



# MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

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STATEMENT BY  
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DELEGATE OF MALAYSIA TO THE UNITED NATIONS  
ON AGENDA ITEM 78:  
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS  
SIXTY-EIGHTH SESSION

CLUSTER 2  
CHAPTER VII: CRIMES AGAINST HUMANITY  
CHAPTER VIII: PROTECTION OF THE ATMOSPHERE  
CHAPTER IX: JUS COGENS

AT THE SIXTH COMMITTEE OF THE  
71<sup>ST</sup> SESSION OF THE GENERAL ASSEMBLY

NEW YORK, 26 OCTOBER 2016

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**CHAPTER VII: CRIMES AGAINST HUMANITY**

Mr. Chairman,

1. Malaysia records its gratitude to the Second Report on Crimes Against Humanity (A/CN.4/690) prepared by Mr. Sean D. Murphy, Special Rapporteur for the topic which proposed six draft articles relating to the obligation of a State party, which amongst others, to take any necessary measures to ensure that crimes against humanity constitute an offence under national law and to establish the State party's competence to exercise jurisdiction over the offence. It is convincing to express that this Meeting has become a platform to the Member States to continue deliberating and discussing the draft articles on Crimes against Humanity ("draft Article").

2. With regard to draft Article 5, Malaysia notes that it imposes a mandatory obligation on State parties to criminalize the acts of crimes against humanity under the national law. In this regard, Malaysia wishes to highlight that the list of offences enumerated under subparagraph 1 of draft Article 3 are partially covered as ordinary crimes under the Malaysian Penal Code.

Mr. Chairman,

3. Under draft Article 7, Malaysia takes note that the State is required to proceed with a prompt and impartial investigation which means investigations should be initiated, as soon as there is suspicion of a crime having been committed. In other words, the relevant State could be considered as violating draft Article 7 if the State's investigation is deemed to be not prompt and impartial. In this vein, Malaysia views that it should be within the prerogative power of the States to determine the parameters of "prompt" and "impartial".

4. Further, Malaysia notes that draft Article 9 caters the principle of *aut dedere aut judicare*. In relation to this, Malaysia wishes to highlight that its practice on the obligation to extradite or prosecute is based on its domestic law, namely the Extradition Act 1992 [Act 479] and also the bilateral and multilateral treaties to which Malaysia is a party including cooperation on the basis of reciprocity.

5. As for draft Article 10, generally Malaysia would be able to comply with the requirement thereunder. Be that as it may, we should also take into consideration the gravity of the offences in ensuring fair treatment to the alleged offender.

Mr. Chairman,

6. Bearing in mind that there are already various multilateral treaties which addresses crimes against humanity, for example, the Rome Statute, Malaysia wishes to

reiterate its concern that it is premature to conclude that the time is ripe for the adoption of new international instrument on the issue of crimes against humanity.

7. Finally, Malaysia wishes to reiterate its recommendation to the ILC to focus on drafting a guidelines or sample of articles relating to Crimes Against Humanity which may be adopted or be used as guidance for States in developing domestic legislations on Crimes Against Humanity.

8. Malaysia further reiterates its statement during the 68<sup>th</sup> UNGA Session which was also recorded in the Blog of the European Journal of International Law that the draft Articles should be drafted prudently to ensure that any further work on this should not overlap with existing regimes, but rather to complement it.

## **CHAPTER VIII: PROTECTION OF THE ATMOSPHERE**

Mr. Chairman,

9. Moving on to the next topic on “Protection of the Atmosphere”, Malaysia wishes to record our earnest appreciation to the Special Rapporteur, Mr. Shinya Murase for having to produce a report on the topic “Protection of the Atmosphere” by studying and clarifying the genesis of the protection of atmosphere and the resulting contemporary practice on the same. Malaysia understands that the task of clarifying the scope of this topic and its subsequent components is indeed a challenge. Moreover, the conscientious efforts in examining the basic principles and drawing up the treaty practices and judicial decisions on the same require sheer determination.

10. Malaysia notes that the insertion of the fourth preambular paragraph pays heed to the special situation and needs for developing countries. In utilizing the atmosphere, Malaysia strongly believes that the participation of developing countries on equitable basis should not be marginalized in any way for lack of a proper economic standing and/or technical assistance.

11. With reference to draft guideline 3, Malaysia notes that to prevent the atmospheric pollution and atmospheric degradation, States have the obligation to conduct due diligence by taking appropriate measures. Due diligence is an obligation to make best possible efforts in accordance with the capabilities of the state to control public and private activities. This obligation does not require the achievement of a certain result but only requires the best available efforts not to cause adverse effects. Due diligence merely implies a duty of vigilance and prevention, and does not guarantee that harm will never occur.

Mr. Chairman,

12. Upon scrutinizing the commentary to draft guideline 3 as expounded in the Special Rapporteur's third report, Malaysia views the notion "exercising due diligence in taking appropriate measures" attracts sparks of concern as the ambit of such term may be questionable when put into practice. Malaysia is hopeful for this phrase to be clarified by the Special Rapporteur as the report does not provide detailed elucidation on the same. Further, the draft guideline does not specifically provide for the burden and standard of proof to be discharged by the States in meeting the obligation imposed on them *vis-à-vis* draft guideline 3. Though it is true that the third report explores into the possible standards that may be adhered to by the States in different instances, nevertheless the attempt turns out to be one that is futile. This stems from the fact that it could be challenging to ascertain the standard that is to be applicable in a particular circumstances of a case. This, coupled with the fact that different standards may be imposed in a similar case, does not provide coherence nor solace. On that note, Malaysia believes that the issue raised above warrants further consideration, particularly in light of the fact that precautionary principle has been ousted from the application of the present draft guidelines. It ought to be pointed that a clear set of guiding principles on the issue, at least in the commentaries to the draft guideline may be beneficial, failing which it could possibly open a can of worms.

