MALAYSIA
PERMANENT MISSION TO THE UNITED NATIONS

CANDIDATE
to the
UNITED NATIONS
SECURITY COUNCIL
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STATEMENT BY
MS. FARHANI AHMAD TAJUDDIN, REPRESENTATIVE OF MALAYSIA

ON AGENDA ITEM 81 ENTITLED
"REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD AND SIXTY-FIFTH SESSION"
(PART III)

AT THE SIXTH COMMITTEE OF THE SIXTY-EIGHTH SESSION
OF THE UNITED NATIONS GENERAL ASSEMBLY
NEW YORK, 4 NOVEMBER 2013

Mr. Chairman,

The Malaysian delegation would like to commend the members of the Commission and respective Special Rapporteurs and Chairs of Working Groups for their tremendous achievements in the work of the Commission this year. We would like to take this opportunity to provide our comments on all remaining topics under the third cluster, namely on Chapters VI, VII, VIII, IX, X and XI of the Commission's report.

CHAPTER VI: PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

Mr Chairman,

2. Malaysia thanks the Special Rapporteur to the topic "Protection of Persons in the Event of Disasters", Mr. Eduardo Valencia-Ospina for his Sixth Report which contains new draft Articles 5 *ter* and 16. Malaysia notes that the Commission during its 65th Session has adopted the report of the Drafting Committee on draft Articles 5 *ter* and 16.

3. In relation to draft Article 5 *ter*, Malaysia finds the general idea behind the formulation of this provision to be favourable to States and that it would support cooperation that could lead to disaster risk reduction within the ambit of the principle of State sovereignty under public international law. Malaysia joins many others in subscribing to the belief that prevention is better than cure and as in this case, Malaysia supports cooperation that could lead to the circumvention of a disaster and any form of disaster risk reduction.

4. Malaysia notes that the reference to the term "*measures*" in draft Article 5 *ter* appears to correlate to the "appropriate measures" stated in draft Article 16. Malaysia notes that this correlation may prove to be venturesome when Article 5 *ter* is read together with Article 5 on the "Duty to cooperate".

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5. Malaysia further notes that Article 5 makes it mandatory for States to cooperate with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations. This cooperation, read together with the measures of implementation stated in draft Article 16 and draft Article 5 *ter* may lead to the sovereign right of the States being usurped by a certain supra-international body.

Mr Chairman,

6. With regard to draft Article 16, Malaysia notes that the Drafting Committee has taken a different approach in the adoption of the said draft Article. In this context, Malaysia notes that draft Article 16 as introduced by the Special Rapporteur limits the adoption of "appropriate measures" through the establishment of institutional arrangements, whereas draft Article 16 coming from the Drafting Committee has widened the scope of the implementation of such "appropriate measures" to include the adoption of legislation and regulations by the State.

7. Malaysia finds that in comparison to draft Article 16 coming out from the Drafting Committee, the proposed draft by the Special Rapporteur is more acceptable. Malaysia maintains that any measures to be undertaken by a State to reduce the risk of disasters should be within its full capabilities, having regard to the principle of State sovereignty under public international law.

8. Malaysia feels that the drafting Committee in imposing the requirement for States to adopt legislation and regulations for the prevention, mitigation and preparation for disasters may not be sensitive to these considerations.

Mr. Chairman,

9. Malaysia wishes to highlight the phrase "the collection and dissemination of risk and past loss information" in paragraph 2 of draft Article 16. It is noted that the aim of the said provision is, among others, to "enhance transparency in transactions and public scrutiny and control". Of this, we are of the view that such dissemination may touch on matters concerning a State's national security. Dissemination of risk and past loss information should not be absolute and must be guided by each State's existing laws, rules, regulations and national policies.

CHAPTER VII: FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

Mr. Chairman,

10. Malaysia wishes to express its gratitude to the Special Rapporteur for his First Report which provides a commendable foundation and working plan for the future work on this topic. At the outset, Malaysia finds the proposals set out in the First Report as generally acceptable and further wishes to share its observations and proposals on the First Report and also the report of the Commission on the topic.

