



MALAYSIA

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STATEMENT BY
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DELEGATE OF MALAYSIA TO THE UNGA 73RD SESSION

AGENDA ITEM 82:
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE
WORK OF ITS SEVENTIETH SESSION

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

CHAPTER X:
SUCCESSION OF STATES IN
RESPECT OF STATE RESPONSIBILITY

CHAPTER XI:
IMMUNITY OF STATE OFFICIALS
FROM FOREIGN CRIMINAL JURISDICTION

31 OCTOBER 2018

Mr. Chairman,

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

Malaysia would like to congratulate Ms. Marja Lehto for her appointment as the new Special Rapporteur for the topic Protection of the Environment in Relation to Armed Conflicts. We thank her for her first report which has been considered by the Commission during its 70th Session.



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2. Malaysia notes the Commission has provisionally adopted a number of draft principles and commentaries thereto. Malaysia hopes to continue following the work of the Commission on this topic closely given its significance in addressing the effective protection and management of the environment, in peacetime, or through and after armed conflicts.

3. Malaysia's statement on this topic will focus on selected issues of importance to Malaysia, as well as on the draft principles most recently adopted on a provisional basis by the Commission.

'Environment' and 'natural environment'

4. Malaysia would like to recall its observations on the discrepancy of concepts particularly with regard to the terms 'environment' and 'natural environment' used in the draft principles. Hence, Malaysia would reiterate the importance of identifying distinguishable criteria to avoid confusion in the use of either term. Indeed, environmental issues encompass, not just the natural environment, but also issues relating to human rights, sustainability and cultural heritage.

5. In this regard, Malaysia would support an earlier proposal discussed by the Commission to revisit at a later stage the issue concerning the designation of the said terms, 'environment' and 'natural environment', specifically, to determine the appropriate use of such terms in the context of given principles.



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Rights of indigenous peoples

6. With regard to draft principle 6 in relation to indigenous peoples which has been provisionally adopted, Malaysia would like to reiterate its recognition of the special relations between indigenous communities and their precious natural living environments. In general, Malaysia's domestic laws recognize the right of indigenous peoples, as embedded in the Federal Constitution.

7. Malaysia is of the view that indigenous communities are particularly affected by, and have a significant role to play in, post-conflict remediation efforts. In this connection, it would be worthwhile for the Commission to pay special regard to the rights and roles of the local communities and indigenous groups most connected to their natural living environments whose welfare and livelihoods are detrimentally affected by the environmental impacts and remnants of war.

Peace operations and remedial measures - Malaysia's views as part of peacekeeping operations (draft principles 8, 14 and 15)

8. Malaysia wishes to inform that Malaysia's peaceful transition to independence in 1957 has instilled in it the conviction in conflict resolution through peaceful means. In this regard, Malaysia has been supporting and actively participates in peacekeeping operations under the auspices of the United Nations Peacekeeping Operations (UNPKO).



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9. Being part of the peacekeeping operations under the auspices of the international organizations, Malaysia understands the need to protect the environment before, during or after an armed conflict. Thus, Malaysia is supportive of the objectives of draft principles 8, 14 and 15 in encouraging or requiring certain actions by the States, parties to armed conflict or other relevant actors including international organizations in the efforts for the prevention, mitigation and remediation of the negative environmental consequences; the restoration of environmental damage; and the cooperation in environmental assessments and remedial measures, for purposes of the protection of the environment in relation to armed conflicts.

Remnants of war on land or at sea (draft principles 16 and 17)

10. Malaysia observes that draft principle 16, which seeks to ensure that toxic and hazardous remnants of war (on land or at sea) are removed or rendered harmless after an armed conflict, does not directly deal with the issue of responsibility because responsibility to clear, remove, destroy or maintain remnants of war is already regulated to some extent under the existing law of armed conflict.

11. In this regard, as far as Malaysia is concerned, the requirement under draft principle 16 would be subject and without prejudice to the rules of international law applicable to Malaysia, including Article 5, paragraph 1 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction to which



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Malaysia is a party. Malaysia however is neither party to the Convention on Cluster Munitions (CCM) nor the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW).

