



# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

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**STATEMENT BY  
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ON AGENDA ITEM 83:  
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS  
SIXTY-SEVENTH SESSION**

**CLUSTER II  
CHAPTER VI : IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW  
CHAPTER VII : CRIMES AGAINST HUMANITY  
CHAPTER VIII: SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN  
RELATION TO THE INTERPRETATION OF TREATIES**

**AT THE SIXTH COMMITTEE OF THE  
70<sup>TH</sup> SESSION OF THE GENERAL ASSEMBLY**

**NEW YORK, 6 NOVEMBER 2015**

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**CHAPTER VI – IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW**

Mr. Chairman,

1. On behalf of Malaysia, allow me to extend our utmost gratitude and congratulate the Special Rapporteur and the ILC Drafting Committee for exemplifying its persistent determination and effort in its work on the topic Identification of Customary International Law. In this regard, Malaysia notes that there has been tremendous progress on this topic, paving the way for its conclusion in 2016, as proposed by the Special Rapporteur.

2. While welcoming this progression, Malaysia maintains its view that since this topic is crucial to the progressive development of international law and will carry substantive effect on one of the main sources of international law, therefore,



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consensus and understanding by Member States in arriving at a position acceptable at the international level must be achieved. On this note, Malaysia recalls and echoes the saying of *festina lente* (make haste slowly) by the Chairman of the Drafting Committee at the 66<sup>th</sup> ILC Session.

Mr. Chairman,

3. Noting the new draft conclusions that were further proposed, Malaysia's preliminary concerns are such that these conclusions should be more user and layman friendly and not too technical in its nature. Nonetheless, Malaysia's initial reactions on certain draft conclusions are as follows:

- i) Resolutions of International Organizations and Intergovernmental Conferences (Draft conclusion 12 [13])

Malaysia refers to draft conclusion 12 [13] on resolutions of International Organizations and Intergovernmental Conferences which may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development. Malaysia notes the negotiation and adoption of resolutions by international organisations or conferences, together with the explanations of vote, are acts of the States involved who are members of the international organization. In this regard, Malaysia is of the view that the act of a State who is not a member of an international organization but chooses to adopt, support or follow the resolution of that international organization should also be considered as providing evidence for establishing state practice.





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ii) Decisions of national courts (Draft conclusion 13 [14])

In relation to this draft conclusion, Malaysia notes that draft conclusion 6 [7] refers to 'decisions of national courts'. While Malaysia is of the view that this draft conclusion can be favourably considered, nonetheless Malaysia's stand on the acceptability of this draft conclusion shall be subjected to the commentaries by the Special Rapporteur.

iii) Teachings (Draft conclusion 14)

While Malaysia notes that this provision is derived from Article 38 (1) (d) of the ICJ Statute, Malaysia is of the view that the term 'highly qualified publicists' is subjective and may attract many definitions. Therefore, Malaysia looks forward to the commentaries to this draft conclusion that would provide a better definition and explanation of the term 'highly qualified publicists'.

4. Additional to taking into account the interests of Member States, Malaysia also wishes that the Special Rapporteur consider the work of the Working Group of the Asian-African Legal Consultative Organization ("AALCO") on this topic at further stages of this work. Among notable salient discussion at the 3<sup>rd</sup> Meeting of the AALCO Informal Expert Group on Customary International Law are as follows:

i) Assessment of evidence for the two elements (Draft conclusion 3 [4])

Despite the need to ascertain the two elements of the existence of customary international law separately, Malaysia notes that there are various forms of evidence that may be assessed in ascertaining the different elements of general



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practice and *opinio juris* and further notes that the forms of evidence for each element may overlap. In this regard, Malaysia was informed and generally agrees with the view that the same form of evidence may be assessed in determining the two different elements of general practice and *opinio juris*. Nonetheless, Malaysia seeks further clarification on instances where the same form of evidence or material may be examined for both general practice and *opinio juris*.

ii) The practice must be general (Draft conclusion 8 [9])

The requirement of widespread representativeness must be clarified and pursuant to this, due consideration must be given to the practice of specially-affected States in the identification of customary international law.

Mr. Chairman,

5. Malaysia reiterates that despite the existence of evidence of custom, Courts in Malaysia are bound by the dualist nature of the Malaysian legal framework. However, Malaysian Courts may apply international law if it is consistent with its existing domestic laws.

6. To conclude, taking into consideration the work at the ILC and AALCO Working Group level, Malaysia firmly believes that the assembling of legal minds at both fora will truly contribute to this great development of an area in international law.



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### CHAPTER VII: CRIMES AGAINST HUMANITY

Mr. Chairman,

7. Moving on to the topic on Crimes Against Humanity, Malaysia records its appreciation to the First Report on Crimes Against Humanity (A/CN.4/680) prepared by Mr. Sean D. Murphy, Special Rapporteur for the topic which proposed two draft articles relating respectively to the prevention and punishment of Crimes Against Humanity and to the definition of Crimes Against Humanity.