Scope of the topic

11. In relation to the change of the title of the topic from “Formation and evidence of customary international law” to the “Identification of customary international law”, Malaysia is flexible with this proposition. In essence, even with this change, the topic would still include an examination of the requirements for the formation of rules of customary international as well as the material evidence of such rules.

12. With reference to the study of regional customary international law, Malaysia observes that regional customary international law can also exist and become binding upon a group of states in a particular region. However, it is further observed that based on a decision of the International Court of Justice[1], it appears that regional customary international law may require a different approach in terms of how a particular practice can be recognized as customary international law within a particular region. In this regard, Malaysia views that the Commission should carefully scrutinize the manner in which regional customary international law has gained its recognition within a particular region.

Methodology

13. In terms of methodology, Malaysia supports the proposal to carefully analyse the two widely accepted constituent elements of customary international law, namely state practice and *opinio juris*. In this regard, Malaysia proposes that the Commission also addresses the following:

(i) For purposes of *opinio juris* – identification of common situations where States acted as a result of comity and courtesy as opposed to recognizing that they were required to act in such manner because of legal obligation;

(ii) The relative weight of each constituent element in identifying customary international law;

(iii) Evidence of customary international law – whether a piece of evidence can be used to prove both the constituent elements.

14. As far as analyzing the sources of customary international law, Malaysia is of the view that reference to Article 38 of the Statute of International Court of Justice is sufficient and further examination of the sources is not pertinent to this topic. The main focus should be on the formation and evidence of customary international law.

Range of materials to be consulted

15. With reference to the range of materials to be consulted, Malaysia agrees with the range of materials proposed by the Special Rapporteur and further agrees that a distinction should be made between the relative weights accorded to different materials. On that note, Malaysia supports the view that the jurisprudence of the International

[1] Asylum Case: Columbia v. Peru 150 ICJ Rep 266 (1950).

Court of Justice may be considered the primary source of material on the formation and evidence of rules of customary international law as it is more “authoritative” than the other range of materials proposed by the Special Rapporteur.

16. Malaysia further agrees that the Commission should carefully scrutinize the manner in which national courts apply customary international law as domestic judges may not be well versed in public international law. However, Malaysia is fully aware and recognizes that domestic judges are at liberty to apply their national laws.

Future work / Outcome of the topic

17. For the outcome of the study of this topic, Malaysia is in agreement that any such outcome should not prejudice the flexibility of the customary process or future developments concerning the formation and evidence of customary international law. In this regard, Malaysia reiterates the importance of taking into account State practices from all principal legal systems of the world and from all regions.

18. Lastly on this topic, Malaysia acknowledges that it is pertinent for States to provide the relevant information as requested by the Commission and Malaysia will endeavour to co-operate with the Commission to provide the relevant materials.

CHAPTER VIII: PROVISIONAL APPLICATION OF TREATIES

Mr. Chairman,

19. Malaysia commends the efforts of the Special Rapporteur in preparing the First Report on the provisional application of treaties and notes that the study on the topic is still at a very initial stage of identifying areas of study and possible direction.

20. Malaysia agrees with the Special Rapporteur that it is important not to over regulate the topic and allow for flexibility in its application. While we understand that the study is intended to simplify provisional treaty application processes, there exists a number of States, like Malaysia, that have established, almost rigid procedures on the internalization and application of treaties. In this regard, Malaysia wishes to emphasize that States should not be compelled to implement their treaty obligations when they are not ready to do so.

21. Malaysia proposes that focus be given to principal legal issues arising in the context of the provisional application of treaties, by considering doctrinal approaches to the topic and by reviewing existing State practice.

CHAPTER IX: PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

Mr. Chairman,

22. Malaysia commends the Commission for including the topic "Protection of the environment in relation to armed conflicts" in its work programme and for its appointment of Ms Marie G. Jacobsson as the Special Rapporteur for this topic. Malaysia notes with appreciation the syllabus prepared by Ms Jacobsson for this topic, which had been annexed to the Report of the Commission at its 63rd session (2011) (A/68/10, annex E). Malaysia further notes that the Special Rapporteur has presented her oral report on informal discussions of the topic during the Commission's 3188th Meeting, the details of which have been highlighted in the current Report of the Commission during its 65th session.