13. Turning to draft guideline 4, whilst Malaysia notes there has not been a comprehensive global convention that regulates environmental impact assessment, nonetheless this concept is no alien to most States as it has been embodied in their national legislations and widely practiced. Based on the contents of the draft guideline, Malaysia understands that a State is obligated to ensure that environmental impact assessment is to be undertaken. That being said, Malaysia does not understand the rationale in omitting reference to transparency and public participation from the draft guideline founded on the Commission's justification that the procedural aspects should not be dealt with in the draft guideline. From Malaysia's perspective, they certainly do not constitute simple procedural aspects of the draft guideline but rather key principles that have to be integrated into the draft guideline. From the legal perspective, Malaysia is of the view that it is worthy to consider the Special Rapporteur's proposal on capturing the element on transparency and public participation in the draft guideline. Be that as it may, Malaysia will only convey our position on this issue after consulting our relevant agencies.

Mr. Chairman,

14. As far draft guideline 5 is concerned, Malaysia is in agreement with the Special Rapporteur that the normative character of the notion of sustainability has been hazy in the international landscape. The concept has garnered many disagreements from States on its actual application owing to the different perspective of States. Although the International Court of Justice in *Gabcikovo-Nagymaros Project* (Hungary v Slovakia) in 1997 had recognised the need to reconcile environmental protection and economic development in exercising sustainable development, it had failed to examine the normative character and status of the concept. Trailing from the same, the Special Rapporteur had done little to remove the ambiguity surrounding this notion as he had merely required States to strike a proper balance between the economic development and environmental protection in undertaking sustainable development. The Commission, on the other hand, had departed from the formulation advocated by the Special Rapporteur and states that sustainable utilization as found in draft guideline 5(2)

would include amongst others, the reconciliation of economic development with protection of the atmosphere. Nonetheless, Malaysia fails to see how this tackles the possibility of discarding the underlying difficulty of weighing both the factors on scales. The language, if any, only appears to be a camouflage and does not shift the paradigm. As such, Malaysia urges the Special Rapporteur to conduct an in-depth analysis on this draft guideline and study how best the issues raised above may be addressed accordingly.

15. In a similar vein, draft guideline 6 does little justice to evade the long debate heralding on the notion of equity. Perhaps, the draft guideline should consider assimilating on the concept thus enumerating the criteria to be taken on-board in determining the possible characteristics of equity. This could come in various forms such as equitable sharing in exploitation of resources and participation of countries on equitable basis. Malaysia wishes for the Special Rapporteur to venture into the factors that will be assessed in the balancing of interest of the present and future generations. This step, if any, will certainly inject a certain level of certainty to the States and may be proven to be a useful guiding principle.

16. On draft guideline 7 that touches on intentional large-scale modification of the atmosphere, Malaysia views that it may not be prudent to include this aspect into the guidelines as it is closely interwoven with climate change. This is evident from the Commission's report that states' *"Activities aimed at intentional large-scale modification of the atmosphere have a significant potential for preventing, diverting, moderating or ameliorating the adverse effects of disasters and hazards, including drought, hurricanes, tornadoes, and enhancing crop production and the availability of water. At the same time, it is also recognized that they may have long-range and unexpected effects on existing climatic patterns that are not confined by national boundaries."* Here, Malaysia recalls the understanding of the Commission that *"work on this topic will proceed in a manner so as not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution"*. Given the close relationship between climate change and intentional large-scale

modification of the atmosphere, and owing to the fact that there has yet to be any concrete international norms and legal rules to govern its usage in the future, Malaysia believes that perhaps the time is not right to incorporate this component into the draft guidelines.

17. Overall, Malaysia views that the draft guidelines should work towards providing clear guiding principles and approaches for States to convene appropriate steps to protect the atmosphere.

## **CHAPTER IX: JUS COGENS**

Mr. Chairman,

18. Last but not least, on the topic “Jus Cogens”, Malaysia would like to caution against expanding the principle beyond the language of article 53 of the VCLT. Against a backdrop of international law which is developing through consent-based instruments, it would be injudicious to expand upon a principle that certain universal norms can bind States irrespective of State consent.

19. Malaysia notes the proposed Draft Conclusions by Mr. Tladi and at this juncture Malaysia welcomes the efforts to identify and set the parameters on the scope and the legal consequence relating to peremptory norms of general international law.

20. However, Malaysia wishes to caution on moving forward with Draft Conclusion 2 as Malaysia finds it difficult to rationalise or to illustrate how peremptory norms *from which no derogation is permitted* could be modified, derogated from or abrogated by. We look forward to a thorough analysis on this.

Mr. Chairman,

21. Insofar as *jus cogens* relates to State sovereignty, Malaysia's domestic legal framework renders it imperative for international law, whether general principles thereof, or as expounded in treaties, to be incorporated into domestic law before it may be enforced by municipal courts. However, where there is a divergence of interpretation, judges have been known to give due regard to Malaysia's international obligations.

22. Malaysia also looks forward to the work of the Special Rapporteur, Mr. Tladi, in relation to *jus cogens* and universal applicability, firstly, on the doctrine of persistent objector and secondly, on the application of *jus cogens* on a regional or bilateral basis.

I thank you, Mr. Chairman.