



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

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AT THE SIXTH COMMITTEE OF THE
71ST SESSION OF THE GENERAL ASSEMBLY

NEW YORK, 28 OCTOBER 2016

CHAPTER X: PROTECTION OF THE ENVIRONMENT IN RELATION TO
ARMED CONFLICTS

Mr. Chairman,

1. Malaysia would like to extend her appreciation to the Special Rapporteur, Ms. Jacobsson for her third report on the topic "Protection of the environment in relation to armed conflicts" which had been considered by the Commission at its 68th Session.

2. At this stage, the Commission has provisionally adopted a set of draft principles on the topic. In this regard, Malaysia understands that the final form of the draft principles will be subject to further consideration at a later stage.

Mr. Chairman,

3. Malaysia acknowledges the significance of the topic in addressing the importance of effective protection and management of the environment, in peacetime, or through and after armed conflicts. Malaysia today will continue to provide her views on the topic, in particular in relation to the structure, methodology and scope of the topic, the use of terms and rights of indigenous peoples.

Structure of the topic

Mr. Chairman,

4. Moving forward to the overall structure of the draft principles, Malaysia has always had the understanding that the three temporal phases i.e. the pre-conflict, during conflict and post-conflict phases respectively were merely artificial, as elucidated by the Special Rapporteur, and were placed in the topic to facilitate the study. In view of that, Malaysia finds it difficult to understand concerns raised by some members of the Commission who continued to argue that the draft principles lacked demarcation along the temporal lines.

5. As the work progresses, Malaysia would agree that it will become harder to completely separate rules which apply to the pre-conflict, during conflict and post-conflict phases respectively. The phases are understandably inaudible, and Malaysia notes that this is especially true in relation to the designation of protected zones¹ which are established in peacetime or during military operations, and that such protected status loses its significance if it has become a military objective.²

6. In view of the above consideration, Malaysia looks forward to seeing significant development of the study in this aspect, particularly on how the Commission would further reflect on the overall interaction between conflict phases.

Scope of the topic

Mr. Chairman,

7. With regard to the scope of the topic, Malaysia observes that the debate on whether there should be a distinction between “environment” and “natural environment” is self-defeating. Malaysia views that the work on the topic should not be overly prescriptive, but at the same time, it would be limiting the full potential of the draft principles if application is to be limited to the “natural environment”, considering the fact that environmental issues

¹ **Draft principle 5 [I-(x)] Designation of protected zones**

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

² **Draft principle 13 [II-5] Protected zones**

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

encompass not just the natural environment, but also issues relating to human rights, sustainability and cultural heritage.

8. From the adopted draft principles, Malaysia notes the discrepancy of concepts particularly with regard to the terms “environment” and “natural environment” used in the draft principles. Hence, Malaysia observes the importance of identifying distinguishable criteria to avoid confusion in the use of either term. In this regard, Malaysia would agree with the proposal to revisit the designation of the two terms at a later stage, specifically, to determine the appropriate use of terms in the context of given principles.

Use of terms

Mr. Chairman,

9. In addition to the above, the debate over the use of the term “environment” is also connected to the issue of whether or not the draft principles should adopt a definitions portion. Malaysia requires clarification on the need to define certain terms under the “use of terms”. Malaysia observes that since the aim of the draft principles is to provide a set of guidelines, it would be too prescriptive to provide legal definitions for certain terms and concepts. In this regard, Malaysia views that further study needs to be undertaken should the Special Rapporteur wish to consider the insertion of the definitions in the text.

Methodology of the topic

Mr. Chairman,

10. With regard to the methodology of the topic, Malaysia supports the views of the members of the Commission that the draft principles need to differentiate the international armed conflicts and non-international armed conflicts given the rules applicable to the two categories of conflicts differed. Malaysia notes that the scope of this topic should apply to both international armed conflicts and non-international armed conflicts, hence the objective by the Commission is to harmonise the principles from both disciplines of the International Humanitarian Law.

11. In this regard, the draft principle on the prohibition against reprisals³ is noted to be a point of contention as highlighted in the commentary to the draft principle II-4. In light of the controversy surrounding the formulation of this draft principle and the divergence in views, Malaysia supports that this area will promote the progressive development of international law, which is one of the mandates of the Commission.

