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## UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,  
SEVENTY-FOURTH SESSION, AGENDA ITEM 79,  
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK  
OF ITS SEVENTY-FIRST SESSION: PART I (A/74/10)  
CHAPTERS I – III (INTRODUCTORY PARTS) AND XI (OTHER DECISIONS  
AND CONCLUSIONS OF THE COMMISSION)  
CHAPTER IV (CRIMES AGAINST HUMANITY)  
CHAPTER V (PEREMPTORY NORMS OF GENERAL INTERNATIONAL  
LAW (JUS COGENS))

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Check against delivery

Mr/Madam Chairperson,

1. I would like to begin by thanking the Chairperson of the International Law Commission, Mr. Pavel Šturma, for his report to the Sixth Committee, and all members of the Commission for a busy and successful year. The United Kingdom is particularly grateful to the Chairperson of the Drafting Committee, Mr. Claudio Grossman Guiloff, for all his hard work during the session.
2. The United Kingdom also commends and thanks the Codification Division of the Secretariat and its director, Mr. Huw Llewellyn, for their consistently excellent work.

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Mr/Madam Chairperson,

3. Before addressing specific chapters in the Commission's report, I would like to make some general remarks regarding the Commission's methods and output, and the Sixth Committee's treatment of that output.
4. First, the Commission's work products are nowadays frequently cited by international and domestic courts and tribunals. This is in principle, a good thing – provided there is clarity about the legal force of these products. But that is not always the case. The Commission's work is sometimes relied on as an articulation of international law without proper consideration of whether that product has been accepted as a treaty or is sufficiently underpinned by State practice and *opinio juris* to be regarded as customary international law. This confusion may be perfectly understandable: international law (and therefore the work of the Commission) features in the business of all kinds of tribunals and courts in national legal systems and not all of these courts can be expected to be conversant with international law principles. The Commission therefore has a responsibility to assist judges and practitioners in their handling of international law, by making clear in its products when it is codifying existing law and when it is suggesting the

progressive development of the law, or new law. This is a point that has been repeatedly made, but the situation is becoming critical. The Commission must shoulder its responsibilities in this regard.

5. Second, engagement between the Commission and States is essential to the maintenance of the authority of the Commission's work. Both the Commission and States have responsibilities in this regard.
6. The working methods adopted by the Commission with regard to the topics on its programme of work must allow States to participate fully in the process of determining the output of those topics. Currently, draft provisions are presented to States at various stages. Some follow the Commission's usual practice of drafting and adopting a provision together with the commentary to that provision. In other cases, however, provisions have been proposed by Special Rapporteurs which have already been revised by the Drafting Committee, but for which there are not yet commentaries. Or they are kept in the Drafting Committee without commentaries until a full set of draft provisions has been adopted. This inevitably reduces the opportunity for States to comment and inform the Commission's work as it progresses. As the United Kingdom has previously stated in this Committee, States will have a fuller understanding of draft provisions, and will be able to engage more productively with the Commission, when drafts and commentaries are produced simultaneously.
7. For their part, States must avail themselves of the opportunity to express their views and contribute fully to the Commission's work, and the Commission must accurately and fully consider the observations of States. At the end of a topic's life cycle in the Commission, the Commission's proposed output should in principle be subject to discussion among States in the Sixth Committee. This is especially the case where the Commission's proposed outputs are intended to progressively develop the law, or create new law.

8. Third, the United Kingdom is concerned at the speed at which voluminous and important topics, with wide ranging syllabuses, are being dealt with by the Commission. Topics with excessively broad syllabuses should be approached with caution, and the Commission should choose new topics carefully and judiciously, taking into consideration the requirements and needs of States when planning its work. If there were fewer, more focused, topics on the Commission's agenda, the Commission could adopt a more rigorous and measured approach to those topics, which would be to the benefit of the clarity and acceptability of the final product
  
9. These points may sound familiar to some of the distinguished delegates in the room today. That is because they are essentially the same points the United Kingdom and other States made in statements to the Sixth Committee last year. The United Kingdom felt compelled to repeat them, however, because in the intervening 12 months it does not seem like much has changed. The United Kingdom is a committed supporter and friend of the Commission, but in the spirit of dialogue it is important that States speak plainly about the concerns they have. To do otherwise risks eroding the confidence States have in the Commission and its work.

