



# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

*(Please check against delivery)*

STATEMENT BY  
MS. EDORA AHMAD  
DELEGATE OF MALAYSIA TO THE UNITED NATIONS  
ON AGENDA ITEM 83:  
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS  
SIXTY-SEVENTH SESSION

CLUSTER III  
CHAPTER IX : PROTECTION OF THE ENVIRONMENT IN RELATION TO  
ARMED CONFLICTS  
CHAPTER X : IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL  
JURISDICTION  
CHAPTER XI : PROVISIONAL APPLICATION OF TREATIES

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

NEW YORK, 11 NOVEMBER 2015

---

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

Mr. Chairman,

1. Malaysia would like to exPRESS its appreciation to Ms. Jacobsson, the Special Rapporteur for her second report on the topic “Protection of the Environment in relation to Armed Conflicts” which has been considered by the Commission at its 3264<sup>th</sup> to 3269<sup>th</sup> meetings.

2. Malaysia wishes to highlight its concern with regard to the terms “armed conflict” and “environment”. Malaysia notes that such provisions were proposed by the Special Rapporteur in view of the fact that it would have been premature to



# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

*(Please check against delivery)*

exclude it and also in light of the views expressed by some members with regard to the value of such clause.

3. Pertaining to the definition of “armed conflict”, Malaysia observes that the Special Rapporteur had quoted the definition of “armed conflict” under Article 2 of the Effects of Armed Conflicts on Treaties. In relation to the definition “environment”, the Special Rapporteur had adopted Principle 2(b) of the draft principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities. Of this, Malaysia supports views by the members of the Commission that it was impossible to borrow a definition from an instrument dealing with peacetime situations and merely transposing it to situations of armed conflict. Malaysia views that alternative definitions should be proposed for further deliberation by the members of the Commission.

4. While working definitions on these terms may be useful, Malaysia wishes to reiterate that there is no urgent need to achieve a conclusive definition of these terms at such an early stage. In particular, the debate on the definition of “armed conflict” should be preceded by a determination of which actors the intended draft principles would cover, and the specific scope of such draft principles itself.

Mr. Chairman,

5. Malaysia discerns that draft principles 1-5 are diverged from the adopted draft principles by the Drafting Committee. Nevertheless, Malaysia notes that commentaries on the draft principles will be considered in 2016. In this regard, Malaysia hopes that such commentaries will provide a detailed analysis particularly with regard to the changes made to draft principles 1-5. Thus, Malaysia views that draft principles 1-5 are premature to be considered at this stage. It is anticipated that the upcoming commentaries to the draft principles would assist the members in further understanding these matters.



# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

(Please check against delivery)

## **CHAPTER X: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION**

Mr. Chairman,

6. Moving on to the topic “Immunity of State Officials from Foreign Criminal Jurisdiction”, Malaysia notes that the Fourth Report of the Special Rapporteur for the topic was considered at the Commission’s Sixty Seventh session. Malaysia is particularly interested in the matter as the Special Rapporteur has proposed two (2) new draft Articles which capture the key issues pertaining to the normative elements of immunity *ratione materiae*.

7. Malaysia welcomes the proposed draft Articles and will continue to conduct an in-depth study of the draft Articles. Malaysia meanwhile notes the new draft Article 2(f) as adopted by the Drafting Committee on the definition of an “act performed in an official capacity” which covers any act performed by a State official in the exercise of State authority. It is further noted that the question of how far a State may determine the range of activities which it considers as constituting acts performed in an official capacity has not been fully explored by the Special Rapporteur in the current report.

8. In this regard, Malaysia echoes the Commission’s suggestion for the Special Rapporteur to explore the question of how far a State may determine the range of activities which it considers as constituting acts performed in an official capacity. As such, Malaysia is of the view that the acceptability of draft Article 2(f) as adopted by the Drafting Committee is subject to further clarification by the Special Rapporteur on the issue.



# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

(Please check against delivery)

Mr. Chairman,

9. Malaysia further notes the adoption of draft Article 6 by the Drafting Committee which provides the scope of immunity *ratione materiae*. Malaysia has previously highlighted that the definition of the terms “Immunity *ratione materiae*” is imperative to determine in which circumstances State officials would be granted immunity from foreign criminal jurisdiction. It is however noted that the definition of “Immunity *ratione materiae*” which was defined in the previous draft article has been deleted and no reason given for such deletion.

10. In this regard, Malaysia agrees with the view by the Special Rapporteur in its report that the basic characteristic of immunity *ratione materiae* can be identified as being granted to all State officials, granted only in respect of “acts performed in an official capacity”, and is not time limited since immunity *ratione materiae* continued even after the person who enjoys such immunity ceases to be a State official.

11. Malaysia further takes note that the commentaries on the above draft Articles will be considered at the next session and looks forward to the commentaries to enable a better understanding of the purpose and intention of the draft Articles.