23. Malaysia notes with concern the ongoing and widespread exploitation of the environment in present time warfare. It follows that environmental damage can continue to impair natural resources and extend beyond national borders even long after the end of armed conflicts. Malaysia is of the view that in order to promote effective regulation on the environment in situations of armed conflict, the time is ripe for a detailed analysis leading to progressive legal development in this particular area.

24. As was highlighted in the syllabus annexed to the Report of the Commission at its 63rd session, Malaysia notes the importance of premising the study on the different bodies of law, namely international humanitarian law (IHL), international criminal law, international environmental law, and international human rights law to provide a holistic assessment of the protection of the environment in relation to armed conflict. Malaysia is party to various multilateral instruments which indirectly address the issue of the protection of the environment in relation to armed conflicts, including the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. At the regional level, Malaysia is party to the Southeast Asian Nuclear-Weapon-Free-Zone Treaty 1995 promoting the protection of the Southeast Asia region from environmental pollution and the hazards posed by radioactive wastes and other radioactive material.

25. With reference to paragraph 135 of the Report of the Commission during its 65th session, Malaysia is generally agreeable with the proposal by the Special Rapporteur to approach the subject from a temporal perspective in the methodology of her work. Together with this practical approach to produce recommendations for concrete measures in the protection of the environment in the different phases of armed conflict, Malaysia believes it is equally important to identify the gaps in the relevant bodies of law as lessons to achieve an appreciable outcome for the study. Malaysia is of the view that in order to address questions on overcoming the challenges faced in enforcing measures to protect the environment in connection to situations of armed conflict, a broad analysis of the extent of the protection of the environment under existing IHL rules would also be required.

26. Malaysia takes note of the preliminary debate within the Commission on whether the effects on any specific weapons shall be specifically addressed in relation to the topic. Malaysia notes that the Special Rapporteur has proposed that the effect of particular weapons should not be the emphasis of the study, while some other members are of the view that the matter should be addressed. Malaysia would align itself with the latter view and is of the opinion that the question on the effects of weapons and methods of warfare to the environment is necessary since the various instruments addressing this particular area is integral to the corpus of IHL.

27. In that connection, Malaysia notes the 2009 Report published by UNEP entitled "Protecting the environment during armed conflict: An inventory and analysis of international law", which contains an observation, among others, that provisions in IHL regulating the means and methods of warfare, and restricting the use of particular weapons and military tactics indeed provide indirect protection to the environment, albeit being rarely implemented or enforced effectively.

Mr. Chairman,

28. The foregoing preliminary views by Malaysia on the direction of the study on this topic by the Commission is presented for its consideration, and Malaysia looks forward to further progress on the study to be reflected in the first report by the Special Rapporteur in 2014.

CHAPTER X: THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

Mr. Chairman,

29. Malaysia would like to record its appreciation to the open-ended Working Group under the Chairmanship of Mr. Kriangsak Kittichaisaree for its report (Annex A to the Report of the Commission) on the obligation to extradite or prosecute (*aut dedere aut judicare*).

30. Malaysia is agreeable to the comments made in paragraph 18 of the Working Group's report that owing to the great diversity in the formulation, content, and scope of the obligation to extradite in conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute.

31. At this juncture, Malaysia is of the view that the obligation to extradite or prosecute is currently an obligation under general international law arising from treaty, domestic legislation as well as on the basis of reciprocity between Malaysia and other countries. Since there has not been strong evidence to support that this obligation is widely accepted by the majority of states, this obligation falls short of attaining customary international law status. In addition, the principle of *aut dedere aut judicare* is neither equivalent nor synonymous with the principle of universal jurisdiction. Malaysia has not criminalized offences attracting universal jurisdiction. In Malaysia's view, this

obligation is not binding upon States unless the State chooses to bind itself either under treaty or domestic legislation.

32. Responding to the major issues highlighted by the Working Group in its report, Malaysia wishes to highlight that the obligation to extradite or prosecute has been incorporated by Malaysia under section 49 of the Extradition Act 1992 [Act 479]. Determination of whether to grant the extradition request or to refer it to the relevant authority for prosecution lies with the Minister.

