



# MALAYSIA

## PERMANENT MISSION TO THE UNITED NATIONS

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**STATEMENT BY  
WAN MOHD ASNUR WAN JANTAN, REPRESENTATIVE OF MALAYSIA ON  
AGENDA ITEM 78: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE  
WORK OF ITS SIXTY-SIXTH SESSION AT THE 6TH COMMITTEE  
OF THE 69TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY  
(PART III)**

**NEW YORK, 5 NOVEMBER 2014**

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### **CHAPTER X: IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW**

Mr. Chairman,

1. With regard to the topic of “Identification of Customary International Law”, Malaysia believes that this topic requires much detailed analysis in order to arrive at a position acceptable at the international level. Hence, Malaysia’s preliminary observations on certain draft conclusions as prepared by the Special Rapporteur are as follows:

Reference to the term “International organisation” (Draft conclusion 2 and draft conclusion 7(4))

2. Malaysia refers to draft conclusion 2 on the definition of an “international organisation (“IO”)” and draft conclusion 7(4) on the acts (including inaction) of an IO which may serve as practice. Malaysia is of the view that such a deduction is not acceptable and the practice of an IO should only be applicable to States which are members of the said IO. Since different IOs vary in terms of membership and structure, it should not be presumed that actions of an IO represent the overall practices of a State for purposes of establishing customary international law. Malaysia notes the concern that it might not be ripe yet to choose between possible definitions at this stage since the questions relating to the role of IO would be dealt with in greater detail in the third report of the Special Rapporteur.

Role of Practice - Draft conclusion 5

3. In respect of draft conclusion 5 (“Role of Practice”), Malaysia notes the discussion and the decision by the Drafting Committee to decide to retain the word “primarily” essentially to indicate that the practice of an IO should not be overlooked.

Malaysia would like to emphasise that widespread and consistent State practice must be given utmost priority in the contribution to the formation or expression of customary international law. At this early stage, the ILC should make this the principle applicable throughout this work.

#### Attribution of conduct (Draft conclusion 6)

4. As regards draft conclusion 6 (“attribution of conduct”), Malaysia notes that this is derived from Article 4 of the Articles on the responsibility of States for internationally wrongful acts (UN General Assembly Resolution 56/83). However, Malaysia is of the view that the study should not be held in comparison with the said Article 4 as the basis for arriving at both conclusions are different in nature and should be distinguished. For example, Malaysia highlights its concern on the term “any other functions” which may attribute to a conduct of State practice. In the event that the term “any other functions” is to be retained, Malaysia proposes for the study to provide further clarification and clearer guideline on the term. Consideration should also be regarded to the weight in determining as to when “any other functions” is invoked and also the State’s consent for such practices to be used as a basis of customary international law should be obtained.

#### Inaction which may serve as evidence of practice/acceptance of law (Draft conclusion 7(3) and 11(3))

5. In respect of draft conclusions 7(3) and 11(3), Malaysia is of the view that this matter requires detailed consideration since it is mootable to consider that ‘inaction’ may serve as evidence of practice or acceptance of law.

#### Draft conclusion 10 (2)

6. With regard to draft conclusion 10(2), Malaysia reiterates her previous position during the 68<sup>th</sup> UN General Assembly in 2013 regarding States that act as a result of comity and courtesy as opposed to recognising that they were required to act in such manner because of legal obligation. Such acts should be distinguished from *opinio juris* which involves a sense of legal obligation. Malaysia proposes for other elaborations in the report to be included in this draft conclusion, and not merely be confined to terms “habit and usage” but to also include the phrase “as a result of comity and courtesy”.

7. Malaysia shares its concern with some of the ILC Members on the ambitious pace of work proposed by the Special Rapporteur, noting that the topic contains numerous difficult questions that would require cautious and careful consideration.

8. Lastly, Malaysia wishes to highlight that the Asian-African Legal Consultative Organisation (“AALCO”), in which Malaysia is also a Member, has also taken an initiative to propose an establishment of a Working Group at AALCO’s level to study this topic in support of the on-going work by the ILC on this topic.