12. Further, Malaysia observes that draft principle 17 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. As an UNCLOS coastal State party, Malaysia retains specific rights and duties within a particular maritime zone. In this regard, Malaysia wishes to underscore the importance of a coastal State's cooperation in efforts to get rid of remnants of war, which are subject to such specific rights and duties, depending on where the remnants are located.

Sharing and granting access to information (draft principle 18)

13. Malaysia notes that draft principle 18 refers to the obligations States and international organizations may have under international law to share and grant access to information with a view to facilitating remedial measures after an armed conflict, subject to national defence and security considerations, provided that as much information as possible is provided through cooperation in good faith.

14. Malaysia wishes to highlight that as a State which takes active part in peacekeeping operations under the auspices of the international



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organizations, Malaysia would be obliged to provide information useful for remedial measures if the treaties to which Malaysia is a party indeed contain such an obligation and subject to the requirements of its internal laws such as the Official Secrets Act 1972 [Act 88].

Use of natural resources in the situation of an occupation (draft principles 19 to 21)

General obligations of an Occupying Power (draft principle 19)

15. Malaysia takes note that the definition of “occupation” and the obligations of the occupying Power that are applicable are contained in the Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 August 1907 (H.IV – the Hague Regulations). This definition takes into account the effective control of the territory by a hostile authority and seeks to regulate the responsibility of such an authority. Indeed, the Hague Regulations have acquired the status of international customary law.

16. Malaysia supports the call for clarification of terms used in the paragraphs under draft principle 19. In particular, on the term “environmental considerations”. We are of the view that although the term is also referred to in draft principle 11 – nevertheless in that provision, the term is taken in the context of *jus in bello*, namely in consideration of principles of proportionality and military necessity, whereas here it is applied in the *jus ad bellum* context. Where different standards and



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thresholds would apply on common terms across draft principles, such terms should be clarified as to its respective application.

17. Malaysia would echo views that the language in paragraph 3 should reflect a greater latitude for the occupying Power to improve environmental laws of the occupied territory where necessary. Such process however well-intentioned should highlight the need to involve local communities and groups who remain the custodians and primary stakeholders of any environmental regulation.

18. Malaysia takes note of a number of decisions by international courts that have confirmed that the occupying power is obliged to comply with its human rights obligations in occupied territories and in respect of people placed under its effective control as a result of occupation. The application of international humanitarian law therefore is complementary to the conventions on human rights in the situation of occupation.

19. Malaysia finds it difficult to distinguish between any discussion about the health and wellbeing of an occupied population and questions of its human rights. As such, where the duty to protect the basic human rights of the occupied subjects is incumbent upon the occupying Power and should be a paramount consideration under this particular principle, such an important element should not be overlooked and warrants recognition in “General Obligations”.



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Sustainable use of natural resources (draft principle 20)

20. Malaysia takes note of the discussion by members of the Commission who question the linkages between sustainable use with other areas of application, such as in usufruct arrangements, administration and exploitation of natural resources, and the economic and social development of the occupied subjects and territories.

21. While all such areas are necessary to consider, Malaysia would argue that the principle of permanent sovereignty of the peoples of the land over their natural resources should be the foundation for draft principle 20. From this starting point, it follows that any use of natural resources by the occupying Power must necessarily be sustainable and in the benefit and interest of the subjects and occupied territories, rather than the strategic goals of the occupying Power.

22. In that connection, we would seek clarification on what “other lawful purposes” of use of natural resources are acceptable in the context of an occupation. There may also be a need to further clarify the meaning of “lawful purposes”, especially in different and changing circumstances, namely during an ongoing warfare, or a post-warfare situation.

23. We are of the further view that use which merely “minimises harm” is insufficient to demonstrate sustainable practice, and that the more appropriate attribution is to “prevent” harm to and destruction of natural resources.



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Due Diligence (draft principle 21)

24. The coverage of draft principle 21 takes the duty owed by the occupying Power beyond the limits of the occupied territory by asserting the “no harm” principle and principles of transboundary harm in international environmental law. These principles which have been widely recognised under customary international law stipulate that a State is duty-bound to prevent, reduce and control the risk of environmental harm to other states.

25. In this context of draft principle 21, Malaysia agrees that the control exercised by the occupying Power over the occupied territory attaches to it the duty of due diligence to areas beyond the occupied territory when it comes to any activity having an environmental impact.