33. Further, the Minister has the discretion to extradite or refer the fugitive offender to the relevant authority for prosecution based on grounds of nationality or the country's jurisdiction. In doing so, the Minister would take into consideration the nationality of the fugitive offender and whether Malaysia has jurisdiction to try the particular offence.

34. Nevertheless, the obligation to fulfill the doctrine *"aut dedere aut judicare"* would also depend on the types of offences committed by the fugitive offender. Under Act 479, only extraditable offences would be considered in determining any extradition request.

35. In this regard, Malaysia is agreeable with the comments made in paragraph 27 of the report where the obligation to prosecute is actually an obligation to submit the case to the prosecuting authorities and does not involve an obligation to initiate prosecution.

36. Malaysia is of the view that as the basis of the obligation remains undetermined, an in-depth study is required and it would be premature to attempt the drafting of any draft articles until these parameters have been identified.

37. For this purpose, Malaysia reiterates its view that the Commission must ascertain the status of existing law before it embarks on progressive development on this area of international criminal law.

38. Malaysia further notes that the mandate was for the Working Group, on the basis of its discussions at the 65th session to submit concrete suggestions for the consideration of the Commission.

39. Malaysia notes the third alternative suggested, that is, surrendering the suspect to a competent international criminal tribunal as a means for States to meet their international obligation. In this regard, Malaysia categorically states its position as a dualist State – Malaysia's international obligation would only have a legally binding effect with regard to those treaties to which Malaysia has become party subject to the reservations it has entered and upon the necessary domestic codification of treaty obligations. In the case of its obligation to extradite or prosecute, Malaysia would fulfil its obligations as agreed upon in the bilateral and multilateral treaties that it has entered into and subject to applicable Malaysian laws and procedures.

CHAPTER XI: THE MOST-FAVOURED-NATION CLAUSE

Mr. Chairman,

40. Malaysia would like to thank the reconstituted Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae and Mr. Mathias Forteau (in Mr. McRae's absence) for its report.

41. Malaysia acknowledges that the overall objective of the Commission's study on the MFN Clause is to provide greater coherence in approaches adopted by tribunals in interpreting the MFN Treatment Clause. It would primarily be useful for the Commission to elaborate a general principle of interpreting the Clause to ascertain whether there is any assimilation of substantive rights and procedural treatments in the first place. Based on the discussion in *Daimler* and *Kilic* as highlighted in the working paper on *"Survey of MFN language and Maffezini-related Jurisprudence"* by Mr. M.D. Hmoud, it is noted that that the MFN Clause generally cannot extend to dispute resolution provisions. Based on these two cases and other related cases in point, it would be useful and more dynamic for the Commission to first establish a general principle of interpretation and application of the MFN Clause under public international law.

42. Although there has been no uniformity and harmonised approach to interpret the Clause, the Study Group may look into several concepts of interpreting the MFN clause, for example substantiation of "contemporaneity of evidence" and "standard of preponderance" to analyse *rationae materiae* application of the Clause *vis-à-vis* less favourable treatment in disputes resolution procedures. As for concepts of peculiarity and specificity of a treaty, "margin of appreciation" is an example of one of the concepts that may be considered to assist in interpreting the MFN Clause. With these interpretative tools, the Commission should be able to develop a deeper analysis on what constitutes "admissibility", and "jurisdictional" issues concerning the MFN Clause and to what extent the Clause can affect "State's consent" to arbitral jurisdiction.

43. Noting that the Study Group will develop guidelines and model clauses, the interpretation of the MFN Clause should not be overly prescriptive nor should it prejudice States' original intention and consistent practice with respect to the interpretation and application of the MFN Clause. In this regard, it is recommendable that the Commission adopts a mere descriptive and illustrative list approach to interpret the MFN Clause, having regard to the generality as well as the specificity of the language of the MFN Clause which operates within its contemporaneous context.

Mr. Chairman,

44. That concludes Malaysia's statement on the last cluster of topics. Thank you.