## **CHAPTER XI: PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS**

Mr. Chairman,

9. Turning now to the topic of “Protection of the Environment in relation to Armed Conflicts”, Malaysia notes from the report of the 66<sup>th</sup> session the discussion among ILC members on the prospect of addressing a number of other issues, namely of internally displaced persons, refugees, cultural heritage and environmental pressure as a cause of armed conflict and non-international armed conflict. Malaysia is of the view that the focus of work on this topic should be kept to identifying the legal issues on environmental protection arising during each phase of armed conflict, toward the development of future guidelines or conclusions, rather than to modify existing legal rules and regimes under International Humanitarian Law, Human Rights Law or International Criminal Law. As such, Malaysia believes that those other legal issues, although they may be relevant to the present topic, should be approached with caution.

10. Malaysia further notes the broad support for the proposal to develop working definitions on “armed conflict” and “environment” to guide the discussions. While working definitions on these terms may be useful, Malaysia would agree that there is no urgent need to achieve a conclusive definition of these terms at these early stages. In particular, the debate on the definition of “armed conflict” should be preceded by a determination of which actors the intended guidelines or conclusions would cover and the specific scope of such guidelines or conclusions itself.

Mr. Chairman,

11. In relation to linkages between environmental principles, human rights law and armed conflict, Malaysia is of the view that the consideration of principles such as “sustainable development”, “principle of prevention”, “polluter-pays” principle and obligation to conduct environmental impact assessments, is indeed relevant. These principles would be applicable in the development of guidelines that will be aimed at employing environmentally sound measures in relation to military or defence planning and operations.

12. In that connection, and in response to the Special Rapporteur and ILC’s request for evidence of State practice, Malaysia would like to highlight that measures to protect and preserve the environment within the administrative and operational scope of the Malaysian Armed Forces are generally based on domestic legislation, primarily the Environmental Quality Act 1974, as well as enabling laws such as the National Forestry Act 1984 and the Wildlife Conservation Act 2010.

13. It follows that the construction of military bases and installations by the Malaysian Armed Forces requires compliance with the Environmental Quality Act 1974, including the need for environment impact assessment (“EIA”) reports prior to such construction, as well as the proper placement of explosives and fuel storage installations so as not to

adversely affect water tables, and to observe the safety of populations and to preserve the surrounding environment.

14. The Malaysian Armed Forces further partake in incidental tasks to provide support to civilian enforcement agencies such as the police force, customs, and the forestry and wildlife departments, in view of the fact that a number of Malaysia's border security areas are adjacent to or within national wildlife or forest reserves. An example worth mentioning is the Royal Malaysian Navy's enforcement through its manned installation in the Layang-Layang Atoll within the South China Sea to maintain the area as a marine reserve for both economic and security objectives.

15. The Malaysian Armed Forces have also reported that there have been a number of cases in which service personnel have been found to have breached certain laws pertaining to the protection of wildlife and the environment. In these cases, the Malaysian Armed Forces have undertaken to initiate both judicial and administrative punitive action through the Armed Forces Act 1972 and military regulations pertaining to service discipline, resulting in a number of such personnel being charged before the courts martial.

16. Currently, the Malaysian Armed Forces are reviewing a number of their Rules of Engagement ("ROE"), including the elaboration of Standing ROE ("SROE") for the Malaysian Army. Steps are being undertaken to incorporate provisions with regard to environmental protection, such as procedures on petrol oil lubricant storage and disposal, waste disposal in the field, prohibition against hunting of wildlife in operational areas and appropriate management of military lands that would limit environmental degradation. This is in consideration of the fact that the Malaysian Armed Forces own a number of field firing range sites that are situated in heavily forested areas.

