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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,
AGENDA ITEM 81,
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY FIFTH SESSION: PART III (A/68/10)
CHAPTER VI (PROTECTION OF PERSONS IN THE EVENT OF DISASTERS), CHAPTER VII (FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW), CHAPTER VIII (PROVISIONAL APPLICATION OF TREATES), CHAPTER IX (PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS), CHAPTER X (THE OBLIGATION TO EXTRADITE OR PROSECUTE) AND CHAPTER XI (THE MOST-FAVOURED NATION CLAUSE)
(NEW YORK: 4-6 NOVEMBER 2013)

STATEMENT BY MS. RUTH TOMLINSON
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4 – 6 NOVEMBER 2013

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Mr Chairman,

On the topic of **Protection of persons in the event of disasters**, the UK commends the Special Rapporteur for his persistence in systematically analysing the various strands of this topic.

The UK has no objection to the substance of the two new draft Articles proposed this year, which are in line with activity that already takes place within the UK. Cooperation for disaster risk reduction (set out in the new draft Article 5*ter*) takes place *inter alia* through the United Nations Hyogo Framework for Action. As for the duty to reduce the risk of disasters, set out in the new draft Article 16, legislation exists in the UK which establishes obligations to assess risks, take measures to mitigate them, and to put preparations in place. The legislation also includes a duty to warn and inform, along the lines of that set out in draft Article 16.

On the form of the eventual product of the Commission's work, the UK continues to be of the view that guidelines to inform good practice would be helpful for States rather than a legally binding instrument.

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Mr Chairman,

Turning now to the topic of the **Formation and evidence of customary international law**, the UK is pleased to see that the Commission held a useful albeit preliminary debate based on the Special Rapporteur's first report. We continue to see this topic as having real practical value.

The UK considers that both State practice and *opinio juris* are essential elements to the formation of a rule of customary international law. We therefore agree with the adoption of a "two-elements" approach to the topic; that the topic requires an assessment of both State practice and *opinio juris*. We also agree that this topic should not deal in detail with *jus cogens* since whether a rule constitutes a rule of *jus cogens* is a different question to whether a rule constitutes a rule of customary international law.

As set out previously, parties to litigation before the domestic courts in the UK have increasingly sought to make arguments based on customary international law in a wide variety of contexts. In situations where the proposition before the domestic court is that there is or, conversely, is not a customary rule of international law, there is of course important guidance to be found in the judgments of the International Court of Justice, but there is currently no other authoritative point of reference to which a domestic judge can turn for guidance as to how to determine the issue. Accordingly, the UK welcomes the Commission's intention that the outcome of the work of this

topic should be of an essentially practical nature, in the form of a set of conclusions with commentaries. We see such conclusions as a useful tool for judges as well as for practitioners confronted with the question of identifying whether or not a rule of customary international law exists.

The UK considers that it would not be appropriate for the Commission to be unduly prescriptive in respect of this topic and welcomes the Commission's consideration that any outcome of its work on this topic should not prejudice the flexibility of the customary process or future developments concerning the formation and evidence of customary international law.

The UK notes that the Commission has decided to change the title of the topic to Identification of customary international law. We have no comments on this change of name.

We look forward to studying the further work of the Commission, which will presumably begin to spell out the two-elements approach.

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Mr Chairman,

Turning now to the topic of **Provisional application of treaties**. The UK welcomes the Special Rapporteur's first report on this topic and considers that the continued study of this topic by the Commission will usefully build on the body of work on treaties already undertaken by the Commission. Provisional application of treaties is often utilised in the UK's own treaty practice.

The UK firmly agrees with the Special Rapporteur that the need for flexibility is key. In order to ensure that this flexibility is maintained, we consider that the Commission's work should be aimed at the provision of some kind of "guidelines", with commentaries, to help decision-makers at various stages of the treaty process, taking into account State practice, rather than "model clauses" or the development of "agreed principles", which could tend to suggest something prescriptive and could hinder flexibility of parties to treaties. We agree that aim of the Commission should not be seen as encouraging or discouraging recourse to provisional application and should rather be to provide greater clarity to States when negotiating and implementing provisional application provisions.

