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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,
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CRIMES AGAINST HUMANITY: CLUSTER 3

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Thank you Madame Chair.

1. I will now comment on draft Articles 6, 7, 8 and 10 in turn.

Draft Article 6 – Criminalization under national law

2. Article 6 is at the heart of the legal regime that the draft Articles are seeking to establish. While prevention requires far more than criminalization, criminalization is an important part of prevention by making it clear that individuals who commit crimes against humanity shall face justice. Moreover, criminalization also emphasises for survivors of crimes against humanity that the world recognises the harm they have suffered and considers that harm to be punishable. The UK has already criminalized crimes against humanity under its national law. It is right therefore that draft Article 6(7) requires offences to be punishable by appropriate penalties that take into account their grave nature.

3. Further, given the complexity of crimes against humanity, it is appropriate that draft Article 6(2) has various modes of responsibility, which also reflect the practice of international courts. We are conscious the approach taken sought “to allow national legal systems to approach such accessorial responsibility in a manner consistent with their criminal law”.¹ However, we can see that there may be arguments to include other modes of responsibility such as “*conspiracy*” and “*incitement*”.

4. The UK has no difficulties with draft Articles 6(3) and 6(4) on command responsibility and superior orders respectively. These have long been part of the body international criminal law, and are entirely appropriate in crimes committed pursuant to, or in furtherance of, a State or organisational policy.

Official position

5. As regards draft article 6(5), we note the statement in the commentary that its effect is that where an offence is committed by a person holding an official position,

¹ Paragraph 12 commentary on draft Article 6.

that fact alone does not exclude substantive criminal responsibility. We note in this respect that the commentary cites some analogous provisions in other relevant conventions. However, importantly, the commentary goes on to say that paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law. The UK does not take issue with either of these statements, but we are considering whether the text is adequate as it stands or whether further clarifications may be useful or necessary.

Statute of limitations

6. The UK strongly supports the inclusion of draft Article 6(6) which requires States to ensure that statutes of limitations do not apply to crimes against humanity. This will allow survivors to seek judicial remedy when they are ready, which could be many years after the incident. However, the UK considers that it may be helpful for the draft Articles to state that the obligation in draft Article 6(6) does not mean that States are obliged to prosecute crimes against humanity that took place before such crimes were criminalised in their law. The UK welcomes the clarification made by the Commission in paragraph 33 of the commentary to draft Article 6 which expressly confirms that position.

Draft Article 7 – Establishment of national jurisdiction

7. Article 7 provides for extraterritorial jurisdiction over crimes against humanity, in similar terms to the Torture Convention. This reflects the gravity of the crimes and the interest of the international community of States in bringing an end to impunity for them, and ensuring that perpetrators cannot escape justice by moving between States. It is also an important signal to victims and survivors that the international community treats these crimes with appropriate gravity. When Article 7 is taken alongside the extradite or prosecute provision in Article 10, the draft articles provide quasi-universal jurisdiction based on the presence of a suspect on the territory of a relevant State.

8. However, it remains the UK's view that, it is preferable for crimes to be prosecuted in the State in which they occurred. This reflects the reality that the

authorities of the State in whose territory an offence is committed are generally best placed to prosecute that offence, not least because of the obvious advantages in securing the evidence and witnesses necessary for a successful prosecution.

Jurisdiction under Article 7(1)(a)

9. Separately, on draft Article 7(1)(a), we reiterate our point from yesterday that this should refer to a State's "territory", rather than "territory under its jurisdiction". We also note that as reflected in the recent award in the *Enrica Lexie* arbitration, the basis of jurisdiction over ships is not part of the principle of territoriality. We will submit a drafting suggestion to reflect this in the written comments we will provide later this year.²

Draft Article 8 – Investigation

10. We welcome the inclusion of draft Article 8, and in particular the clarification in the commentary that this is not a criminal investigation as such. This broader investigative obligation when there is reasonable ground to believe crimes against humanity are occurring on a State's territory is a critical part of the prevention mechanisms within the draft Articles.

Draft Article 10 – *Aut dedere aut judicare*

11. We note that this provision includes the possibility of extradition to another State or a competent international criminal court or tribunal. The UK notes that the structure of this provision is that there is an obligation on a State to prosecute a suspect on its territory, unless it agrees to extradite that individual to another State or international court. Article 10 therefore allows a State to recognise an extradition or transfer request from an international tribunal, but it is not required to agree to such a request by virtue of this provision.

² For example, in the *Enrica Lexie* arbitration before the Permanent Court of Arbitration (PCA), the PCA said that 'the test under the Convention for establishing a jurisdictional link between a vessel and a State is whether a vessel possesses the nationality of that State, as opposed to whether or not it is found in a public register or flies a flag' at paragraph 1029

12. Finally, we note the Commentary on draft Article 10 discusses the potential impact of an amnesty granted by one State on proceedings before the Courts of another State, though the text does not deal with these questions expressly.