



MALAYSIA

Permanent Mission to the United Nations, New York

STATEMENT BY

MR. AHMAD GHAZALI BIN MUHAMAD NADZRI

**REPRESENTATIVE OF MALAYSIA TO THE SIXTH COMMITTEE OF THE
79TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY**

**ON AGENDA ITEM 79:
REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SEVENTY-FIFTH SESSION**

**CLUSTER I - CHAPTERS I, II, III, VII (IMMUNITY OF STATE OFFICIALS FROM
FOREIGN CRIMINAL JURISDICTION) AND X (SEA-LEVEL RISE IN RELATION TO
INTERNATIONAL LAW)**

**AT THE SIXTH COMMITTEE OF
THE 79TH SESSION OF THE GENERAL ASSEMBLY**

NEW YORK, 23 OCTOBER 2024

Mr. Chair,

Malaysia expresses its deep appreciation to the International Law Commission (ILC) for the opportunity to engage in discussions on three critical topics: (i) general principles of law; (ii) the immunity of State officials from foreign criminal jurisdiction; and (iii) the impact of sea-level rise in relation to international law. We commend the Commission's efforts in the progressive development and codification of international law on both fronts, recognizing their significant influence on issues of State sovereignty, accountability for international crimes, and the preservation of Statehood in the face of environmental challenges.

CHAPTER III: GENERAL PRINCIPLES OF LAW

2. Malaysia wishes to express its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Marcelo Vazquez – Bermudez on this topic that has led to a successful conclusion of the adoption of the draft conclusions on general principles of law at its first reading.

3. Malaysia also notes that the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments

and observations be submitted to the Secretary-General by 1 December 2024. In this regard, Malaysia wishes to provide comments on some of the draft conclusions as follows:

Draft Conclusion 1: Scope

4. Malaysia views that the draft conclusion 1 generally reaffirms a well-established principle that has existed even before its codification – general principle of law as a source of international law. Noting the grey areas subsisting in this ‘source’ of law, development of conclusions in the future work of the Commission on the scope, the method for their identification, and their functions and relationship with other sources of international law would provide clarity in their application. Malaysia therefore supports the Commission’s work in this regard with the hope that the conclusions would be useful guides to assist States, international organizations, courts and tribunals, and others called upon to deal with general principles of law as a source of international law.

Draft Conclusion 2: Recognition

5. Malaysia observes that there are two (2) important elements or conditions under the draft conclusion 2, namely, recognition and community of nations. On recognition, for a general principle of law to exist, it must be agreed as true or legal, or formally acknowledged. In the sense of Article 38(1)(c) of the Statute of the International Court of Justice, the agreement or formal acknowledgement must be proven by all the available evidence that showing the general principle of law has been ‘recognized by civilized nations.

6. It is noted that ‘community of nations’ is employed instead of ‘civilized nations’, a term that can be considered as obsolete, when referring to whose recognition is required for a general principle of law to exist. Hence, for a general principle of law to exist, it must be generally recognized by the members of the community of nations. Malaysia acknowledges that the term ‘community’ is widely used in various international treaties such as the Universal Declaration of Human Rights. The concept of ‘community’ is also an integral element of the Association of Southeast Asian Nations (ASEAN).

7. To Malaysia, the draft conclusion 2 is generally consistent with Article 1(2) and Article 2(1) of the UN Charter, as well as various international treaties, which provides the basic foundation of the principle of sovereign equality of States.

8. Nonetheless, Malaysia has reservations on paragraph (5) of the commentary relating to the role of international organizations in the formation of general principles of law, as international organizations do not, in any way, have the same equal standing, structural character, obligations as well as responsibilities with that of sovereign States. Unlike States, international organizations are established for specific functions which characterize their restricted mandates and activities. In this regard, Malaysia looks forward to have these issues being comprehensively analysed, deliberated and considered for the purpose of inclusion in the Special Rapporteur's future report.

Draft Conclusion 5: The comparative analysis must be wide and representative, including the different regions of the world

9. Regarding paragraph 1 of draft conclusion 5, Malaysia observes that the word “common” is subjective. In practice, the identification of general principles is usually conducted on a case-by-case basis, tailored to a particular problem, and guided by the conditions and requirements of the international legal system. Hence, there must be criteria to address the freedom of choices by judges in adopting any general principle of law pursuant to the finding of common principle based on the comparative analysis.