## **CHAPTER XII: PROVISIONAL APPLICATION OF TREATIES**

Mr. Chairman,

17. Further, moving on to the topic of "Provisional Application of Treaties", the Second Report, while still at the initial stage of elaborating further the areas of study and possible direction of the topic, had managed to elucidate several scenarios within which the provisional application of treaties might operate. The myriad of scenarios, in an attempt to illuminate the question of creation of legal effects produced by the provisional application of treaties, should be discerned with great care and caution. In this regard, Malaysia wishes to highlight its preliminary views on the topic as the foregoing:

- (a) in order to discern the application of treaty either provisionally or upon its entry into, primary guidance should be found in the express provision of the treaty itself which specifies the intended manner in which the treaty should be applied. This includes whether there is an unequivocal consent and explicit commitment made by States to apply the treaty provisionally and thereby agree to be bound by the treaty. Thus, the principle of *Pacta Sunt Servanda* as enshrined under Article 26

of the *Vienna Convention on The Law of Treaties* (“VCLT”) should be the general point of departure to determine manifestation of the will to be bound by a treaty and hence, the application of the treaty to the States concerned. Should there be no such an express provision in a treaty, recourse to parallel agreement, unilateral declaration, diplomatic exchanges and conduct of States should be examined within the proper context and content as to how the will of the States are actually manifested. With this exercise of care and caution, we should be able to avoid a generalised interpretation and legal analysis that might *ipso facto* bring the effect of provisional application of treaties legally and technically equivalent to the effect of treaties that are going to be in force or are already in force. Further, in a circumstance where there is an explicit provision that specifies a treaty shall apply provisionally but conditional upon an express consent by the States concerned, legal effect ensuing from such a commitment is subject to the clear expression of intention. This determination of legal effect should be distinct from a “silence” scenario by State which does not manifest itself into a positive accord to apply the treaty provisionally. Without such a positive undertaking, the question of legal effect, source, rights, obligations and termination thereof should not arise;

- (b) Malaysia notes the example highlighted in the Second Report relating to Article 23 of Arms Trade Treaty, which provides a certain level of discretion to States that they “may declare to apply provisionally Articles 6 and 7 pending the entry into force of the Treaty for that State, at the time of signature or the deposit of instrument of ratification, acceptance, approval or accession”. Thus, the question of legal effect on the provisional application of treaties can be ascertained in the light of full or partial application of the treaty, subject also to the declaration by State of its clear intention to apply the treaty provisionally;
- (c) in the context of Malaysia’s experience and practice, signing of treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. The effect of signing in this regard means, a State is not yet a Party albeit being a signatory to the treaty, pending its subsequent act of ratification, accession, approval or acceptance of the treaty. The effect emanating from this process is subject to the understanding as enshrined under Article 18 of the VCLT whereby the State must refrain from acts which may defeat the object and purpose of the treaty. Malaysia opines that the effect expounded from this context is confined to moral and political outcomes without giving rise to any legal consequences. Be that as it may, prior to signing or becoming a Party to a treaty, Malaysia will usually ensure that its domestic legal framework is in place and ready in order to implement the treaty; and
- (d) in addition, the legal effect of provisional application of treaties, while also being mooted to go beyond the commitment under Article 18 of the VCLT, should also be analysed within the context on how the treaty provision is expressed, provided and intended to be applied. If the manifestation of intention is not or less than

expressly clear, it is mootable to submit that the provisional application of treaties might even crystallise and create legal effects to the States concerned as well as affecting their commitment beyond Article 18 of the VCLT.

Mr. Chairman,

18. Hence, Malaysia reiterates its view that it is crucial to discern the provisional application of the treaties from the source of obligations as provided by the treaty provision itself. Otherwise, if recourse to alternative sources should be had, the analysis of legal effect should be guided and determined by the result of an unequivocal indication of consent by the State that it accepts provisional application of treaty. Thus, for a further comprehensive analysis of the topic, Malaysia would like to suggest that the topic be further elaborated having due regard to State's sensitivities, as well as peculiarities and contextual differences embedded in the treaty provisions, and how State practices so far have responded to such variations.