Mr. Chairman,

12. Malaysia seeks to highlight that in order to produce effective guidelines on environmental protection in relation to armed conflicts, necessary linkages must be drawn with certain established principles on

³ **Draft principle 12 [II-4] Prohibition of reprisals**
Attacks against the natural environment by way of reprisals are prohibited.

rules of engagement under the International Humanitarian Law, i.e. military distinction, proportionality, necessity and reprisals.

13. This approach as reflected in draft principles II-2⁴, II-3⁵ and II-4⁶ is consistent with Malaysia's understanding that these draft principles should be aimed at ensuring that environmentally sound measures are taken in military or defence planning and operations. Also, this is possibly another approach which leans towards progressive development of international law rather than mere codification.

Rights of indigenous peoples

14. With regard to the rights of indigenous peoples,⁷ Malaysia recognizes the special relations between indigenous communities and their precious natural living environments. Malaysia shares the view that indigenous communities are particularly affected by, and have a significant role to play in, post-conflict remediation efforts. Hence, Malaysia encourages further analysis on the matter and more perspective be given

⁴ **Draft principle 10 [II-2] Application of the law of armed conflict to the natural environment**

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

⁵ **Draft principle 11 [II-3] Environmental considerations**

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

⁶ **Draft principle 12 [II-4] Prohibition of reprisals**

Attacks against the natural environment by way of reprisals are prohibited.

⁷ **Draft principle IV-1 Rights of indigenous peoples**

1. The traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment shall be respected at all times.

2. States have an obligation to cooperate and consult with indigenous peoples, and to seek their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands.

on post-conflict phase specifically to obligations of States in dealing with the environmental consequences of armed conflicts.

CHAPTER XI: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Mr. Chairman,

15. Moving on to the topic “Immunity of State officials from foreign criminal jurisdiction”, Malaysia notes that the fifth report of the Special Rapporteur for the topic was considered at the Commission’s 68th session. Malaysia is particularly interested in the matter as the Special Rapporteur has proposed a new draft Article which captures the key issues pertaining to the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

16. Malaysia further notes the adoption of draft Article 2 (f) adopted by the Drafting Committee is on definition of an “act performed in an official capacity” which covers act performed by a State official in the exercise of State authority and Article 6 by the Drafting Committee which provides the scope of immunity *ratione materiae*. Malaysia observes that the commentaries to the above draft Articles has been considered in the report.

17. In this regard, Malaysia agrees with the view by the Special Rapporteur in its report that there are discrepancies in the characterization of a particular act as a limitation or on the especially in the case of international crimes in each states. Malaysia welcomes the new draft

Article 7 as proposed by the Special Rapporteur on the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction which covers customary international crimes, corruption-related crimes and crimes that cause harms to persons or property performed by a State official in the exercise of State authority.

18. Malaysia echoes the proposal to the formulation in the draft article 7 however; the formulation in the draft article proposed in the present report should be dealt cautiously by the Commission. As such, Malaysia is of the view that the proposed draft article 7 (1) should be studied and deliberated further since existing state practice varies on the definition and characterization of the offences, in particular torture, enforced disappearances, corruption related crimes and crimes that cause harm to persons or property.

19. Despite the strengthening of initiatives to combat corruption Malaysia notes that corruption crimes have increased both domestically and internationally. Malaysia strongly supports continued action and proposals for strengthening action against corruption. On that note, Malaysia is currently studying the commentaries and endeavours to submit its comments and observation to the Commission from time to time. Subsequently, to this end, Malaysia will provide its comments and observation to the Secretary-General within the stipulated deadline i.e. 31 January 2017.

20. In respect of draft Article 7 (2), Malaysia proposes that Article 7 be further clarified. The application of *ratione materiae and ratione personae* in paragraph 1 and 2 respectively needs to be addressed clearly.

21. As regards to the proposed draft Article 7(3) (ii) further study is required on cooperation between state and international tribunal. Malaysia notes that cooperation between States and international organizations or tribunal plays a vital role especially in resolving criminal cases that involves two or more States. Therefore, further studies and deliberation should be done as regards to the cooperation between States and international organizations since both of them have different legal status.

