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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,
SEVENTY-THIRD SESSION, AGENDA ITEM 82
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK
OF ITS 70TH SESSION: PART 2 (A/73/10)

CHAPTER VI (PROTECTION OF THE ATMOSPHERE)
CHAPTER VII (PROVISIONAL APPLICATION OF TREATIES)
CHAPTER VIII (PEREMPTORY NORMS OF GENERAL INTERNATIONAL
LAW (JUS COGENS))

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Mr/Madam Chairperson,

1. The United Kingdom welcomes the completion of the first reading of a set of draft guidelines on the topic **Protection of the atmosphere**. We shall send written comments in due course. We express our appreciation to Mr Murase for his work and are grateful to the Commission for its careful consideration of this topic.
2. We read with interest the fifth report of the Special Rapporteur, Mr Shinya Murase, which included proposals for three additional draft guidelines concerning implementation (draft guideline 10), compliance (draft guideline 11) and dispute settlement (draft guideline 12).
3. The United Kingdom recalls the doubts it has expressed in previous sessions about the utility of the Commission's work on this topic and continues to emphasise the significance of existing international obligations concerning protection of the environment that already address many of the issues concerning protection of the atmosphere.
4. In addition, we note the relevance of existing agreements for addressing new challenges as they have arisen. One example is the Montreal Protocol on Substances that Deplete the Ozone Layer, the scope of which was recently extended to include greenhouse gases, thereby evincing the flexibility inherent in the existing international legal framework to tailor legal norms to evolving global challenges in a manner which is nuanced and context-specific.
5. The United Kingdom continues to be concerned about the ambiguity of draft guideline 9 on the interrelationship with other obligations in international law. With regard to the three draft guidelines adopted by the Commission this year, it is difficult to see what value these add. While implementation may be widely encouraged, the guidelines nevertheless do not address fundamental barriers to effective

implementation such as lack of resources or political will. Compliance is already an obligation imposed upon States under the relevant treaties to which they are party.

6. Mr/Madam Chairperson, despite our reservations about the project as a whole, 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 putting into question our commitment to these important goals.

7. The United Kingdom is very grateful to the Special Rapporteur, Mr Gómez-Robledo, and the members of the Commission for their continued work in taking forward the topic of **provisional application of treaties**. The adoption of the guidelines and commentaries on first reading gives States the opportunity to step back and look at the project overall. We shall submit our observations in writing within the deadline. We welcome the fact that, in the meantime, further thought will be given to model clauses.
8. The United Kingdom welcomes the inclusion of Draft Guidelines concerning reservations made to provisionally applied treaties and the termination or suspension of such provisional application. The United Kingdom notes that the Commission is only at the initial stage of considering the question of reservations. In the United Kingdom's view, an analysis of the practice of States and international organisations would be of assistance for a comprehensive consideration of this issue.
9. The United Kingdom agrees with the text of the draft guideline 6, but finds paragraph 5 of the commentary less than clear when it states that "Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application "produces a

legally binding obligation to apply the treaty or part thereof as if the treaty were in force” does not imply that provisional application has the same legal effect as entry into force.” It would be helpful if the Commission could explain in a little more detail, if possible with examples, in what ways a provisionally applied treaty is “not subject to all rules of the law of treaties”.

10. The United Kingdom was pleased to see the addition of Draft Guideline 9 on the termination and suspension of provisional application and the evident efforts of the Special Rapporteur and the Commission to maintain, in this Guideline, a pragmatic and flexible approach. Further, given the difficulties that have arisen in the interpretation of some provisional application clauses, the United Kingdom is pleased to note the recommendation of the Drafting Committee that a reference be made in the Commentaries to the possibility of including a set of draft model clauses and looks forward to seeing revised proposals from the Special Rapporteur in that regard.

11. The United Kingdom looks forward to providing further comments on the draft Guidelines and commentaries by December 2019.

12. Turning to **peremptory norms of general international law (*jus cogens*)**, the United Kingdom is grateful to the Commission for its work on this topic and especially to the Special Rapporteur, Mr Dire Tladi, for his third report, which considered the consequences or legal effects of peremptory norms of general international law and proposed no less than thirteen draft conclusions. The United Kingdom is also grateful to the Drafting Committee and in particular to the Chairperson, Professor Jalloh, for the two interim reports this year annexing the draft conclusions provisionally adopted by the Drafting Committee. The Commission has made considerable progress in moving the topic forward.

13. The United Kingdom reiterates its support for the Commission's work on this topic, which it believes could have genuine practical value to States, judges and practitioners. As previously noted, this is not an easy topic, and, given its importance and difficulty, and the need to secure wide support from States, the United Kingdom urges the Commission to continue to approach this topic with caution.
14. The United Kingdom notes that the texts of five draft conclusions were provisionally adopted this year by the drafting committee, and that one paragraph and eight draft conclusions proposed in the third report remain to be considered by the committee in 2019. In addition, the United Kingdom notes that once again this year the draft conclusions have not yet been adopted by the plenary together with the all-important commentaries. Accordingly, the United Kingdom's comments are necessarily provisional as we await the full text of all the conclusions and commentaries.
15. The United Kingdom also notes the wish of the Special Rapporteur that the Commission conclude a first reading of the draft conclusions at its next session. In order that the drafting committee and Commission are able properly to consider and comment on this important topic, the United Kingdom encourages the Commission not to unduly rush to conclude its work on this topic and to ensure that it spends enough time on the matter. The latest report of the Special Rapporteur covers a number of sensitive topics, in particular concerning the consequences of *jus cogens* in relation to international criminal law, customary international law and Security Council resolutions. These topics generate considerable debate in academic literature and divergent views in case law.
16. The United Kingdom has provisional comments on the draft articles which are contained in an annex to the written copy of this statement. These include comments on one or two of the draft conclusions provisionally adopted by the Drafting Committee in 2018 (draft

conclusions 8 to 14) as well as comments on some of the draft conclusions in the third report that have been debated in the Commission and referred to the Drafting Committee (but which have not yet emerged from the Committee) (draft conclusions 10(1) and 15-23). We are aware that it may be a little premature to be commenting on draft provisions that have yet to be adopted by the Commission itself, with commentaries. But, given the procedure adopted by the Commission this seems the most practical approach to get our views across in a timely way. I do not, therefore, intend to set these out in my oral statement today; instead the annex should be seen as the formal position of the United Kingdom on the draft conclusions concerned.