10. On paragraph 2 of draft conclusion, States are deemed equal by their status under international law. 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.

Draft Conclusion 6: Compatibility test should be in relation to norms that were universally accepted and that could be considered as a reflection of the basic structure of the international legal system

11. Malaysia notes the compatibility test is important to determine the principle in foro domestic to be transposed into the international legal system. Malaysia views that in deciding which general principles of law (derived from domestic court or tribunal) may be transposed to the international legal system, relevant criteria such as variety and diversity must be considered. The test should be carried out with caution to identify the issues raised and discussed by States involved in the context of the community of nations, any particular treaty, customary rules or other international instruments.

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.

12. 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.

13. 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.

14. 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.

15. 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.

Draft Conclusion 10: General principles of the law fulfilled the same functions as the other sources of international law and not being necessarily limited to gap-filling

16. Malaysia opined that though there was consensus by Member States that general principles of law fulfilled the same functions as the other sources of international law, caution must be applied whilst determining the nature of principles and their applicability to the issues presented before the international courts and tribunal.

Draft Conclusion 11: General principle of law could exist in parallel with a rule of customary international law

17. Malaysia supports the proposition that the possibility of a parallel exists between general principles of law and rules of customary international law. However, it is important to acknowledge that the emergence of a general principle of law is dependent on its compatibility with every single treaty and customary rule in the context in which it is to be applied.

18. Malaysia takes note of the official deadline, set for States to submit their written comments and observations on the draft conclusions, which is 1 December 2024. We are committed to contributing our written input as part of this crucial process. In this context, we respectfully request the Secretary-General to take the necessary steps to compile and circulate a comprehensive document of comments and observations well in advance of the forthcoming sessions in 2024, enabling early consideration.

Mr. Chair,

CHAPTER VII: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

19. Malaysia wishes to express its appreciation to the Commission for the work accomplished, whereby proposals were made for consideration on the second reading in relation to Draft Articles 1 to 6 in furtherance of comments and observations made by States as well as the Sixth Committee. In light of the recent request by the Commission for Governments to submit their comments and observations on draft articles 7 to 18 and the draft annex of this topic, we wish to share our comments and observations on these draft articles through four (4) key issues.

20. Firstly, immunity *ratione materiae* protects State officials from being prosecuted in foreign courts for acts performed in an official capacity. Although draft article 7 provides the exception to this rule, definitions such as genocide, war crimes, and crimes against humanity are enumerated in the Rome Statute of the International Criminal Court, in which not all States are signatories. The same applies to the International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”) and the International Convention for the Protection of All Persons from Enforced Disappearance (“ICCPED”). Thus, Malaysia opines that clarifications must be sought from the Commission on how best to invoke draft article 7 in respect of such circumstances, including the possible inclusion of provisions on reservations made by the state parties.

21. Secondly, there is a necessity for the Commission to provide clear and coherent explanation on the application of the procedural provisions *vis-à-vis* the two types of immunity namely immunity *ratione personae* and immunity *ratione materiae*. This took into account that no distinction was made to the procedure of invoking the two different types of immunity by the State of the official, particularly on draft articles 9,11 and 14.

22. Thirdly, on the application of draft article 13 in relation to the immunity of State officials from foreign criminal jurisdiction, we believe that it may be prudent to incorporate elements of confidentiality at a starting point for the examination of any request for information, taking into consideration the potential sensitivities of information that may be requested and/or exchanged between States on the application or invocation of immunity. Apart from that, Malaysia opines that the draft article itself is silent on the ability of the requested State to assess whether to formulate conditions as part of the process of “considering in good faith” a request for information that could facilitate the transmission of such information.

23. Fourthly, Malaysia notes that the Commission omitted the initially proposed provision in draft Article 18, which would have required the suspension of jurisdiction by the forum State when a dispute is referred to arbitration or the International Court of Justice, due to a lack of supporting precedents. While the Commission recognized that this procedural safeguard could encounter serious difficulties in some State legal

systems, Malaysia believes that suspending domestic proceedings should be carefully negotiated between parties to ensure fairness and balance in the treatment of State officials under foreign criminal jurisdiction.