22. Malaysia further notes that the commentaries to the above draft Article 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 XII: PROVISIONAL APPLICATION OF TREATIES

Mr. Chairman,

23. Last but not least, on the topic “Provisional application of treaties”, Malaysia commends the efforts of the Special Rapporteur in preparing the fourth report on the “Provisional application of treaties”. The fourth report, while still at the initial stage of elaborating further the areas of study and possible 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 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 view on the topic as the foregoing:

23.1 Malaysia notes that the Drafting Committee has adopted on a provisional basis three draft guidelines on the Scope, Purpose and General rule on provisional application of treaties, at its meetings on 29 and 30 July 2015. In addition, the Drafting Committee is considering the proposals for six draft guidelines (draft guidelines 4 to 9) on provisional application of treaties which are currently pending discussion. Malaysia is of the view that due consideration must be given as to the issues of doubts on some parts of the guidelines. The draft guidelines must provide a clear understanding and interpretation as well as taking into account the practice of internal laws of states;

23.2 In this regard, Malaysia would like to raise concern on several issues, among others, on the internal law and Malaysia's practice in signing and ratifying 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 but Parliament may by law confer executive functions on other persons.” 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 conclusion of treaties, agreements and conventions with other countries. 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 domestic legal framework to be in place before the treaty is binding upon Malaysia;

- 23.3 In relation to draft guideline 4, 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 for 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 any ambiguity 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;

23.4 In relation to draft guideline 5, Malaysia notes that the Drafting Committee decided to keep draft guideline 5 in abeyance and to return to it at a later stage;

23.5 In relation to draft guideline 6, a similar provision is stipulated in Article 11 of VCLT whereby Article 11 explains on the methods of giving consent to be bound by a treaty. Consent can either be given by way of signature, ratification, acceptance, approval or accession or by any other means if so agreed. In principle, Malaysia agrees that a treaty will come into force by way of such methods. However, Malaysia

takes a non-committal position as the consent to be bound by a treaty is subjected 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 provisional application of treaty especially on the rights and obligations of States who agree to apply a treaty provisionally. Therefore, Malaysia proposes that draft guideline 6 should be further deliberated by taking into consideration the rights and obligations of States which arise in a provisionally applied treaty;

23.6 Further, in relation to draft guideline 7, Malaysia is of the view that this draft guideline is to be read together with draft guideline 6 as they are interrelated. Malaysia's position on this point is that a provisionally applied treaty is only morally and politically binding. However, Malaysia is also 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 shall be within the context of Article 18 of the VCLT and shall 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 internal law and procedural law in

signing and ratifying treaties as explained in para 1.2 above, Malaysia is of the view that extreme caution should be exercised in determining whether draft guideline 7 is acceptable as it has significant legal obligation;

23.7 As for draft guideline 8, Malaysia is of the view that the proposed draft guideline 8 is vague as the term “international responsibility” was not explained in the draft guideline. Furthermore, draft guideline 8 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, the provisional application of a treaty is not *pari materia* with a full pledge treaty. 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 this issue of international responsibility of a State;

23.8 As for draft guideline 9, Malaysia is mainly guided by paragraph (2) of Article 25 of the VCLT on the termination of treaty. Malaysia is also of the view that this issue must be further addressed by the Special Rapporteur and that the termination of the provisional application and its obligations must be clearly stated to prevent any issues of doubts;

23.9 Malaysia notes that the new draft guideline 10 submitted by the Special Rapporteur to the Committee is derived from the

principle enshrined under Article 27 of the VCLT and should be without prejudice to Article 46 of the VCLT. In view of this, Malaysia observes that Article 27 of the VCLT is with regard to observance of treaties and refers to a different aspect from that referred to in Article 46 which is in respect of provisions of internal law concerning competence to conclude treaties. In relation to Malaysia's domestic law, there is no any express provision that prohibits or allows for the provisional application of treaties. In the context of Malaysia's experience and practice, signing of treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. However, it is to be pointed out that each State must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its internal law. If a State is to adhere to a basic criterion of a legal certainty, such determination would be made beforehand, and not at a later stage. 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

23.10 In addition, the legal effect of 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.

24. 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 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 that the topic be further elaborated having due regard to State's sensitivities, as well as peculiarities and contextual differences embedded in the treaty provisions, and how State practices so far have responded to such variations.

I thank you, Mr. Chairman.