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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,
SEVENTIETH SESSION, AGENDA ITEM 83,
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS
SIXTY-SEVENTH SESSION: PART III (A/70/10)
CHAPTERS IX (PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED
CONFLICTS), CHAPTER X (IMMUNITY OF STATE OFFICIALS FROM FOREIGN
CRIMINAL JURISDICTION) AND CHAPTER XI (PROVISIONAL APPLICATION OF
TREATIES)

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Mr Chairman,

Turning to the topic of **Protection of the environment in relation to armed conflicts**, the United Kingdom welcomes the Commission's report at Chapter IX.

The United Kingdom notes that the focus of the second report was to identify existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. The United Kingdom agrees with the Special Rapporteur that the Commission should not seek to modify the law of armed conflict. The law of armed conflict applies as *lex specialis* during armed conflict, and the United Kingdom does not consider that the topic should broaden in scope to examine how other legal fields, such as human rights, interrelate.

With regard to the future of the topic and its eventual outcome, the United Kingdom is still unclear what will happen after the third report. The preparation of non-binding guidelines or principles could be useful, but the United Kingdom remains unconvinced that there is a need for new treaty provisions in this area.

In respect of the draft principles that were provisionally adopted by the Drafting Committee, the United Kingdom considers that they should more accurately align with the existing law of armed conflict. For example, the United Kingdom:

- Notes the removal of the phrase 'military object' from paragraph 3 of draft principle II-1 but considers it important that the commentaries make clear that there is no basis for treating all the natural environment as a civilian object for the purposes of the laws of armed conflict;
- Does not accept the blanket prohibition against reprisals in draft principle II.4, which does not reflect the current state of customary international law and reservations by States to article 55(2) of Additional Protocol 1; and
- Remains doubtful about the legal basis for draft principle I-(x) and its practical application during armed conflict.

In more general terms the United Kingdom supports an approach which excludes certain subject matter from the scope of the topic, including the exploitation of natural resources, the protection of cultural heritage and areas of cultural importance and the effect of particular weapons. The United Kingdom considers that internal disturbances and tensions such as riots and law enforcement activity should also be excluded from this topic.

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 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 proposal by the Commission will 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 progressive development of the law. In these circumstances, the United Kingdom considers 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 by the Drafting Committee this year.

The United Kingdom welcomes the provisional adoption of paragraph (f) of article 2 and of article 6. However, the United Kingdom notes that commentaries on these provisions are yet to be adopted and that it will be necessary to consider these provisions further in light of the commentaries.

The United Kingdom further 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 claiming and waiving immunity. The United Kingdom's comments on the articles so far adopted must necessarily be regarded as provisional until the text of all the draft articles is available.

In respect of the question of exceptions to immunity *ratione materiae*, the United Kingdom recalls the well-known decision of its 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 United Kingdom domestic 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 criminal proceedings for certain acts of State officials committed on the territory of the forum State.

Furthermore, in respect of immunity *ratione 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 allows for no exceptions from immunity (other than by way of waiver). In this context, it is important to note that the topic concerns immunity from national jurisdiction; different considerations apply to prosecutions before the International Criminal Court or the ad hoc tribunals.

Mr Chairman,

Turning to the topic of **Provisional application of treaties**, the United Kingdom welcomes the third report of the Special Rapporteur on this topic.

The United Kingdom was pleased to respond to the Commission's request for information on state practice and notes that a number of other States have done so since last year. The United Kingdom considers an analysis of State practice is an important contribution to the consideration of this issue.

We support the preparation of guidelines, rather than draft articles or model clauses. In our view, guidelines, with commentaries, can assist decision-makers at various stages of the treaty process, taking into account State practice, whilst avoiding the unnecessary prescription of model clauses or agreed principles. Flexibility in this area is important.

We found the summary of the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties valuable and look forward to further work in this regard.

We agree that the issue of legal effects of provisional application is the key provision of the draft guidelines. It also has implications for the consideration of the consequences of breach of obligations deriving from provisional application. We note that this issue was discussed in the Commission this year. Draft guideline (4) merits further consideration and, in particular, we would encourage elaboration of the meaning of "legal effects".

In relation to the Special Rapporteur's draft guideline (1), we welcome the deletion of the expression "provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application" from the text of draft guideline 3 provisionally adopted by the Drafting Committee. It is important to conform to Article 46 of the Vienna Convention on the Law of Treaties and to avoid any suggestion that the terms of internal law could be relied upon to avoid an international obligation.

Thank you, Mr Chairman.

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