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Mr/Madam Chairperson,

10. Turning to Chapter XI of the Commission's annual report, concerning **'other decisions and conclusions of the Commission'**, the United Kingdom welcomes the Commission's decision to include the topic **'Sea-level rise in relation to international law'** in its current programme of work.
  
11. The United Kingdom also notes the Commission's decision this year to recommend the inclusion of two additional new topics in its long-term programme of work. Recalling its earlier comments regarding the number and scope of topics being dealt with by the Commission, the

United Kingdom's view is that there is currently no need for the Commission to move any further topics onto its current programme of work.

12. However, if the Commission is still minded to do so, the United Kingdom is in favour of the Commission taking up the topic '**Prevention and repression of piracy and armed robbery at sea**'. The United Kingdom considers that the resurgence of maritime piracy in the twenty-first century is an issue of grave concern to the international community. The Commission could usefully study and suggest ways in which States could improve arrangements and cooperation for the prosecution of the perpetrators of piracy and armed robbery at sea.
13. Regarding the other topic recommended this year for inclusion on the Commission's long-term programme of work, '**Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law**', the United Kingdom regrets to say that it does not share the view that this topic is yet ripe for work by the Commission. There are a number of conceptual issues that concern, as a general matter, the degree to which international obligations owed between States can result in an obligation to make reparation to private persons. The United Kingdom considers that such examples as exist in State practice exist in the context of specific treaty regimes (for example certain human rights treaties). Such practice is not easily generalisable. In the United Kingdom's view, therefore, there is not sufficient practice to lend itself to codification efforts by the Commission.
14. With regard to other topics on the Commission's long-term programme of work, the United Kingdom recalls its previous comments on the topic '**universal criminal jurisdiction**'. It is clear that there continues to be a diversity of views among Member States on the definition, nature, scope and limits of this principle. As such, the United Kingdom remains of the view that State practice on universal criminal jurisdiction

is not yet sufficiently advanced to enable consideration of the topic by the Commission.

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Mr/Madam Chairperson,

15. The United Kingdom is grateful to the Commission and to the Special Rapporteur, Mr. Sean Murphy, for their impressive and important work on the topic '**crimes against humanity**'. The United Kingdom welcomes the Commission's adoption on second reading of a set of draft articles on prevention and punishment of crimes against humanity, and accompanying commentaries.
16. The draft articles navigate this complex and sensitive area well through a rigorous, practical approach that draws significant inspiration from international criminal law precedents. The United Kingdom considers the draft articles to be a positive and useful example of the potential for the Commission to promote the codification and progressive development of international law, by distilling existing international law and practice in a focused, responsible and practical way.
17. Since States provided their written comments to the Commission last December, the Commission has made some amendments to the draft articles and their commentaries. Many of these amendments are helpful. In particular, the United Kingdom supports the removal of the definition of "gender" from draft article 3, and the amendment of draft article 4 so that the list of measures through which each State undertakes to prevent crimes against humanity is more clearly exhaustive. The United Kingdom also supports the Commission's decision to keep the scope of the draft articles limited by, for example, not seeking to cover issues such as amnesties and immunity.
18. In light of the changes made by the Commission, the limited scope of the draft articles and the United Kingdom's support for an extradite-or-prosecute convention in respect of crimes against humanity, the United Kingdom would support the Commission's recommendation for States

to elaborate the draft articles into a convention in the UN General Assembly or at a diplomatic conference.

19. In the United Kingdom's view, a future convention on this subject would complement, rather than compete with, the Rome Statute. A new convention could also facilitate national prosecutions, thereby strengthening the complementarity provisions of the Rome Statute. The elaboration of the draft articles also provides a good opportunity for States to work together to tackle a lacuna in the fight against the most serious crimes.