### **CHAPTER XIII: THE MOST-FAVoured-NATION CLAUSE**

Mr. Chairman,

19. Turning now to the topic of the Most-Favoured-Nation ("MFN") Clause, Malaysia wishes to state that it shares the view as reiterated in the 66<sup>th</sup> ILC Report that in interpreting the MFN Clause, the general point of departure would be the VCLT. The interpretation can be further augmented by relevant States' practice, in so far as construing States' intention, when they negotiate the MFN Clause and enter into International Investment Agreements ("IIAs") which provides for the same. Thus, Malaysia underscores that it is vital to examine and analyse the MFN Clause within its proper context and the negotiating background within which a particular IIA is entered into. This is to safeguard against expansive interpretation of the MFN Clause.

20. From Malaysia's point of view, there is no assimilation between substantive preferential treatments deduced from the interpretation of the MFN Clause and procedural treatments that can be extrapolated from the application of the MFN Clause. This means, the MFN Clause should be interpreted in such a way that it only applies to substantive preferential treatment provided in the IIAs and not to Investor State Dispute Settlement ("ISDS") mechanism. Malaysia's experiences drawing upon the ASEAN region also herald a conscious perspective towards this development. As a result of which, most of the ASEAN Free Trade Agreements explicitly provide that the MFN Clause shall not apply to ISDS mechanism.

21. In this connection, as the ILC Study Group on MFN Clause is now in the midst of finalising its study and report, the elaboration on the interpretation of MFN Clause should clearly elucidate the principle that MFN Clause applies to substantive preferential treatment obligations only and not the ISDS procedure so as to avoid further fragmentation of international law.

## **CRIMES AGAINST HUMANITY**

Mr. Chairman,

22. Malaysia notes the ILC Report at its 66<sup>th</sup> Session that the Commission has decided to include the topic “Crimes against Humanity” in its long-term programme of work, on the basis of the recommendation of the Working Group on the Long-Term Programme of Work. Malaysia further notes the appointment of Mr. Sean D. Murphy as Special Rapporteur for the topic.

23. From the paper prepared by the Special Rapporteur, Malaysia takes note that the objective of the Commission on this topic is to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity. Malaysia also notes with appreciation on the elaboration of the relationship of the proposed Convention and the International Criminal Court (“ICC”) established by the Rome Statute.

24. Malaysia notes that the proposed convention intends to promote general inter-State cooperation on the investigation, apprehension, prosecution, and punishment of persons who commit crimes against humanity. On that note, Malaysia wishes to highlight that, in Malaysia, the international cooperation is governed by Mutual Assistance in Criminal Matters Act 2002 and the Extradition Act 1992. Therefore, in relation to the proposed mechanism in which the Convention would adopt to promote general inter-State cooperation on the investigation, apprehension, prosecution and punishment of perpetrators of crimes against humanity, such mechanism must take into account the divergence of State legislations and practices in these areas.

25. It is also noted that ICC does not have the capacity to prosecute all persons who commit crimes against humanity in light of insufficient resources. Malaysia viewed that Article 115 of the Rome Statute provides for funding of resources of the ICC. Therefore in lieu of drafting a new Convention to address the inadequacy of resources for the prosecution of all perpetrators of crimes against humanity regardless of his position, it augurs well that the ICC be supported by providing additional funds to enhance their resources.

26. Malaysia is also mindful that the proposed Convention would advance key initiatives not addressed in the Rome Statute while simultaneously supporting the mission of the ICC. However, on this issue, Malaysia would like to seek clarification on whether a State which accede to the proposed Convention would be obligated in future to also accede to the Rome Statute as Malaysia observes that the proposed Convention will be drafted on the premise that a State which accede to the proposed Convention would also be presumed to accede or has acceded to the Rome Statute. In addition, it would be useful if the Working Group could study the issue of whether the proposed Convention would be able to be implemented independently from the Rome Statute.

27. Finally, Malaysia is of the view that the time is not yet ripe at this juncture to consider an elaboration of a new international instrument on the issue of crimes against humanity.

I thank you.