The UK also believes that the study of this topic should focus on the wording of Article 25 of the Vienna Convention on the Law of Treaties. We will be interested to see how this is applied in practice and how parties express the intention to provisionally apply a treaty.

The UK will be particularly interested in the Commission's work on provisional application in the context of multilateral treaties (as distinct from bilateral treaties), which may present different scenarios and issues regarding provisional application.

We note that the Commission is surveying State practice and has requested information from States to be submitted in the New Year. This is to include information in relation to (a) the decision to provisionally apply a treaty; (b) the termination of such provisional application; and (c) the legal effect of provisional application. The UK welcomes this survey and looks forward to submitting information on UK practice in due course. We consider that State practice should inform the scope and nature of the Commission's work in this area.

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Mr Chairman,

Turning now to the topic of **Protection of the environment in relation to armed conflicts,** the UK has considered the proposal from the Special Rapporteur as to how this topic is to be taken forward.

We note that the Special Rapporteur intends to concentrate on what are described as Phases I and III (the pre and post conflict phases), whilst Phase II (the phase during conflicts) will be given less focus. The UK considers that the Special Rapporteur is right not to focus on Phase II: although obligations applicable during armed conflict are arguably the most important issue in this context, a great deal of relevant law already exists. The UK notes that the Special Rapporteur also proposes not to address the effects of certain weapons on the environment; and we welcome this conclusion.

We note the view of the Special Rapporteur that the topic is more suitable for the preparation of non-binding guidelines than a convention. We too remain unconvinced that there is a need for new conventions in this area.

We will look carefully at what the Special Rapporteur proposes in due course.

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Mr Chairman,

Turning to the topic of the **Obligation to extradite or prosecute** (*aut dedere aut judicare*), the UK thanks the Working Group of the Commission for its helpful report on this topic at Annex A of the Commission's report.

The UK's position continues to be that the obligation to extradite or prosecute arises as a result of a treaty obligation. That the substantive crimes in respect of which the obligation arises and the question of whether the custodial State has discretion as to whether to extradite or prosecute are governed by the terms of the relevant treaty.

As we have also stated on previous occasions, the UK does not consider that we have reached the stage at which the obligation to extradite or prosecute can be regarded as a rule or principle of customary international law. We

note that whether the obligation can be regarded as such is not mentioned in the report of the Working Group. We consider that the Commission has wisely decided not to give further consideration to this aspect of its work on this topic.

The UK previously welcomed the excellent Secretariat Study from 2010 (A/CN.4/630) on multilateral treaty practice and welcomes the Working Group's consideration of this Study in its report. In this respect, we support the Working Group's conclusion that the scope of the obligation to extradite or prosecute under the relevant conventions should be analysed on a case-by-case basis. The UK notes the position of the Working Group that there are gaps in the Convention system governing the obligation to extradite or prosecute in respect of certain core crimes. We have commented separately on the proposal for a separate Convention on Crimes against Humanity.

The UK is grateful for the Working Group's analysis of the judgment of the International Court of Justice in Questions relating to the obligation to extradite or prosecute (Belgium v Senegal), which gives some useful guidance for the interpretation of the relevant treaty provisions. We continue to take the view that the Commission should avoid examining the issue of universal criminal jurisdiction and that the so-called "triple alternative", that is to say the issue of transfer to an international tribunal should not be considered by the Commission as there are specific rules expressly covering such transfers.

We consider that, having submitted the report at Annex A, there is no more than can be usefully done on this topic at this stage. The UK takes the view that the Commission should conclude its work on the topic.

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Mr Chairman,

Turning finally to the topic of the **Most-Favoured-Nation clause**, we would like to thank the Study Group for the update on its work on this topic. The UK welcomes the acknowledgment by the Study Group of the risks of any outcome on this topic being overly prescriptive and that the Group is mindful that it should not overly broaden the scope of its work. As we have previously indicated, we do not consider that the development of draft articles or any revision of the 1978 draft Articles on the Most Favoured Nation clause is appropriate in respect of this topic. We look forward to reviewing the Study Group's draft final report in due course.

That concludes this statement on behalf of the UK.

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