20. The United Kingdom should, however, note that a convention based on these draft articles would require it to amend its domestic law on crimes against humanity, as presence in the United Kingdom alone is not currently sufficient for the exercise of jurisdiction. Consequently, before becoming a party to a convention containing this extension of jurisdiction, the United Kingdom would need to assess in full the impact on its justice system. The United Kingdom also needs to consider carefully the requirement to apply the undertaking to prevent crimes against humanity in any territory under its jurisdiction, and whether certain safeguards should be included in any convention to ensure the extension of jurisdiction is not abused.

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Mr/Madam Chairperson,

21. I now turn to the topic '**Peremptory norms of general international law (*jus cogens*)**'. The United Kingdom is grateful to the Commission, and especially to the Special Rapporteur, Mr. Dire Tladi, and the Drafting Committee, for their continued work in taking forward this topic. This has resulted in the Commission's adoption on first reading this year of a set of 23 draft conclusions and accompanying commentaries.

22. The completion of the first reading of the draft conclusions and commentaries gives States the opportunity to step back and look at the

project overall. From the outset, the United Kingdom has supported the Commission's work on this topic, which it believes could have practical value for States, judges and practitioners. However, 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 urged the Commission to approach this topic with caution.

23. For the most part it has done so, and the United Kingdom welcomes this. However, in certain respects the Commission has adopted a somewhat expansive and in places theoretical approach to the topic. This has resulted in the adoption on first reading of a set of draft conclusions which cover a diverse range of sensitive issues and which do not in all respects reflect current law or practice. Nor, in some instances, do they reflect or address the specific views and concerns expressed on this topic by States in Sixth Committee. This approach has no doubt been driven in part by the lack of State practice relating to *jus cogens* and the dearth of existing rules of international law in this area. But in the United Kingdom's view this is no justification for adopting such an expansive approach to such a fundamental topic. This is especially so when, as here, the Commission's output does not clearly distinguish between when it is codifying existing law and when it is suggesting the progressive development of the law or new law. Given the importance and complexity of this topic's subject matter, and therefore the potentially far-reaching consequences of these draft conclusions, the United Kingdom considers it imperative that the Commission addresses these matters on second reading.

24. The United Kingdom has provided some headline observations in a written annex to this statement: these cover issues such as the introduction of the notion of 'fundamental values' in draft conclusion 3; the need for caution in referring to the Security Council in the commentary to draft conclusion 16; and the question of the list annexed to the draft conclusions. The United Kingdom will submit detailed written comments by the 1<sup>st</sup> of December 2020 deadline, and



encourages others to do likewise. This is an important and difficult topic, and input from States is vital.

Thank you, Mr/Madam Chairperson.

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

1. In relation to the draft conclusions and commentary thereto adopted on first reading by the Commission this year, the United Kingdom remains of the view that, for the reasons articulated in its 2017 statement on this topic, draft conclusion 3 (or draft conclusion 2 as it was at the time) is at best superfluous, and at worst unhelpful. It would be better to drop this provision from the conclusions. The rationale underpinning *jus cogens* is a controversial and essentially theoretical matter which the United Kingdom does not believe it is necessary or helpful for the Commission to try to address.
2. Draft conclusion 3 is also a potential source of confusion to States and practitioners, not least because its descriptive elements could be read as creating additional requirements regarding the formation and identification of peremptory norms of general international law (*jus cogens*). In particular, the reference to 'fundamental values' does not appear in the definition of such norms in Article 53 of the Vienna Convention on the Law of Treaties or in any other relevant text. Draft conclusion 3 could therefore lead to an argument by a State that a norm did not have peremptory status even if it met the test in Article 53 because, in the view of the State making the argument, the relevant norm did not reflect a 'fundamental value'. The accompanying commentary has not moved the United Kingdom from its position that draft conclusion 3 should be omitted.
3. Regarding draft conclusion 16, the United Kingdom notes the omission of the specific reference to binding resolutions of the UN Security Council in the text of the conclusion itself. This is welcome, so far as it