26. Malaysia also takes note of an important point discussed by the Commission namely of extending the no-harm rule to situations of armed conflict beyond occupation. Indeed, Malaysia can agree that the responsibility of reversing any harm to territories or jurisdictions outside the occupied territory should be carried out by the occupying Power even after the occupation ceases. Therefore, we would urge the Commission to further consider this aspect of continued accountability. Such accountability or duties to reverse harm or take measures to compensate affected territories should not then squarely fall on those succeeding the occupying Power and the population.



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CHAPTER X: SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

27. Malaysia records its appreciation and gratitude to the Commission for its comprehensive report on its seventieth session and to Mr. Pavel Šturma, the Special Rapporteur for the well-organized second report on the topic Succession on States in respect of State responsibility.

28. At the outset, Malaysia notes that the second report of the Special Rapporteur has considered the comments made by the members of the Commission and delegates in the Sixth Committee in 2017, In this respect, Malaysia views that the second report encompasses sufficient information and analysis on draft articles 7 through 11 which deal with the legality of succession, general rules on succession of states in respect of State responsibility, special categories of State succession to the obligations arising from responsibility and future programme of work on the topic respectively.

29. Malaysia also supports the general view expressed by the Special Rapporteur at paragraph 13 of his second report that even though the subject of the succession of States still belongs to “the most complex in international law”, there is a need for international law to serve as a framework able to ensure legal security and stability in international relations.



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30. Malaysia notes that draft article 5 that deals with the issue of legality of succession is modelled on article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties and article 3 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1978 and 1983 Vienna Conventions). In this regard, Malaysia supports the inclusion of draft article 5 due to its consistency with the previous work of the Commission and the principles of international law embodied in the Charter of the United Nations.

31. Concerning draft article 6(1), Malaysia views that its language formulation is quite ambiguous as it does not state clearly that only the State that has committed internationally wrongful act in case of succession of State should be held responsible for such wrongful act. Thus, clarity purposes, Malaysia recommends the Special Rapporteur to consider revising draft article 6(1) by specifying that the internationally wrongful act committed by the predecessor State before the date of the succession is attributable to that State.

32. Malaysia notes that draft articles 7, 8 and 9 address three (3) specific categories of State succession where the predecessor State continues to exist, namely separation of parts of a State (secession), establishment of a newly independent States and transfer of part of the territory of a State.



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33. Malaysia views that the term “(secession)” in the title of draft article 7 should not be used as this term may be interpreted to include unlawful succession and this could be contrary to draft article 5 whose purpose is to limit the present draft articles to succession of States in conformity with international law. Furthermore, Malaysia is of the view that the expressions “if particular circumstances so require”, “an organ of a territorial unit of the predecessor”, “direct link” and “assumed” inserted into draft articles 7(2) and 7(3) are equivocal. Hence, Malaysia recommends the Special Rapporteur to further elucidate these expressions in the upcoming reports.

34. Malaysia notes that draft article 8 makes reference to the term “newly independent States” as defined in the 1978 and 1983 Vienna Conventions. Thus, for clarity purposes, Malaysia recommends for this term to be defined under article 2 (Use of terms) based on the definition of such term in the 1978 and 1983 Vienna Conventions.

35. With regard to draft article 9, Malaysia notes the second report of the Special Rapporteur puts more emphasis on State practice in European countries compared to the State practice in other regions when deliberating the issue of transfer of part of the territory of a State. As such, the analysis on draft article 9 seems to be disproportionate. Hence, for the purpose of a comprehensive review on draft article 9, Malaysia recommends the Special Rapporteur to consider analysing State practice



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in regions outside Europe such as Asia, Africa and Americas and include the outcome of such study in the future reports on this topic.

36. Additionally, Malaysia views that the expressions “if particular circumstances so require”, “an organ of a territorial unit of the predecessor”, “direct link” and “assumed” inserted into draft articles 9(2) and (3) are vague and thus, necessitate further clarification by the Special Rapporteur in the upcoming reports.