8. Malaysia is firmly committed to ending impunity and will continue to support any effort of the ILC towards that end, including the current work in relation to Crimes Against Humanity. Malaysia notes that based on the First Report of the Special Rapporteur, the objectives of having a Crimes Against Humanity Convention ("Convention") is because there is no global treaty dedicated to preventing and punishing Crimes Against Humanity. In this regard, as far as the criminalization of acts of Crimes Against Humanity as enumerated in draft Article 3 (1), these have already been addressed in a few international instrument, foremost of which, the Rome Statute of the International Criminal Court. Draft Article 3(1) as it stands at this juncture, substantially reflects Article 7 (1) of the Rome Statute.

9. Based on the concept of complementarity, Malaysia is of the view that there may be a necessity for States Parties to the Rome Statute to enact legislation for the crimes under the Rome Statute, failure of which, they may be deemed as "unwilling" or "unable". In view that currently there are 123 States Parties of the Rome Statute, as far as the issue of criminalizing the acts of Crimes Against Humanity, Malaysia





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remains unclear on any value-add of draft Article 3 (1). Perhaps, what needed to be addressed is the reason behind the failure of the States Parties to the Rome Statute, who had not done so, to enact such legislation. In this vein, Malaysia is of the view that the draft Convention should be drafted prudently to ensure that any further work on this should not overlap with existing regimes, but rather to complement it.

Mr. Chairman,

10. Malaysia believes that the current issues pertaining to impunity of the perpetrators of international crimes, including Crimes Against Humanity, which require urgent attention, are practical issues relating to the investigation and prosecution of such offences, including international cooperation amongst States. In this regard, Malaysia looks forward to future draft Articles addressing, inter-alia, the general inter-State cooperation on the investigation, apprehension, prosecution, and punishment of persons. In addition, Malaysia is also of the view that other surrounding legal issues such as universal jurisdiction, primacy of jurisdiction and immunity of state officials merit consideration in discussing the draft Convention.

11. Further, as far as Malaysia's current framework, perpetrator of Crimes Against Humanity may be prosecuted under its general criminal laws, foremost of which, the Penal Code. In relation to international cooperation, this is mainly governed by Mutual Assistance in Criminal Matters Act 2002 (MACMA) and the Extradition Act 1992.

12. Malaysia wishes to take this opportunity to recommend to the ILC, to focus on drafting a guidelines or sample of articles relating to Crimes Against Humanity to be adopted or to be used as guidance for States in developing domestic legislations on Crimes Against Humanity.



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## CHAPTER VIII: SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

Mr. Chairman,

13. Last but not least, on the topic Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Malaysia records her appreciation to the Special Rapporteur, Mr. Georg Nolte, for his work on the draft Conclusion which had been provisionally adopted by the Commission at its 67<sup>th</sup> Session.

Mr. Chairman,

14. During the previous two (2) sessions, Malaysia had submitted her preliminary views on draft conclusions 1 to 10 which still stand at the moment. In this regard, Malaysia wishes to reiterate her previous concern regarding the modifying effect of a subsequent agreement and subsequent practice in particular when it results in altering the provisions of the treaty or providing too broad interpretation of treaty provisions. It is Malaysia's view that the modification or amendment of a treaty should only be done in line with articles 39-41 of the 1969 Vienna Convention on the Law of Treaties (VCLT).

Mr. Chairman,

15. With regard to the present draft conclusion 11, Malaysia notes that it aims at addressing the role of subsequent agreements and subsequent practice in relation to the interpretation of constituent instruments of international organizations. In this regard, Malaysia greatly appreciates the importance of this draft conclusion in guiding





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the interpretation of constituent instruments of international organizations insofar it follows the rules on treaty interpretation contained in the VCLT specifically articles 31 and 32.

16. In particular, draft conclusion 11 provides greater understanding on the applicability of the VCLT, specifically its rules of treaty interpretation, to constituent instruments of international organizations as envisaged by article 5 of the VCLT.

17. Nevertheless, as draft conclusion 11 does not apply to “treaties adopted within international organizations”, Malaysia proposes the Special Rapporteur to explore in its future work the applicability of articles 31 and 32 of the VCLT 1969 on such treaties. This would be of great significance in providing comprehensive and full understanding on article 5 of the Convention especially from the perspective of treaty interpretation.

Mr. Chairman,

18. Malaysia acknowledges great disparities between sovereign States and non-State entities particularly international organizations as elaborated at length in the Commission’s general commentary to the 2011 articles on the responsibility of international organizations. In this regard, Malaysia sees merit in the observation made by the Special Rapporteur in its report whereby the important differences between States and international organisations should be borne in mind in addressing questions regarding, among others, the relationship between subsequent agreements and subsequent practice of the practice of the parties to the constituent instruments themselves for the interpretation of constituent instruments of international organizations.





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19. In this regard, Malaysia wishes to highlight the necessity to analyse again the first ten draft conclusions that had been provisionally adopted by the Commission, with a view to ascertain that the draft conclusions, which were mainly analysed from States' perspectives, are also applicable and relevant within the context of constituent instruments of international organizations. At this juncture, Malaysia notes that the Commission might revisit the definition of "other subsequent practice" in the previous draft conclusions 1(4) and 4(3) which so far is limited to the practice of States parties.

I thank you, Mr Chairman.