisms can be used to assist in this area) and paragraph 3 on the presumption that the practice showing an agreement about the application of a treaty is about interpreting the treaty, not amending it. In a similar vein the United Kingdom welcomes the context set out in commentary (2) which stresses that subsequent agreements and subsequent practice are not the only means of interpretation. The United Kingdom found the structure of the commentary to this draft conclusion particularly user-friendly.

In **draft conclusion 8**, the United Kingdom is concerned that this may be a little too prescriptive. In paragraph (1), notwithstanding the use of the term “inter alia” and the explanation in commentary (2), the emphasis placed on clarity and specificity without, for example, any similar reference to consistency of practice or how widespread any practice is in all the circumstances, the United Kingdom thinks is too limited and would welcome consideration of whether these concepts of consistency and breadth of practice could be taken expressly into account in paragraph (1). In paragraph (2) the United Kingdom is likewise concerned that this is too limited in nature. The commentary on this point (commentary (11)) specifically notes that there is a divergence of views on whether subsequent practice needs to be repeated but paragraph (2) does not reflect this. The United Kingdom would welcome a drafting change so that “depends” is replaced with “may depend”.

In **draft conclusion 10**, the United Kingdom would suggest that the final three words in paragraph (3) are deleted. The United Kingdom considers that retaining the final three words creates the possibility of misinterpretation which would require a reading of the commentaries to correct; the United Kingdom therefore considers that this matter is best left to the commentaries.