37. With reference to draft articles 10 and 11, Malaysia notes that both draft articles deal with situations where the predecessor State has ceased to exist. In general, Malaysia could support the inclusion of draft article 10 that deals with unification of States (merger of States and incorporation of a State into another existing State). Nonetheless, Malaysia views that second report of the Special Rapporteur did not discuss adequately the instances of State succession in Asia, Africa and Europe relating to international responsibility in the context of unification of States to support a presumption of succession that obligations arising an internationally wrongful act of the predecessor State pass to the successor State, unless the State concerned otherwise agreed. Furthermore, most of the examples of State practice cited in the second report concerned unlawful expropriation. Thus, Malaysia proposes for the Special Rapporteur to include more examples of State practice in the upcoming reports for the purpose of comprehensive review on draft article 10.



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38. Malaysia is of the view that draft article 11 is the most challenging text, and therefore cautious approach should be employed in deliberating this matter. In particular, Malaysia observes that the examples of four (4) State practices cited in the second report concerning the Union of Columbia, the United Arab Republic, Czechoslovakia and the former Yugoslavia demonstrated that the succession to State responsibility resulted from agreements reached between the interested parties rather than the existence of an exception to the general rule of succession.

39. In light of this, Malaysia views that draft article 11(1) that mentions the words “subject to an agreement, to one, several or all the successor States” should be reviewed further by the Special Rapporteur by specifying which parties would be involved in such agreement, what would be the consequences if the interested parties could not reach an agreement to be responsible for the internationally wrongful act committed by the predecessor State that no longer existed and what would be the apportionment of responsibility among successor States.

40. Finally, Malaysia notes that there are some significant challenges to the work of the Commission on this topic, such as the complexity of the subject of succession of States under international law, rare occasion of cases of State succession as well as diverse, context-specific and politically sensitive State practice in this area. In light of these challenges, Malaysia proposes for the Commission and Special Rapporteur to conduct more proactive consultations with the States on this topic for the



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purposes of codification and progressive development of international law relating to succession of States responsibility in the future.

CHAPTER XI: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

41. Malaysia notes that the sixth report on immunity of State officials from foreign criminal jurisdiction by the Special Rapporteur (“the Sixth Report”) was deliberated at the Commission’s seventieth session. The Sixth Report provided an analysis of procedural issues relating to immunity of State officials although no new draft articles were proposed in the Sixth Report.

42. Malaysia appreciates the inclusion of the summary of the debate on draft article 7 at the seventy second session of the Sixth Committee in the Sixth Report. Malaysia further appreciates that the Special Rapporteur had captured Malaysia’s position on draft article 7 (1) that torture and enforced disappearances should be an exception to immunity and that there is a need to establish procedural safeguards concerning limitations and exceptions to immunity. However, Malaysia wishes to highlight that Malaysia did not express any view on the inclusion of corruption and territorial tort exception in the original proposal for draft article 7 as mentioned in the Sixth Report.



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43. As regards to when immunity should be considered by the authorities of the forum State, Malaysia is of the view that immunity issues should be addressed at the earliest stage possible to prevent nullifying the essence of the immunity rule.

44. As regards to the kind of acts affected by immunity, Malaysia notes that the Special Rapporteur was of the view that whether such acts were affected by immunity must be considered case by case. While Malaysia agrees with this approach, immunity must be considered before binding measures were taken against the State official so as not to defeat the principle of immunity.

45. Malaysia notes that the Special Rapporteur was of the view that it was for the courts of the forum State to determine whether immunity existed and if so, whether there were exceptions to such immunity. In this regard, Malaysia is of the view that the executive should also have the authority to decide whether immunity existed and whether there were exceptions to such immunity. This is based on the reason that if the determination whether immunity existed is made only when the matter is brought to court, it might already be too late and the criminal jurisdiction of the forum State might have been exercised on the State official (for e.g. being remanded or detained during investigation) thus nullifying the essence of the immunity rule.



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46. Based on the aforementioned considerations, Malaysia is of the view that the consideration of immunity which should be done at the earliest stage possible could also mean consideration by the executive even before the start of the criminal procedure i.e. before the start of an investigation. In the event the consideration of immunity is done by the executive, further procedural safeguards may be needed to prevent abuse of power or political prosecution.

47. Finally, Malaysia notes that the debate on the Sixth Report would be continued and completed at the seventy-first session of the Commission. Malaysia looks forward to the seventh report which will conclude the consideration of procedural issues and contain proposed draft articles based on the analysis in the sixth and seventh reports that will be submitted in 2019.

Thank you.