



# MALAYSIA

Permanent Mission to the United Nations, New York

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STATEMENT BY  
MS. NOOR NADIRA NOORDIN  
ATTORNEY GENERAL'S CHAMBERS OF MALAYSIA

ON AGENDA ITEM 77:  
REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS SEVENTY-THIRD SESSION

CLUSTER III - CHAPTERS VII (SUCCESSION OF STATES IN RESPECT OF STATE  
RESPONSIBILITY) AND VIII (GENERAL PRINCIPLES OF LAW)

AT THE SIXTH COMMITTEE OF  
THE 77TH SESSION OF THE GENERAL ASSEMBLY

NEW YORK, 2 NOVEMBER 2022

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Mr. Chair,

## CHAPTER VII: SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

2. My delegation would like to record its utmost appreciation to Mr. Pavel Šturma, the Special Rapporteur, for his fifth and last report on the topic of succession of States in respect of State responsibility. Malaysia commends the Special Rapporteur for his commitment and contributions to the codification and progressive development of such a complex and challenging topic of international law.

3. Malaysia also expresses its gratitude to the Special Rapporteur for consolidating the draft guidelines for purposes of the first reading of the draft guidelines at the current session. Malaysia supports the current format of the work of the Commission which has been changed to draft guidelines which aims to serve as general guidance for States as opposed to developing a set of binding rules.

4. Malaysia notes that draft guidelines **6, 7 bis, 10, 10 bis, 11, 12, 13, 13 bis, 14, 15** and **15 bis** has been provisionally adopted by the Commission at its seventy-third session.

Mr. Chair,

On “clean slate” rule and automatic succession

5. With regard to Part One of the fifth report on the competing theories of the “clean slate” rule and automatic succession, Malaysia echoes the sentiment of most States that neither the clean slate rule nor automatic succession could be accepted as general rules as there is no conclusiveness of State practice on this issue to warrant either the clean slate rule or automatic succession to prevail over the other.

6. Malaysia reiterates its agreement with the Special Rapporteur that the draft articles were subsidiary in nature and that priority should be given to agreements between the States concerned.

7. My delegation also reiterates our support on the general view of the Special Rapporteur that this topic must preserve consistency, in terminology and substance, with the previous works of the Commission. Specifically, Malaysia agrees that the topic should be consistent with the articles on Responsibility of States for Internationally Wrongful Acts 2001 that are largely considered as reflecting customary international law.

Mr. Chair,

8. Malaysia can support the inclusion of draft guideline 6 as it is in line with the Commission’s aim to clarify that succession of States has no impact upon attribution.

9. With regard to draft guideline 7 bis, Malaysia agrees that the provision on composite acts should be placed next to draft article 7 which had been provisionally adopted in 2019 by the Drafting Committee. Malaysia further considers it is useful to complement to draft article 7 in differentiating composite acts from continuing acts.

10. In general, Malaysia does not have any objection to draft guideline 7 *bis* as Malaysia believes that States are responsible for the consequences of its own act as correctly encapsulated in paragraphs 1 and 2.

11. However, with regard to whether a successor State would be responsible for a wrongful act that commences with the predecessor State and continues with the successor State, Malaysia believes that the provision should be open to further discussion and deliberation as currently, it is dealt with on a case to case basis and there is no clear guidance on the issue. Before the provision is adopted, it must first be determined whether such a composite act is possible under international law.

Mr. Chair,

12. Concerning draft guideline 10, Malaysia agrees that flexibility should be given to States to choose the modalities of the agreement between the injured State and the successor State on how to address the injury committed by any of the predecessor States in cases of uniting of States.

13. Nevertheless, Malaysia underscores the importance of States to enter into the negotiations with a view to concluding an agreement. The obligation must be fulfilled in good faith as clearly supported by several decisions of international courts and arbitral tribunals.

Mr. Chair,

14. With regard to draft guideline 10 bis, Malaysia reiterates its position that the onus is on the incorporating State to negotiate in good faith with the injured State for purposes of reaching an agreement.

15. Malaysia also agrees with the formulation of paragraph 2 to provide further clarity that incorporation does not diminish the responsibility of the State that committed the wrongful act especially since the articles on Responsibility of States for Internationally Wrongful Acts 2001 made no reference to the scenario contemplated in paragraph 2.

16. As for draft guideline 11, Malaysia wishes to highlight that the dissolution of a State might give rise to different kinds of legal relations. In this regard, some successor States might have a closer connection with the wrongful act or the injury than others. Therefore, there is a need for agreement on how to address the injury may not be relevant to all successor States to an equal extent.

17. Malaysia also notes that the factors for determination listed in draft guideline 11 is non-exhaustive. Therefore, Malaysia supports the formulation which allows flexibility for other factors not listed to also be considered in coming up with an effective solution between the injured State and the relevant successor State or States.

Mr. Chair,

18. Draft guideline 12 confirms that the position of the predecessor State is not affected by the succession of States. Malaysia is of the view that paragraph 2 is ambiguous about the circumstances in which a successor State may be able to invoke the responsibility of the State that committed the wrongful act due to the usage of the term “particular circumstances”. At this juncture, the only situation that comes to mind is when there is a connection between the injury to the predecessor State before the date of succession and the territory or the nationals that became those of successor State upon the succession. Other than the situation envisaged, Malaysia seeks clarification on any other circumstances that may warrant an invocation by the successor State.

