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
http://twitter.com/UKUN_NewYork

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 3 (A/72/10)

CHAPTER VIII (PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*))
CHAPTER IX (SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY)
CHAPTER X (PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS)

STATEMENT BY MR STEPHEN H. SMITH
ASSISTANT LEGAL ADVISER
UNITED KINGDOM MISSION TO THE UNITED NATIONS

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Mr Chairman,

1. Concerning **peremptory norms of general international law (*jus cogens*),** the United Kingdom is grateful to the Commission for its work on this topic, to the Special Rapporteur, Mr Dire Tladi, for his Second Report, and to the Drafting Committee, in particular to the Chairperson, Mr Aniruddha Rajput, for the helpful interim report annexing the provisionally adopted draft conclusions.

2. At the outset, the United Kingdom recalls its earlier support for the Commission's work on this topic. It is an opportunity for the Commission to provide clarity and assistance to practitioners, in particular domestic courts faced with the task of identifying and determining the legal effects of *jus cogens* norms. This could be of immense practical value to States.

3. Mr Chairman, in the view of the United Kingdom, the focus of this work should be identifying the rules dealing with the formation, operation and legal effects of *jus cogens* norms.

4. The complexity and controversy of *jus cogens* norms lies in determining the process for their identification, and their significance once identified. The concept has been subject to a vast amount of literature, not all of which has been consistent. While the commentators are united as to the existence of *jus cogens,* in many respects that is where the unity ends. Agreement and consensus concerning the concept can be as elusive as the doctrine itself.

5. As such, the Commission's work on this topic has the potential to influence the way in which the international community of States as a whole regulates its conduct for years to come. And for that reason the work of the Commission also has the potential to divide States.

6. It is against that background that the United Kingdom reaffirms its support for the Commission's work on this topic, while urging the Commission to proceed with great caution. Given the importance and difficulty of this topic, and the need to secure the consensus of States with this work, such caution is essential.

7. Turning to the draft conclusions, we do not consider **draft conclusion 2** to be helpful, for the following reasons.

8. First, it unrealistic to attempt accurately to capture within the confines of these draft conclusions the rationale which underpins *jus cogens*, as this draft conclusion attempts. This is a controversial and essentially theoretical matter, which we do not believe it is necessary for the Commission to address, even in the introductory manner as is now proposed. There is a wide spectrum of views across the international community; certainly that is true of the Commission and its Drafting Committee, not to mention this Sixth Committee, as this [morning's/afternoon's] debate has revealed. While norms of *jus cogens* may well reflect and protect fundamental values of the international community, and possess a hierarchically superior status, we do not consider that this descriptive draft conclusion assists with providing

the clarity and technical assistance which would be of the most practical value to States and practitioners.

9. Secondly, allied to that concern, the inclusion of "descriptive and characteristic elements", even if capable of securing consensus, could be unhelpful. It is necessary to maintain a clear distinction between descriptive elements on the one hand, and the criteria for identification and the consequences of identification, on the other. Conflating the two could be taken as States intending to alter the meaning and effect of the definition set forth in Article 53 of the Vienna Convention on the Law of the Treaties.

10. This point is illustrated by the subjectiveness of the term "fundamental values" and the associated terminology. The Special Rapporteur contends at paragraph 22 of his Second Report that whether *jus cogens* "reflect" (as some say) fundamental values, or whether they "protect" them (as others maintain) is irrelevant. Also immaterial is the distinction found in the literature between "fundamental interests" on the one hand, or "fundamental values" on the other. The general theme, notes the Special Rapporteur, is the same. The United Kingdom agrees that the "general theme" is indeed the same, but what is needed for this most important of topics is more than mere consistency with a "general theme", but precision of analysis reflecting the practice of States.

11. In addition, the term "fundamental values" could either be used to water down the constituent elements of *jus cogens*.

Or it may introduce an additional constitutive element of *jus cogens* norms, making their formation and identification more difficult. Either eventuality could undermine the place of *jus cogens* in the international legal order or leave it open to abuse.

12. Thirdly, the inclusion of a descriptive paragraph such as draft conclusion 2 risks taking this practical project into the territory of pure policy, at the risk of securing consensus among States on matters of practical concern. The Special Rapporteur spoke of the "descriptive and characteristic elements" of *jus cogens* in his reports. An exposition of such descriptive and characteristic elements might have its place in the commentary to the draft conclusions, as aspects of the Special Rapporteur's analysis demonstrate. However, we see no practical value and indeed dangers in such descriptive and characteristic elements featuring the draft conclusions themselves.

