



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-THIRD SESSION, AGENDA ITEM 82,
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK
OF ITS 70TH SESSION: PART I (A/73/10)
CHAPTERS I – III (INTRODUCTORY PARTS) and XIII (OTHER DECISIONS
AND CONCLUSIONS OF THE COMMISSION)
CHAPTER IV (SUBSEQUENT AGREEMENTS AND SUBSEQUENT
PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES)
CHAPTER V (IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW)

STATEMENT BY MR. ANDREW MURDOCH
LEGAL DIRECTOR
FOREIGN & COMMONWEALTH OFFICE

22 – 24 OCTOBER 2018

Check against delivery

Mr/Madam Chairperson,

1. I would like to begin by thanking the Chairperson of the Commission, Mr Eduardo Valencia-Ospina for his report to the Sixth Committee and all members of the Commission for a busy and successful year which has seen some good progress. The United Kingdom is particularly grateful to the Chairperson of the Drafting Committee, Professor Jalloh, for all his hard work during the session.
2. The United Kingdom also takes this opportunity to commend and thank the Codification Division of the Secretariat and its director, Mr. Huw Llewellyn, for their excellent work, including the preparation of a memorandum on ways and means for making the evidence of customary international law more readily available (A / CN.4/710). It is not only the support that the Codification Division provides to the Commission but also the assistance that they offer to States in the Sixth Committee, that is of significant value.

Mr/Madam Chairperson,

3. Before focusing on the topics concerning subsequent agreements and subsequent practice in relation to the interpretation of treaties and the identification of customary international law, the United Kingdom wishes to comment briefly upon Chapter XIII of the Commission's annual report regarding **other decisions and conclusions of the Commission.**
4. The United Kingdom is grateful to the Commission for its careful consideration of its programme of work. It is good to see that there is no shortage of interesting proposals coming before the Commission. The United Kingdom welcomes the Commission's decision to include

the topic 'General Principles of Law' in its programme of work and to appoint Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur.

5. The United Kingdom thanks Mr. Vázquez-Bermúdez for the syllabus for the topic 'General Principles of Law' annexed to last year's ILC report. As previously stated in relation to the topic of *jus cogens*, the United Kingdom agrees that questions concerning sources of international law are natural topics for consideration by the Commission. A careful and well-documented study, focusing on this 'third' source of international law listed in the Article 38, paragraph 1(c) of the ICJ Statute, could be of great practical assistance to States and practitioners alike.
6. The United Kingdom welcomes the Commission's decision this year to include the topic of sea-level rise in relation to international law in its long-term programme of work. We also note the Commission's decision to include the topic of universal criminal jurisdiction on the long-term programme of work. It is clear that there continues to be a diversity of views among Member States on the scope and application of universal criminal jurisdiction. As such, the United Kingdom considers that State practice on universal criminal jurisdiction is not yet sufficiently advanced to enable consideration of the topic by the ILC.
7. The United Kingdom would favour the Commission taking up the topic on the settlement of international disputes to which international organizations are parties, which was included in the long-term programme in 2016. If this is done we consider that the topic should include disputes of a private law character, as suggested in paragraph 3 of the 2016 syllabus.
8. The United Kingdom congratulates the Commission on the successful commemorative events held in New York on 21 May 2018 and in Geneva on 5 and 6 July 2018 to celebrate its seventieth anniversary. We appreciate in particular the contribution and hard work of the

Chairperson, the Advisory Committee, the Secretariat, and of course the speakers at the various events.

Mr / Madam Chairperson

9. The United Kingdom wishes to make four short comments on the methods and outputs of the International Law Commission and the Sixth Committee's treatment of the Commission's output.

10. First, the United Kingdom believes it is important for the Commission to be clear when it is codifying existing law and when it is suggesting the progressive development of the law, or new law. The products of the Commission are often relied on by international and domestic courts and tribunals and without such a distinction it is difficult for such courts and tribunals to determine what is already accepted by states as international law, and what is not.

11. Second, it is the view of the United Kingdom that where the outputs proposed by the Commission on norm-creating topics are intended to progressively develop the law, or create new law, these should in principle be subject to subsequent discussion among States. This would give States an opportunity to express their views and thus contribute fully to the progressive development of the law or the creation of new law.

