



MALAYSIA

Permanent Mission to the United Nations, New York

STATEMENT BY

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**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 III - CHAPTER VI (PREVENTION AND REPRESSION OF PIRACY AND
ARMED ROBBERY AT SEA) AND CHAPTER VIII (NON-LEGALLY BINDING
INTERNATIONAL AGREEMENTS)**

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

NEW YORK, 29 OCTOBER 2024

Mr. Chair,

CHAPTERS VI: PREVENTION AND REPRESSION OF PIRACY AND ARMED ROBBERY AT SEA

1. First and foremost, my delegation would like to record our appreciation to Mr. Yacouba Cissé, the former Special Rapporteur for this topic for his ideas and contributions. Malaysia also welcomes Mr. Louis Savadogo as the newly appointed Special Rapporteur for the topic.

2. Malaysia would like to take this opportunity to make few observations on articles 2 and 3 of the draft articles which have been provisionally adopted by the Commission. On

draft Article 2 regarding the definition of piracy, Malaysia believes that the Commission could offer further clarification on the interpretation of the term “for private end”, particularly when the crime of piracy is committed for ideological or political ends. Malaysia views that such clarification is crucial taking into consideration the differing views and debates currently ongoing on this issue and the fact that piracy itself is a crime that could attract the exercise of universal jurisdiction.

3. With respect to draft Article 3, it is observed that the Commission decided to use the words “Armed robbery at sea” instead of “Armed robbery against ship” at the chapeau of the said draft article to avoid a restrictive definition. It is further stated in the commentary to the said draft article that armed robbery at sea does not necessarily involve two ships, which means it covers such acts committed by persons already on board the ship. The commentary, however, does not specify whether an act of such nature committed against other sea transportation, oil platforms, etc., is included in the definition. Nevertheless, from the plain reading of the draft Article itself, the term “directed against a ship or against persons or property on board such a ship” denotes that the definition does not extend to these entities, similar to the definition of piracy. Thus, Malaysia seeks the Commission’s further explanation on this issue to avoid any uncertainty.

4. Malaysia also observes that the commentaries for the newly introduced draft articles 4, 5, 6 and 7 are yet to be made available by the Drafting Committee. These commentaries serve as crucial tools in assisting states and international organizations to understand the reasoning behind the drafting as well as the application of the draft articles. As such, Malaysia intends to reserve our comments and observations on draft articles 4, 5, 6 and 7 for future sessions of the Assembly.

5. With regard to the final form of the draft Articles, Malaysia notes that there are differing views among the members on whether the draft articles could be a basis of binding instruments or be treated as guidelines aimed at harmonising national laws and identifying lacunae in the area of law. Malaysia believes that it is still premature at this stage to determine the final form or status of the draft articles.

6. Be that as it may, Malaysia remains committed to supporting the Commission's noble mission of advancing international law. We are confident that the Commission's ongoing efforts in this domain will contribute significantly to the global legal framework and foster a shared commitment among states to address the challenges posed by piracy and armed robbery at sea effectively.

Mr. Chair,

CHAPTER VIII: NON-LEGALLY BINDING INTERNATIONAL AGREEMENTS

7. Malaysia congratulates Mr. Mathias Forteau, the Special Rapporteur, and commends his diligent efforts in preparing the First Report on the topic “Non-Legally Binding International Agreements”. The report provides a comprehensive and insightful

analysis of the origins, scope and critical elements of this timely topic. Malaysia values the opportunity to offer its views on the report and on the ensuing debate among members of the Commission on the corresponding issues raised by the Special Rapporteur.

General Observations

8. Malaysia recognises the vital objective of the Commission in this area: to provide much-needed clarity on the legal nature, framework and potential effects of non-legally binding international agreements. Establishing clear criteria to distinguish such agreements from treaties is essential, as non-binding instruments play a significant role in facilitating international cooperation. These agreements allow for flexible undertakings without imposing the legal constraints or obligations inherent in binding treaties. Malaysia's own experience, which includes the use of Memoranda of Understanding (MOUs), Joint Communiqués and Declarations, exemplifies how non-binding instruments promote "soft law" commitments, fostering international collaboration primarily through political rather than legal obligations.

9. Malaysia's Federal Constitution mandates a streamlined executive process for the approval of all international agreements, whether legally binding or not. This process ensures consistency in Malaysia's foreign policy and guarantees that all international commitments align with the nation's best interests. As such, Malaysia strongly advocates for recognising the intent of the parties as a key principle in determining the legal status of non-legally binding agreements—a position on which we will elaborate further in our contributions to these important discussions.

10. Malaysia also wishes to underscore the importance of examining diverse regional practices, such as those within the Association of Southeast Asian Nations (ASEAN), where we are actively engaged. ASEAN offers valuable insights into the practical use of non-binding instruments in international relations. The region's frequent reliance on these instruments illustrates how flexibility can facilitate trust and cooperation, even without the formal obligations that legally binding agreements impose.