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

Mr. Chairman,

12. On the topic “Provisional Application of Treaties”, Malaysia commends the efforts of the Special Rapporteur in preparing the Third Report. The Third Report, while still at the initial stage of elaborating further the areas of study and possible



# MALAYSIA

## PERMANENT MISSION TO THE UNITED NATIONS

*(Please check against delivery)*

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, as well as the relationship between provisional application and other provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT) and the provisional application of treaties with regard to the practice of international organizations should be discerned with great care and caution. In this regard, Malaysia wishes to reflect its preliminary views on the topic:

12.1 Malaysia notes the proposals for six draft guidelines on provisional application of treaties. Malaysia is of the view that due consideration must be given as to the issues of doubt on some parts of the guidelines. The draft guidelines must provide a clear understanding and interpretation as well as taking into account the practice and internal laws of States;

12.2 In this regard, Malaysia would like to raise its concern on several issues, among others, on the domestic law and Malaysia's practice on the signing and ratifying of treaties. It is to be highlighted that in Malaysia, Article 39 of the Federal Constitution provides that: "The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable...by him or by the Cabinet or any Minister authorized by the Cabinet." Further under Article 80(1), the executive authority of the Federation extends to all matters with respect to which Parliament may make laws." By virtue of the 'Federal List', matters with respect to which Parliament may make laws include "external affairs" which in turn include "treaties, agreements and conventions with other countries". The executive authority of the Federation thus extends to the making or concluding of treaties, agreements and conventions with other countries.



# MALAYSIA

## PERMANENT MISSION TO THE UNITED NATIONS

*(Please check against delivery)*

In relation to draft guideline 1, Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties. In this regard, Malaysia has been very conscientious in ensuring obligations in the treaty are carried out accordingly once Malaysia ratifies a treaty by ensuring that its domestic legal framework are in place before the treaty is binding upon Malaysia;

12.3 In relation to draft guideline 2, Malaysia is of the view that at this juncture, the agreement for the provisional application of a treaty must either be expressly provided in the terms of the treaty itself or may be established by means of a separate agreement as both means have legal effect. Malaysia would like to highlight the risk of agreeing to the provisional application of a treaty by way of a resolution adopted by an international conference, or by any other arrangement between the States or international organizations as some of the States may not be directly involved during the negotiation of the resolution concerning the provisional application of a treaty at the international conference. In addition to that, with a few exceptions, it is recognised that resolutions are normally not binding in themselves and therefore it is unacceptable that such resolutions be given the same legal effect as a legally binding treaty.

Malaysia strongly views that the terms must be provided explicitly in the treaty to avoid ambiguities in the future. Furthermore, in the event that States agree to apply a treaty provisionally by way of a separate agreement, Malaysia views that the provision which enables the States to form that separate agreement should also be provided explicitly in the main treaty itself;



# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

*(Please check against delivery)*

12.4 In relation to draft guideline 3, a similar provision is stipulated in Article 11 of the VCLT whereby it explains the methods of giving consent to be bound by a treaty. Consent can be given either by way of signature, ratification, acceptance, approval or accession or by any other means, if so agreed. Malaysia takes a non-committal position as the consent to be bound by a treaty is subject to Malaysia's legal framework whereby subsequent act of ratification by our domestic legislations is required. On this point, Malaysia is particularly concerned on the effects of the provisional application of treaties especially on the rights and obligations of States who agree to apply a treaty provisionally. Therefore, Malaysia proposes that draft guideline 3 should be further deliberated by taking into consideration the rights and obligations of States which arise in a provisionally applied treaty;

12.5 Further, in relation to draft guideline 4, Malaysia is of the view that this draft guideline is to be read together with draft guideline 3 as they are interrelated. Malaysia's position on this point is that a provisionally applied treaty is only morally and politically binding. Malaysia is nevertheless guided by Article 18 of the VCLT which spells out that States shall refrain from acts which may defeat the object and purpose of a treaty. In this context, the term "legal effects" should be clarified and further developed but at the same time it must be ensured that the definition of legal effect should be within the context of Article 18 of the VCLT and not go against it. Malaysia wishes to reiterate its concern on the rights and obligations of States in a provisionally applied treaty and proposes for it to be addressed in the draft guidelines to ensure that the rights of the States are safeguarded. Considering Malaysia's domestic law and procedural law in signing and ratifying treaties as explained before, Malaysia is of the view that extreme caution should be exercised in



# MALAYSIA

## PERMANENT MISSION TO THE UNITED NATIONS

*(Please check against delivery)*

determining whether draft guideline 4 is acceptable as it has significant legal obligations;

12.6 As for draft guideline 5, Malaysia is mainly guided by paragraph (2) of Article 25 of the VCLT on the termination of the provisional application of a treaty. Malaysia is also of the view that this issue must be addressed by the Special Rapporteur and that the termination of the provisional application and its obligations must be clearly stated to prevent issues of doubt;

12.7 As for draft guideline 6, Malaysia is of the view that the proposed draft guideline 6 is vague as the term “international responsibility” was not explained in the draft guideline. Furthermore, draft guideline 6 did not discuss on the extent of the applicability of international responsibility of a State that applies a treaty provisionally. As the provisional application of a treaty may only apply to a certain part of a treaty, Malaysia would like to propose for the Special Rapporteur to deliberate and provide further clarification on draft guideline 6 to address the issue of remedy in the event of a breach, bearing in mind that the enforcement provision of the treaty may not yet come into force. Malaysia also suggests that reference should be made to the draft articles on responsibility of states and draft articles on responsibility of international organizations to address the issue of international responsibility of a State;

12.8 In the context of Malaysia’s experience and practice, the signing of a 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





# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

*(Please check against delivery)*

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 ensure that its domestic legal framework is in place and ready in order to implement the treaty; and

12.9 In addition, the legal effect of the 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.

13. Last but not least, 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 by the State that it accepts the provisional application of treaty, as expressed via a clear mode of consent. Thus, for a further comprehensive analysis of the topic, Malaysia would like to suggest further elaborations of the topic having due regard to State's sensitivities, as well as peculiarities and contextual differences embedded in the treaty provisions, and how State practices have so far responded to such variations.

I thank you, Mr Chairman.