12. Third, where Commission outputs are intended to be clarificatory or provide non-binding guidelines, it is crucial that the approach taken by the Commission enables States to participate fully in the process of determining such outputs, and that the Commission accurately and fully considers the observations of States in the 6th Committee. Communication between the Commission and States is essential to the maintenance of the authority of the Commission's work.

13. Fourth, 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. Draft provisions are presented to states at various stages. Some are in the usual format (provision adopted by the Commission together with the commentary), but in other cases provisions have been proposed by the Special Rapporteurs, which have already been revised by Drafting Committee but for which there are not yet commentaries. As we have previously stated in this Committee, States have a fuller understanding of draft provisions, and are therefore able to engage more productively with the Commission, when commentaries are produced simultaneously.

Mr/Madam Chairperson,

14. The United Kingdom welcomes the adoption by the Commission on second reading of the thirteen conclusions on **subsequent agreements and subsequent practice in relation to the interpretation of treaties**, together with commentaries. These draft conclusions and commentaries give helpful guidance to States, international organisations and courts, both international and domestic, when interpreting treaties.

15. The United Kingdom expresses to the Special Rapporteur, Mr. Georg Nolte, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work and for the results he has achieved. The United Kingdom recognises that subsequent agreements and subsequent practice is a complex area of treaty law. The Special Rapporteur's work has been detailed and rigorous and makes a significant and constructive contribution to the art of treaty interpretation.

16. In particular, the United Kingdom welcomes a key element of the Special Rapporteur's findings, as set out in conclusion 10, that subsequent agreements need not be legally binding. The United Kingdom is also pleased that the Commission confirmed, in the commentary, that Memoranda of Understanding do not amount to legally binding agreements.

Mr/Madam Chairperson,

17. Turning to the topic of the **identification of customary international law**, The United Kingdom welcomes the adoption by the Commission of 16 conclusions, together with commentaries thereto, on second reading.

18. The United Kingdom welcomes the clarifications that have been made to the conclusions and commentary following the fifth report of the Special Rapporteur and the Commission's plenary debate on that report.

19. In particular, the United Kingdom welcomes the clarifications made to conclusion 4, and its accompanying commentary, on the requirement of practice and the role of international organisations.

20. The United Kingdom believes it is an indispensable requirement that the practice of specially affected states be taken into account as part of the practice required for the identification of customary international law and welcomes the addition of a reference to specially affected states in the commentary to conclusion 8.

21. The United Kingdom is particularly interested in the treatment of 'silence' and 'inaction' in the conclusions and commentary and appreciates the careful approach taken in the commentaries, which stress that conclusions should not be easily drawn from silence or

inaction of states. In this regard, the United Kingdom welcomes the amendment to paragraph 3 of the commentary to conclusion 6 in relation to forms of practice, to clarify that it 'cannot simply be assumed that abstention from acting is deliberate.' Similarly, the United Kingdom appreciates the clarification to the commentary to conclusion 10, in particular the line at the end of paragraph 8, which states that 'a State may also provide other explanations for its inaction'. There are a number of political and other reasons why a State may not react, or may not react publicly, to the practice of another State and it is the United Kingdom's view that the failure of a State to react in such an instance should not be taken as an indication of its belief as to the legal status of such practice.

22. The United Kingdom remains circumspect regarding the possibility of the existence of particular customary law which does not have a geographical nexus. In this regard, the United Kingdom welcomes the cautious notes in the commentary to the draft conclusions, which note, that while particular customary international law is 'mostly regional, sub-regional or local' there is no reason 'in principle' why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest.

23. As the United Kingdom has previously stated before the Sixth Committee, the United Kingdom considers this topic to be of real practical value. The United Kingdom sees the conclusions and commentaries as a valuable and accessible tool for judges, as well as other practitioners, confronted with the question of determining whether or not a customary rule of international law exists. Parties to litigation before domestic courts increasingly invoke arguments based on customary international law in a wide variety of contexts. Indeed, the Court of Appeal of England and Wales relied upon the conclusions and

commentary in a very recent case (July 2018), stating that it had found them 'a valuable source of the principles on this subject'.

24. The United Kingdom commends all the members of the Commission for their excellent collegial work on the conclusions and the commentary. The commentary is concise and rigorous. It is a helpful and constructive contribution to the identification of customary international law. The United Kingdom believes that the conclusions and commentaries will serve as an important guide to the identification of customary international law.

Thank you, Mr/Madam Chairperson,