11. However, Malaysia emphasises the need for legal clarity, particularly regarding the intent of the parties, which is fundamental in distinguishing non-binding international agreements from treaties. A clear understanding of intent is essential not only for accurately defining the nature of the commitments made but also for ensuring the sustainability and reliability of the relationships between the parties involved. Legal certainty in these areas strengthens confidence among States and contributes to a more coherent international legal framework for non-binding agreements. This approach underscores the significance of understanding and incorporating regional practices, as

they can enhance the ILC's work by reflecting the realities of international cooperation across different contexts.

12. Malaysia will now turn to address the key headings and questions raised in the Special Rapporteur's First Report and discussed by the Commission.

Title and Scope of the Topic

13. Malaysia adopts a practical and balanced stance in the ongoing discussions on non-legally binding international agreements. We believe the emphasis should be on the content and function of these instruments, rather than becoming entangled in debates over their labels. Whether called "agreement", "understanding", or "arrangement" the focus should be on the shared intention between States or international organisations, irrespective of whether they create legal obligations.

14. Malaysia acknowledges that different legal systems use varied terms when describing such instruments. In our case, the Malay term "*perjanjian*" is commonly understood as an "agreement" or "contract" in both international and private law contexts. Typically, "*perjanjian*" implies a legally binding nature. This demonstrates Malaysia's preference for maintaining transparency and certainty in both international and domestic agreements, particularly when legal obligations are expected.

15. In international practice, Malaysia has entered into various forms of agreements, such as MOUs, Joint Communiqués, Declarations, Arrangements and Letters of Exchange, to name a few, all of which represent interstate or intergovernmental cooperation. These instruments may or may not have binding legal force, depending on the mutual intent of the parties involved. The actual legal standing of each instrument is typically determined through a thorough examination of its substance, rather than relying solely on its label.

16. The Special Rapporteur's recommendation to keep the term "agreement" for purposes of the topic's title is seen to reflect its wide adaptability in international relations. As noted, the term is not restricted to binding instruments. Malaysia therefore agrees that its common use across various legal and diplomatic frameworks makes it suitable for the current topic.

17. Furthermore, it is noted that international tribunals, such as the International Court of Justice (ICJ), have consistently evaluated the nature of agreements based on their content and context, rather than their formal designation. This approach provides States

the flexibility to engage in non-binding commitments without needing to classify them as legally enforceable treaties from the outset.

Identification of questions to be examined: Criteria, Regime and Legal Effects

Criteria

18. Malaysia underscores the primacy of intent in determining the legal nature of non-legally binding international agreements. The parties' intention is critical in distinguishing such agreements from treaties. However, Malaysia also recognises the limitations of relying solely on intent, as it is not always clearly expressed. This is why Malaysia supports the hybrid approach, which combines both subjective intent and objective indicators to provide a more reliable and nuanced framework for interpreting agreements.

19. In Malaysia's own drafting practice, specific linguistic cues such as "shall" to denote binding obligations, or "may" and "will" to indicate non-binding commitments, often provide clear indications of whether an instrument is legally binding. Similarly, terms like "agree" are typically used for binding agreements, while "accept" or "decide" are more common in our non-binding instruments. However, Malaysia recognises that other States or parties, across different jurisdictions and legal traditions, may have varied interpretations of such terms. Nonetheless, the key point is that these indicators serve as important tools in understanding the intent behind agreements and in distinguishing between binding and non-binding commitments.

20. On the issue of whether judicial bodies should have the authority to reclassify agreements, Malaysia takes a cautious stance. Judicial reclassification, particularly where parties have expressly stated the legal status of an agreement, risks undermining the separation of powers between the judicial and executive organs of state. In Malaysia, the executive branch is vested with the authority to negotiate and enter into international agreements, and allowing courts to reclassify such agreements would infringe upon this executive function.

21. Malaysia views the role of courts as primarily one of interpreting the provisions of agreements and adjudicating disputes based on the parties' intent. Judicial reclassification should be rare and only considered in exceptional circumstances where significant ambiguities exist or where the intentions of the parties are clearly at odds with the language of the agreement. Such circumstances must be truly exceptional, as the courts should exercise restraint and avoid interfering with the intentions of states, particularly in areas where the executive branch holds decision-making authority. In Malaysia's view, maintaining this balance is essential to preserving the integrity of

international agreements and respecting the executive's role in their negotiation and execution.

22. In conclusion, Malaysia advocates for a balanced approach in assessing non-legally binding agreements. The hybrid method, which combines both subjective intent and objective indicators, provides a comprehensive approach to address the complexities of these instruments. Additionally, judicial bodies should approach reclassification with caution, respecting the expressed intent of the parties and the executive authority in entering into such agreements.

Regime

23. Much has been discussed in the reports regarding the careful application of treaty law by analogy, particularly where important principles such as jus cogens norms are concerned. Malaysia agrees with the Special Rapporteur and ILC members that non-binding agreements cannot violate peremptory norms, such as the prohibition of genocide, torture or slavery. Even in the absence of legal obligations, non-binding agreements must not contravene fundamental principles of international law. Malaysia considers this approach essential to maintaining the integrity of international law and ensuring that even informal agreements respect higher norms and principles.