24. Malaysia has submitted our full written comments on these four (4) keys issues to the Commission on 27 November 2023 and hope that these issues will be taken due consideration towards the final end product of the draft articles. In this regard, Malaysia would like to seek guidance from the Commission on whether states who had submitted its comments and observations concerning draft articles 7 to 18 and the draft annex of the draft articles on immunity of state officials from foreign criminal jurisdiction is required to submit the same by 15 November 2024.

Mr. Chair,

CHAPTER X: SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

25. Turning to Chapter X of the report, Malaysia extends its appreciation to the co-chairs of the Study Group for their comprehensive deliberations.

26. With regard to the issue of preservation of statehood, Malaysia believes that the crux of preservation of statehood would be the preservation of a coastal State's baselines. Preservation of baselines can be attained by coastal States taking reasonable measures under international law to deposit its coordinates or charts with the Secretary General or conclude boundary agreements with neighbouring countries. In this context, Malaysia observes that any protection or recognition as to the "presumption of continuity of statehood" by any coastal State should be backed by evidence in the form of measures that had been undertaken by Member States under international law, in particular the United Nations Convention on the Law of the Sea 1982 (UNCLOS), to preserve its statehood, as well as scientific evidence of imminent threat of sea level rise to its statehood.

27. In light of this, considerations may be given for the admittance of continuity of statehood for Member States directly affected by sea-level rise which had taken initiatives to preserve its baseline either by depositing its coordinates or charts with the Secretary-General or establishing maritime boundary by way of treaties between neighbouring countries. In these instances, maritime boundaries of these Member States are fixed in perpetuity and therefore warrant the protection of statehood, regardless of sea level rise.

28. In light of the above, Malaysia is of the view that the Study Group has given too much emphasis on the analysis of the continuation of statehood with respect to existing States, particularly the discussion on the criteria of Article 1 of the Montevideo Convention, which may cease to be present in the remote future. Malaysia views it would be more pragmatic for the Study Group to focus on addressing the practical solutions that could be employed in the near future by Member States affected by sea

level rise, for instance, to freeze its baselines or prevent any factors that could contribute to the loss its statehood due to sea level rise.

29. At this juncture, Malaysia wishes to impress that the Study Group should exercise caution in its analysis that may potentially be perceived as going beyond the traditional criterion for statehood under the Montevideo Convention or intended to create a new framework for the Member States affected by sea level rise. In this regard, the creation of a new framework could possibly allude towards an exemption to the Montevideo Convention and, as such, could potentially undermine the efforts which had or may be undertaken by certain States to achieve the recognition of its statehood. In this respect, Malaysia recalls the mandate of the Study Group and underscores the importance for the study to be pursued on a precautionary basis so as not to modify existing international law.

30. In this respect, Malaysia encourages the Study Group to explore precautionary solutions for States directly affected by sea-level rise to preserve statehood as a paramount priority in its study and address gaps, if any, for the implementation of such precautionary solutions. Whilst Malaysia supports the Study Group's continuous efforts to analyse the legal implications of the statehood issue, Malaysia views that further analysis should be exercised with caution to avoid any State from deferring the performance of existing obligations under UNCLOS under the pretext of sea level rise.

31. With regard to the protection of persons affected by sea-level rise, Malaysia reaffirms its views that any future obligations in terms of protection and assistance to the persons affected by sea-level rise should be based on the principle of common but differentiated responsibilities, the national capacity of the non-affected States, humanitarian principles and case-by-case basis. In this regard, Malaysia on several occasions has demonstrated to the international community its willingness to offer protection to persons in need and similarly in this context will offer its assistance or protection to persons affected by sea-level rise in accordance with its sovereign responsibility within its own territory, as recognized by international law, and this includes protecting national security, public order (ordre public), morals, rights and freedom of her citizens.

32. In closing, Malaysia looks forward to continuing constructive engagement on both topics and urges the Commission to consider our observations in refining the draft articles and concluding reports, ensuring that the final outcomes reflect both practical realities and respect for international legal principles.

I thank you.