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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,  
SEVENTY-SECOND SESSION, AGENDA ITEM 81,  
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK  
OF ITS SIXTY-NINTH SESSION: PART 2 (A/72/10)

CHAPTER VI (PROTECTION OF THE ATMOSPHERE)

AND

CHAPTER VII (IMMUNITY OF STATE OFFICIALS FROM FOREIGN  
CRIMINAL JURISDICTION)

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Mr Chairman,

1. On the topic of **protection of the atmosphere**, the United Kingdom of Great Britain and Northern Ireland notes the Fourth Report of the Special Rapporteur, Mr Shinya Murase, and is grateful to the Commission for its consideration of this topic.
2. The United Kingdom recalls its earlier observations about the necessity of the Commission's work on this topic, noting that existing international obligations concerning protection of the environment generally cover many issues associated with the protection of the atmosphere. In this respect, we recall the Secretariat's Topical Summary of this Committee's debate during the 71st session (A/CN.4/703, at paragraph 16), which noted that a "number of delegations... reiterated their doubts regarding the usefulness of the Commission's work on [this] topic in the light of existing international agreements".
3. In addition, we note that such existing agreements have proved to be flexible enough to address new challenges as they have arisen. A notable example of this was the adoption of the Kigali Amendment to the Montreal Protocol in 2016, which extended the scope of that agreement to include greenhouse gases alongside ozone-depleting substances.
4. One point arising from the interrelationship of the draft guidelines with other international obligations is illustrated by draft guideline 9, which expressly recognises that there are "*other* relevant rules of international law" concerning the protection of the atmosphere. The examples cited by draft guideline 9 are the rules of international trade and investment law, the law of the sea, and international human rights law. While paragraph (6) of the commentary to the draft guideline states that these are indicative examples and are not intended to be exhaustive, the United Kingdom is concerned there is a risk that inclusion of these

specific topics, to the exclusion of others, implies the existence a special relationship between the topics cited and the protection of the atmosphere. This is unhelpful, and while we note that this ambiguity goes to the heart of our concerns about this project as a whole, one way to begin to address this ambiguity in this context would be to remove the specific examples from the guideline altogether.

5. In a similar vein, we note that paragraph (6) of the commentary to the new guideline provides that nothing in that guideline “should be interpreted as subordinating rules of international law in the listed fields to rules relating to the protection of the atmosphere”. We consider that the guideline itself should address this point in concrete terms.
6. These concerns are underlined by the ambiguity of draft guideline 9 on the interrelationship with other obligations of international law. The draft guideline simply makes a potentially unhelpful reference to certain provisions of Vienna Convention on the Law of Treaties. Those rules already apply to States that are Parties to the Convention, and are in any event widely regarded as reflecting customary international law. It is difficult to see what their inclusion in the guideline adds to long-standing rules and practice on treaty interpretation.
7. We welcome the more balanced approach taken by the 2015 Paris Agreement, which reflects the principle of “common but differentiated responsibilities and respective capabilities”. We are concerned that this draft guideline could undermine the evolution of such principles. Indeed, the concept of common but differentiated responsibilities was itself refined further under the Paris Agreement, to apply “in the light of different national circumstances”. This also underlines the United Kingdom’s earlier point concerning the flexibility inherent to the existing international legal framework to tailor existing legal norms to evolving global challenges in a manner which is nuanced and context-specific.

8. As I conclude on this topic, Mr Chairman, the United Kingdom wishes to stress its support for the need to protect the atmosphere and environment, and to tackle climate change. Nothing in our comments on this aspect of the Commission's report should be taken as undermining our commitment to these important goals.

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Mr. Chairman,

9. Turning to the topic of **immunity of State officials from foreign criminal jurisdiction**, the United Kingdom notes the developments in the Commission on this topic this year, as reflected in Chapter VII of its 2017 annual report, in the summary records, and in the report of the Drafting Committee.
10. This year, the Commission continued its debate of the fifth report of the Special Rapporteur, Professor Concepción Escobar Hernández. The United Kingdom welcomes the Special Rapporteur's conclusion in that report that no exceptions exist under customary international law in respect of immunity *rationae personae*.
11. In addition, the Commission also provisionally adopted draft article 7, which proposes six exceptions to immunity *rationae materiae*: the crime of genocide; crimes against humanity; war crimes; the crime of apartheid; torture; and enforced disappearance.
12. In the view of the United Kingdom, the exceptions to immunity *rationae materiae* listed in draft article 7 lack sufficient support in State practice to be regarded as established under customary international law.
13. Not only is there a lack of State practice to justify drawing this conclusion, it is clear that the Commission itself is deeply divided on the issue. Indeed, it is striking that the provisional adoption of draft

article 7 was achieved only on the basis of a recorded vote of the Commission's members. That is very unusual for the Commission nowadays. The divergence in views of the members of the Drafting Committee itself was reflected in the statement of its Chairperson, Mr. Rajput. Moreover, the footnote to draft article 7 states that the Commission will consider the procedural provisions and safeguards applicable to the draft articles at its seventieth session.

14. In light of these circumstances surrounding its provisional adoption, the United Kingdom considers that draft article 7 cannot be considered as reflecting existing international law (*lex lata*), or even the Commission's settled view of existing international law on this topic. Whilst the United Kingdom welcomes the decision of the Drafting Committee not to include the crime of corruption in draft article 7, it remains difficult to discern the rationale on which all of the remaining suggested exceptions have been selected for inclusion.
15. As noted in the Commission's annual report this year, the Special Rapporteur appears to consider that this topic should be approached from the perspective both of codification and the progressive development of international law (*lex ferenda*). As a general proposition, that is not inconsistent with the Commission's mandate; however, the Commission's annual report records that some members of the Commission queried whether draft article 7 in fact aimed to set out "new law".
16. As the United Kingdom has stated previously in the Sixth Committee, this topic is of great practical significance: the immunity of State officials from foreign criminal jurisdiction occupies a pivotal role in the day-to-day conduct of international relations where, for example, international travel by State officials, of whatever rank, is now commonplace. It should also be recalled that such immunity does not exist for the personal benefit of the individual, but to ensure the efficient

performance of the functions of State officials on behalf of their respective States.

17. Accordingly, the United Kingdom considers it to be of vital importance with this particular topic that the Commission clearly indicates those draft articles which it considers to reflect existing international law (*lex lata*) and those which it does not, whether on the basis of representing the progressive development of international law, or whether amounting to proposals for “new law”.
18. Indeed, if the underlying aim of producing these draft articles is to provide a set of guidelines for use in domestic courts, States, as well as their judges and practitioners, surely need to know what the Commission considers existing international law is. If the aim is to make proposals for States for “new law” to be adopted by them, as they see fit, in treaty form, that that should be clearly stated. It is unfortunate that the Commission has not provided this clarification to date.
19. If the Commission’s work on this topic is going to contain proposals for progressive development of the law or “new law”, the United Kingdom considers that the appropriate form for the outcome of the Commission’s work should be a treaty.
20. Finally, the United Kingdom notes that the Special Rapporteur’s sixth report, to be submitted in 2018, will cover the procedural aspects of immunity. These aspects were ably dealt with by the former Special Rapporteur, Mr. Kolodkin, in his third report and will, as the Commission seems to accept, form a crucial part of the Commission’s output on this topic.

Thank you, Mr. Chairman.