24. Notwithstanding, Malaysia concurs with the Special Rapporteur's assessment that non-legally binding international agreements fall outside the scope of the Vienna Convention on the Law of Treaties (VCLT), as these agreements, by their nature, do not create enforceable legal obligations. However, Malaysia recognises that certain principles of treaty law may still serve as valuable guiding tools, particularly where these agreements interact with broader international legal norms.

19. Malaysia draws a parallel between Article 18 of the VCLT and the principle of good faith in the context of non-legally binding agreements. Article 18 obliges States to refrain from actions that would defeat the object and purpose of a treaty before it enters into force, ensuring respect for the treaty's intent throughout the process of ratification or acceptance. Similarly, the principle of good faith plays a crucial role in non-legally binding agreements. Although these instruments do not impose legal obligations, their effectiveness hinges on the trust and mutual respect between parties, as well as their commitment to honouring the spirit of the agreement.

20. Non-binding international agreements therefore, while not legally enforceable, are vital tools for diplomacy and international cooperation. If parties fail to uphold the object

and purpose of such agreements in good faith, their credibility and utility are diminished, thereby eroding the trust and respect upon which international relations depend.

21. Malaysia also supports the Special Rapporteur's conclusion that, in cases of conflict, treaties must take precedence over non-binding agreements. Treaties create binding legal obligations that cannot be superseded by the political or moral commitments made in a non-binding agreement. Nonetheless, Malaysia recognises that non-binding agreements may still influence treaty negotiations, serving as a framework or shaping the context in which treaties are concluded.

22. Malaysia shares the caution expressed by several ILC members regarding the creation of a parallel legal regime for non-binding agreements. The ILC's work should focus on clarifying the nature of these instruments without imposing rigid legal frameworks that could undermine their inherent flexibility. The true value of non-binding international agreements lies in their adaptability, especially in allowing states, intergovernmental parties to engage without the formality of binding legal commitments.

Potential Legal Effects

23. Malaysia takes keen interest in the discussions surrounding the questions of "legally binding force" and "legal effects" in relation to non-legally binding international agreements.

24. In Malaysia's view, legally binding force refers to an agreement's capacity to impose enforceable legal obligations, thereby allowing parties to seek formal legal redress in the event of a breach. This directly addresses whether an agreement can engage mechanisms for dispute resolution and enforcement of obligations. In our practice, the decision on whether to enter into a legally binding or non-legally binding instrument depends largely on the nature of the commitments and the appetite of the parties involved. While some agreements require the certainty of legally enforceable provisions, others benefit from the flexibility afforded by non-binding instruments.

25. However, even in instances where Malaysia enters into legally binding agreements, amicable dispute resolution mechanisms, such as consultations or negotiations through diplomatic channels, are often favoured over third-party adjudication in international tribunals. This underscores that legally binding force does not always necessitate strict enforcement through judicial means but can also rely on mutually agreeable mechanisms that respect the parties' intent.

26. Malaysia is keen to further examine the distinction between the question of “legally binding force” and “legal effects”, as this raises complex questions. The Special Rapporteur makes a clear distinction between the two: while legally binding force refers to the capacity to compel action or provide grounds for legal recourse, legal effects can arise from non-binding agreements even without formal enforceability. Malaysia notes that this distinction merits deeper analysis, as legal effects could still influence state behaviour under doctrines such as good faith, estoppel or legitimate expectations, despite the absence of legal enforceability.

27. The potential for non-legally binding agreements to generate legal consequences remains an area of considerable interest. As Malaysia sees it, this concept is not entirely reconcilable with the intention of the parties who, by choosing a non-binding format, seek to avoid creating legally enforceable obligations. However, it is clear that non-binding agreements can still shape expectations and conduct, raising important questions about their legal consequences, particularly in relation to state responsibility and compliance with international norms.

Form and Final Outcome

28. As the Commission explores the final form of the work on non-legally binding international agreements, Malaysia sees value in both options—the adoption of draft conclusions or draft guidelines—each offering distinct advantages.

29. Nonetheless, Malaysia aligns with the Special Rapporteur’s reservations about adding best practices, model clauses or other recommendations. We agree that such additions could pose challenges, as they may undermine the very flexibility and informality that make non-legally binding agreements a valuable diplomatic tool. Malaysia has consistently relied on this flexibility in managing its international relations, and imposing rigid structures could diminish the adaptability these instruments offer.

30. Moreover, we recognise that the varied terminologies and legal traditions across international practice complicate the creation of universally applicable models. In Malaysia’s experience, the specific language and context of an agreement are often tailored to the particular relationship at hand, and any attempt to standardise such agreements could inadvertently reduce their effectiveness in addressing unique regional and bilateral issues.

31. Therefore, Malaysia is of the view that draft conclusions or guidelines—without the inclusion of prescriptive recommendations—would better serve the international

community, allowing states and international organisations the freedom to continue using non-legally binding agreements in ways that best suit their needs.

32. In closing, Malaysia is eager to see how the work progresses. We again thank the Special Rapporteur and the Commission for the introduction of this topic, and we look forward to the further discussions and findings that will help shape a balanced and practical approach to non-legally binding international agreements.

Thank you.