19. Malaysia notes the Drafting Committee’s view that such specificity was not necessary in the provision, and that the meaning of “particular circumstances” would be explained further in the commentary. However, Malaysia believes that if there is only one situation which is foreseen to occur, that situation should be spelt out in the provision. Otherwise, the generality of the term “particular circumstances” would leave room to differing interpretation which may pose difficulties in its implementation.

Mr. Chair,

20. As regards draft guideline 13, Malaysia is agreeable with the Commission that it is unnecessary to make explicit in the provision reference to an internationally wrongful act that occurred before the date of succession as in a situation of unification of State, the predecessor State had ceased to exist on the date of succession.

21. Concerning draft guideline 13 bis which provides for the scenario where an injured predecessor State becomes part of another whose legal personality continues, Malaysia is agreeable that the term “*wrongdoing State*” is a concise way of indicating the State that was responsible for the internationally wrongful act. Therefore, Malaysia is of the view that this draft guideline is generally acceptable.

22. With regard to draft guideline 14, Malaysia is of the view that the proposed formulation is clear and hence, has no objection to such proposal.

23. Further, although Malaysia could support the inclusion of draft guideline 15, Malaysia recommends that the Commission could provide further clarification on situations where exception to the general requirements of continues nationality in the commentary for clarity purposes and implementation of the present guidelines.

24. Concerning draft guideline 15 bis, Malaysia can support the views of the Commission to have a separate paragraph for each scenario.

Mr. Chair,

25. Finally, as stated earlier, Malaysia notes that this is the Special Rapporteur’s last report and that no new draft articles were proposed. With regard to the future programme of work for the topic, it will be up to the new composition of the Commission to decide in 2023. Malaysia welcomes the suggestion made by some Members to establish a working group for the topic to draft the commentaries to the draft guidelines to be transmitted to States for their comments.

Mr. Chair,

## **CHAPTER VIII: GENERAL PRINCIPLES OF LAW**

26. Turning to Chapter VIII of the report, my delegation would like to acknowledge with appreciation the efforts undertaken by the Commission and the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, on the topic of “General principles of law”, particularly the third report of the Special Rapporteur (A/CN.4/753), which discussed the issue of transposition, general principles of law formed within the international legal system, and the functions of general principles of law and their relationship with other sources of international law.

27. Malaysia notes the most recent decisions made by the Commission, including the provisional adoption of draft conclusions 3, 5 and 7, and notation of draft conclusions 6, 8, 9, 10 and 11, as contained in the report of the Drafting Committee. Malaysia also notes

that the Commission decided to refer draft conclusions 10, 11, 12, 13 and 14, as presented in the Special Rapporteur's third report, to the Drafting Committee.

28. Malaysia is confident that the Commission and the Special Rapporteur would continue to take into consideration all the analysis, views and comments made by the Member States on this multifaceted topic with a view to reach a position acceptable at the international level.

29. In this regard, Malaysia would like to highlight its observations and recommendations on draft conclusions 3, 5 and 7, which have been provisionally adopted by the Commission.

Mr. Chair,

*Paragraph 2 of draft conclusion 5: The comparative analysis must be wide and representative, including the different regions of the world*

30. States are deemed equal by their status under international law and is therefore juridical in nature. However, it is noted that there are inequalities in areas such as geographical and population size as well as economic development. Therefore, Malaysia is of the view that a comparative analysis should be done not only according to different regions but also according to the economic, social and cultural relations on a state-to-state basis.

*Subparagraph (b) of draft conclusion 3: General principles of law comprise those that may be formed within the international legal system; and*

*Subparagraph (2) of draft conclusion 7: Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.*

31. Malaysia observes that draft conclusion 7 deals with the second category of general principles of law as stated under draft conclusion 3. It concerns the identification of general principles of law formed within the international legal systems. As clearly provided in draft conclusion 2, the element of recognition is an essential condition for the existence of general principles of law. Recognition in this context therefore refers to the existence and content of a general principle of law that may be formed within the international legal system subject to certain conditions that the community of nations has recognized the principle as being intrinsic to the international legal system.

32. However, subparagraph (2) of draft conclusion 7 goes further by stating that such determination is without prejudice the possible existence of other general principles of law formed within the international legal system. As such, this may be construed that even though the principle has not been recognised as intrinsic to the international legal system by the community of nations, the principles may also be considered as general principles of law.

33. Thus, Malaysia is of the view that subparagraph (2) of draft conclusion 7 widens the scope of the general principle of law and may render the condition of having the community of nations to recognize the principle as intrinsic to the international legal system ultimately irrelevant.

34. In deciding which general principles of law that may be formed within the international legal system, the relevant criteria such as variety and diversity must be considered. The analysis should be carried out with caution in order to identify the issues raised and discussed by States involved in the context of that particular treaties, customary rules or other international instruments. A comparative analysis between the identification of the existing general principles of law that are derived from national legal system and that are formed within the international legal system should be conducted.

35. In this regard, Malaysia supports the efforts of the Commission and the Special Rapporteur to continue their works on this particular issue of concern with a view, among others, to identify whether there was sufficient State practice in the international legal system to determine whether a particular principle formed within the international legal system might be considered a general principle of law.

36. Irrespective of the foregoing, Malaysia wishes to reiterate its general stance that States only have the benefit of studying the draft conclusions within the context of what has now been provided by the Commission. Therefore, all the draft conclusions should be read in its entirety to ensure that all concerns have been addressed as a whole since they are interrelated to one another. For this reason, Malaysia would like to reserve the right to make further statements on all the draft conclusions once the entire draft is completed.

Thank you.