goes, but the United Kingdom also notes that the Commission “*considered it important*” to highlight in the accompanying commentary to draft conclusion 16 that this conclusion applies equally to binding resolutions, decisions and acts of the Security Council. Along with a number of other States, the United Kingdom voiced concerns in its statement on this topic last year that there was a lack of State practice to support the contention that a State can refuse to comply with a binding Security Council resolution based on an assertion of a breach of a *jus cogens* norm. Furthermore, specific reference to Security Council resolutions in this conclusion could undermine the legality and effectiveness of binding UN Security Council resolutions and such a conclusion could be used to weaken respect for Security Council resolutions.

4. Having reviewed the commentary to draft conclusion 16, the United Kingdom remains of the view that there is insufficient State practice to support the assertion that a State can refuse to comply with a binding UN Security Council resolution on the basis that it is in breach of a *jus cogens* norm. The limited practice cited by the Commission is insufficient to justify such a significant conclusion. The United Kingdom also considers that the commentary is misleading as to the existence of divergent views on this issue. The Commission should be very cautious about (or better still avoid) making assertions about the relationship between peremptory norms of general international law (*jus cogens*) and UN Security Council resolutions.
  
5. With regard to draft conclusion 23 and the annex thereto, the United Kingdom recalls that at the outset of this topic it said that it would not, in principle, be against the development of an illustrative list of pre-existing *jus cogens* norms, provided that this effort did not detract from the principal focus of the Commission’s work on this topic. At the same time, the United Kingdom stated that the inclusion of such a list did not seem to be an essential part of a topic whose parameters are supposed to be confined to explaining how to identify pre-existing *jus*

*cogens* and the legal consequences of such identification; and that the Commission should only include in any list norms that clearly fulfilled the requirements of *jus cogens*.

6. The United Kingdom notes that the Special Rapporteur proposed in his fourth report to include in a draft conclusion an “illustrative list” of “*the most widely recognized examples of peremptory norms of general international law (jus cogens)*”. Ultimately, the Commission opted to include, as an annex to the conclusions, a non-exhaustive list of norms that the Commission has previously referred to as having that status. The approach adopted by the Commission on first reading is preferable to that proposed by the Special Rapporteur. Nevertheless, the United Kingdom still has concerns, as any use of this illustrative list necessarily must carefully consider the quality and consistency of the Commission’s prior work which referred to a norm as having peremptory status, and then consider developments thereafter, if the aim is to assess the contemporary status of the norm in question. It is clear from the accompanying commentary to the list that that prior work by the Commission was often cursory in nature; at times did not directly declare norms to be *jus cogens*; was sometimes inconsistent in the formulation of the same norm; and at times was not the work of the Commission as a whole. Further, the United Kingdom is concerned that, no matter how it is described, the status of the list will cause confusion and will be treated by some readers as exhaustive and/or a codification of existing *jus cogens* norms.
7. Recalling its comments on this question at the outset of the topic, and in light of the issues with the Special Rapporteur’s and the Commission’s approaches identified by the United Kingdom, other States and members of the Commission, the United Kingdom still considers that a list is not essential to this topic and is now firmly of the view that it would be better not to include such a list. The United Kingdom notes in this regard the contrasting approach of the Special Rapporteur for the ‘general principles of law’ topic, which is that

preparing an illustrative list of general principles of law would be impractical, necessarily incomplete and would divert attention away from the central aspects of the topic.

8. If, however, there is to be a list, the United Kingdom's strong view is that any reconsideration of draft conclusion 23, the list and the accompanying commentary will need to be done with great care, and that any list should go no further than the current neutral, descriptive statement of norms that the Commission has previously referred to as having peremptory status. As to the location of any such list, the United Kingdom's view is that, consistent with the Commission's previous practice, it would be most appropriate for the list to go in the commentaries to the conclusions.