Thank you, Mr/Madam Chairperson,

Annex to United Kingdom statement on the topic of **Peremptory norms of general international law (*jus cogens*)**

1. In relation to the conclusions provisionally adopted by the Drafting Committee in 2018 on the effects of *jus cogens* on treaties, the United Kingdom is of the view that where conclusions are based on the provisions of the Vienna Convention on the Law of Treaties they should follow the language of such provisions. The United Kingdom is concerned about proposed departures from the safeguards enshrined in the VCLT and reserves the right to provide further comments in this regard as the topic develops.
2. Draft conclusion 14 deals with a very important matter, the procedure to be applied when a State invokes a norm of *jus cogens* and another State challenges that invocation. The solution found in the Vienna Convention was a crucial element for the acceptance of the provisions on *jus cogens*. We read with great interest the Special Rapporteur's

discussion of this matter in his third report, and the 'recommended practice' in paragraph 1 of his proposed draft conclusion 14. The drafting committee has tried to go further, having regard to the solution in Vienna Convention. How far it is possible to do so in what are intended to be non-binding draft conclusions is an open question. In any event, as proposed by the drafting committee, draft conclusion 14 suggests a series of procedural requirements applicable in a situation in which a State invokes a conflict with a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law. The United Kingdom is concerned not only about the proposed content of the provision, for example the reference to 'states concerned', which is not clear in meaning or scope, (and which also raises questions given the separate reference in the conclusions to *jus cogens* norms being *erga omnes*), but the appropriateness of the inclusion of such a provision. If it was deemed appropriate to include a provision on procedure, this should perhaps be modelled more closely on Article 65 of the Vienna Convention on the Law of Treaties.

3. The United Kingdom believes that further attention, and clarification, will be needed in respect of draft conclusion 15 as proposed in the Special Rapporteur's third report (on the legal effects of *jus cogens* on customary international law, in particular in relation to proposed paragraph 3). The United Kingdom questions whether the status of a persistent objector should automatically be denied if a customary international law becomes a norm of *jus cogens* (assuming it is possible for a norm of *jus cogens* to develop notwithstanding a clear persistent objection or objections).
4. With regard to draft conclusion 16 in the third report, the United Kingdom notes that unilateral acts only give rise to international legal obligations in certain situations and suggests that it is important to clarify the meaning of a 'unilateral act' in this context.

5. The United Kingdom has concerns regarding draft conclusion 17, on the relationship between *jus cogens* and binding resolutions of international organisations. The United Kingdom does not believe there is State practice to support the contention that a State can refuse to comply with a binding UNSC resolution based on an assertion of a breach of a *jus cogens* norm. Further, the United Kingdom is concerned that the inclusion of the specific reference to resolutions of the Security Council of the United Nations could undermine the legality and effectiveness of binding UNSC resolutions. The United Kingdom does not accept that the Security Council has ever contravened a norm of *jus cogens* in its resolutions; it is not imaginable that the Security Council would require states to breach rules of *jus cogens* and there is a clear danger that this draft conclusion could be used to weaken respect for Security Council resolutions. To ensure the effective operation of the UN's collective security system, it is essential that all UN member states fully respect UNSC resolutions and not question them unilaterally.

6. The United Kingdom also notes draft conclusions 22 and 23 on the consequences of *jus cogens* on immunities and the proposal following the Commission's plenary debate to convert these into a 'without prejudice' clause, which so far as it goes is welcome. It would be even better simply to drop the provisions. The issue of immunities has already been debated in the ILC topic Immunity of State officials from foreign criminal jurisdiction and the United Kingdom does not consider that the issue of immunities should be revisited in this topic. The United Kingdom is particularly concerned that draft conclusion 23, as originally proposed by the Special Rapporteur, would have been potentially far broader than the highly controversial draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction. Customary international law does not treat a state's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule it has alleged to have violated. The draft conclusion is also not in line with the ICJ findings in

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) that immunities were a question of jurisdiction whereas the question of whether there has been a breach of *jus cogens* is one of substance.

7. In relation to the effects of *jus cogens* on state responsibility detailed in draft conclusions 19, 20 and 21, the United Kingdom has general concerns about the reliance by the Special Rapporteur on the non-binding articles on state responsibility, not all of which represent settled law, and some of which present problems of practical implementation. The United Kingdom notes that in some places the proposed conclusions seek to expand the effect or meaning of the non-binding articles on state responsibility and does not believe it appropriate to reopen the carefully achieved balance in the existing articles on state responsibility. The United Kingdom will carefully monitor how this aspect of the *jus cogens* topic develops.
8. Finally, with regard to future work, the United Kingdom is doubtful as to the utility of considering 'regional' *jus cogens*, since it does not believe this concept has any significant support in State practice. The United Kingdom urges caution with regard to any attempts to develop the law in this area, especially given the likelihood that a concept of 'regional' *jus cogens* would undermine the integrity of universally applicable *jus cogens* norms, resulting in even less clarity as to when a *jus cogens* norm is in existence.