



United Kingdom Mission  
to the United Nations

One Dag Hammarskjold Plaza  
(885 Second Avenue)  
New York, NY 10017

Tel: +1 (212) 745 9200

Fax: +1 (212) 745 9316

Email: [uk@un.int](mailto:uk@un.int)

[http://twitter.com/UKUN\\_NewYork](http://twitter.com/UKUN_NewYork)

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 II (A/70/10)  
CHAPTERS VI (IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW),  
CHAPTER VII (CRIMES AGAINST HUMANITY) AND CHAPTER VIII  
(SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION  
TO THE INTERPRETATION OF TREATIES)

STATEMENT BY MS. SHERIN SHEFIK  
ASSISTANT LEGAL ADVISER  
FOREIGN & COMMONWEALTH OFFICE

4-6 NOVEMBER 2015

Check against delivery

Mr Chairman,

On the topic of the **Identification of customary international law**, the United Kingdom welcomes the Drafting Committee's adoption of 16 draft conclusions and is pleased with the progress of this work so far. We look forward to seeing the commentaries, which will be a crucial part of the output on this topic.

*Practical value to practitioners and judiciary*

As set out previously, parties to litigation before the domestic courts in the United Kingdom 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 various 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 United Kingdom 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. The United Kingdom hopes that the conclusions and commentaries will be a useful tool for judges as well as for practitioners confronted with the question of determining whether or not a rule of customary international law exists.

*Role of international organisations*

The United Kingdom notes that the draft conclusions deal with international organisations to some extent, but not (yet) in a way that is entirely consistent. Among the International Organisations concerned, the EU has a particular importance. Where the European Union acts in an area that supplants Member State action, for example in an area where the EU has exclusive competence, such practice should be equated with the practice of States. Otherwise Member States would themselves be deprived of their ability to contribute to State practice.

However, the United Kingdom's view is that it should be made clear in the draft conclusions and/or the commentaries that the practice of International Organisations can only be equated with the practice of States where the International Organisation is not acting *ultra vires*. So to use the EU as an example, EU action can only be equated to State practice where such action is properly taken in accordance with 1) the General Arrangements on EU statements in multilateral organisations, 2) the positions of Member States and EU institutions on the division of competences, and 3) the powers of the EU institutions as expressly conferred on them by the EU Treaties.

### Forms of evidence

The United Kingdom's view is that draft conclusion 10(2) could more clearly state that the listed categories of evidence will only constitute evidence of *opinio juris* to the extent that the content demonstrates the necessary understanding of legal right or obligation. The inclusion of the word 'may' in the opening part of the draft conclusion could remedy this, namely: "Forms of evidence of acceptance as law (*opinio juris*) may include, but are not limited to..." Alternatively, the commentaries could make clear that these listed forms of evidence will only constitute *opinio juris* in some circumstances.

### Conclusion

The United Kingdom broadly agrees with the approach taken and the substance of the draft conclusions provisionally adopted by the Drafting Committee and believes that the Commission's work on this topic will have real practical value in the field of public international law as a whole. The United Kingdom looks forward to considering the draft commentaries, which we think should be seen as a central component of this guidance on the identification of customary international law. We will follow the Commission's development of these commentaries at the 2016 session with interest.

\*---\*---

Mr Chairman,

Turning to the topic of **Crimes against humanity**, the United Kingdom welcomes the Commission's further work on this issue.

The United Kingdom acknowledges that there is currently no general multilateral framework governing crimes against humanity. We continue to see benefit in exploring how an extradite or prosecute regime in respect of such crimes could operate. The United Kingdom appreciates the careful consideration that the Special Rapporteur, the Commission and the Drafting Committee have given to the inter-relationship between their work and the Rome Statute, which already provides for the international prosecution of crimes against humanity. Any additional regime, would have to complement rather than compete with the Rome Statute. It could do so by facilitating national prosecutions and thereby strengthening the complementarity provisions of the Rome Statute. In this respect, it is wholly positive that the International Law Commission has incorporated the definition of crimes against humanity from the Rome Statute into draft Article 3 without any substantive change.

As work on this topic continues, the United Kingdom underlines that we would not welcome the expansion of the scope of this investigation into issues such as civil jurisdiction and immunity. Therefore, we would urge the Commission to keep the draft simple, along the model of earlier *aut dedere aut judicare* conventions. In addition, the United Kingdom encourages the Commission to consider further the appropriate jurisdictional scope of the obligation of prevention under Article 4 and the rationale for this.

\*---\*---

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 third report on this topic and the Commission's additional draft conclusion, with accompanying commentary, regarding treaties which are the constituent instruments of international organisations.

We note that this is an issue which can be complicated due to the variety of international organisations and the numerous ways in which they operate.

We welcome the careful drafting of draft conclusion 11 which conforms to the terms of article 5 of the Vienna Convention and applies the principles set out in draft conclusions previously provisionally adopted by the Commission regarding the application of articles 31 and 32. It provides useful guidance on the application of these principles to this particular type of treaty.

Thank you, Mr Chairman.

\*---\*---