13. In relation to **draft conclusion 5**, we note that the terminology is taken from Article 53 of the Vienna Convention on the Law of Treaties, in particular "norm" and "general international law". Analysing these terms with precision will be a formidable task. In that connection, we welcome the inclusion in the Commission's long-term programme of work of the topic "**general principles of law**". This inclusion is a further reason for the Commission to proceed cautiously on the *jus cogens* topic, since there is some overlap between

the two topics and there may be a need to ensure consistency.

14. **Draft conclusions 6 and 7** concerning the process for acceptance and recognition of *jus cogens* leave a number of matters outstanding. The acceptance and recognition criterion or criteria apparently feature no requirement for State practice to play a role in the identification of *jus cogens*. Thus, while customary international law must be evidenced by State practice as well as *opinio juris*, there is no corresponding requirement for the ascertainment of hierarchically superior *jus cogens no*rms, according to the approach of these draft conclusions. At the very least, it is counterintuitive that the higher legal order of *jus cogens* is formed on the basis of a lower bar.

15. In a similar vein, we are concerned that the acceptance and recognition by the "international community of States as a whole" under Article 53 of the Vienna Convention appears to be watered down to an undefined "very large majority" of States, in the absence of consensus. We appreciate the difficulty of capturing the precise meaning of the term "international community of States as a whole"; but "very large majority" does not help; indeed use of the word "majority", however qualified, would seem to imply something less than the whole. This departure from Article 53 of the Vienna Convention requires re-consideration.

16. While the Special Rapporteur speaks in his reports of Article 53 being a "point of departure" for this work, the United Kingdom has always considered that the substance of this work should not depart from the definition in that article at all. The topic should start and finish within the confines of Article 53, and be consistent with the rule it contains. Article 53 may mark a point of departure for further consideration of the consequences of *jus cogens* beyond the law of treaties, but in our view Article 53 and the other provisions of the Vienna Convention on *jus cogens*, should mark the point of return, as it were.

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17. Mr Chairman, turning now to the **succession of States in relation to State responsibility**, the United Kingdom is grateful to the Special Rapporteur, Mr Pavel Štruma, for his first report. We note that the Commission's work on this topic is at a very early stage. The Drafting Committee has provisionally adopted two draft articles concerning the scope of the topic and the definition of terms. The United Kingdom will reserve detailed comments until the work is further developed, but instead will offer some general observations at this stage.

18. As a preliminary observation, we note that there is very little by way of State practice in this area to guide the Commission. The State practice identified by the Special Rapporteur in his report is highly context-specific and sensitive. It must be viewed in its historical, political and

cultural context. Rather than revealing any discernible trends of universal application, the practice summarised in the report tends to demonstrate the contrary. The succession of State responsibility involves policy – and, indeed, political – decisions which go to the heart of the identity of the States involved.

19. As such, it is hardly surprising that many of the contentions of the Special Rapporteur clearly into the territory of substantive policy making, or *lex ferenda.* My delegation recalls its observations in relation to Cluster 2, and those of other delegations throughout the course if this agenda item, that the Commission needs to be absolutely clear whether it is setting out *lex lata* or *lex ferenda*. We are clearly in the territory of the latter here.

20. The United Kingdom retains an open mind as to utility of this work. One option could be to produce model clauses which States in a succession situation could choose to use as a starting point for determining where State responsibiluty lies. Anything more prescriptive may risk not securing the endorsement of States.

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21. Mr Chairman, turning to the topic of the **protection of the environment in relation to armed conflict**, the United Kingdom welcomes the appointment of the new Special Rapporteur for this topic, Ms Marja Lehto, and we look

forward to her first report in 2018. Given the Commission has not produced further work on this topic since last year, we recall the main points from our statement last year.

22. First, the Commission should not seek to modify the law of armed conflict.

23. Secondly, while the preparation of non-binding guidelines or principles could be useful, we are unconvinced that there is a need for new treaty provisions in this area.

24. Thirdly, international humanitarian law is the *lex specialis* in this field.

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Thank you, Mr Chairman.