



MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

STATEMENT BY
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ON AGENDA ITEM 79:
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE
WORK OF ITS SEVENTY-FIRST SESSION

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CONFLICTS

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AT THE SIXTH COMMITTEE OF THE
74TH GENERAL ASSEMBLY

NEW YORK, 5 NOVEMBER 2019

Mr. Chairman,

**PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED
CONFLICTS**

1. Malaysia wishes to express our appreciation to the Special Rapporteur, Ms. Marja Lehto, for the submission of the Second Report on the topic of the Protection of the Environment in Relation to Armed Conflicts, which was considered by the Commission during its 71st Session.

2. Malaysia also commends the Commission on the conclusion of the first reading and adoption of the entire set of draft principles on this topic, together with the commentaries thereto.
3. Malaysia's statement on this topic will focus on the draft principles most recently introduced and adopted by the Commission.

DRAFT PRINCIPLE 8: HUMAN DISPLACEMENT

4. Although Malaysia is not party to any treaty relating to refugees or internally displaced persons, Malaysia continues to engage constructively with the UNHCR and interest groups in areas involving the persons of concern to them. These are vulnerable persons seeking refuge, security and opportunities in Malaysia. In this regard, the Government's humanitarian efforts continue to improve.
5. Malaysia wishes to emphasise that absence of a commitment to the relevant international instruments has not hindered Malaysia's dedication towards assisting vulnerable persons. This includes ensuring access to necessities and a decent livelihood for such groups finding refuge in Malaysian territory. The elements contained in this principle, namely on the prevention and mitigation of degradation to the environment holding displaced persons and the provision of relief and assistance to them are in line with Malaysia's practice.
6. However, Malaysia's concern is that the wordings "States...should take appropriate measures..., while providing relief and assistance for such persons and local communities" indeed dictate a positive obligation upon States like Malaysia that otherwise owe no direct legal obligation to displaced persons or refugees. Malaysia wishes to emphasise that any decision to take appropriate measures in this regard should be self-judging. Furthermore, the Commission ought to also recognise that efforts by States in facilitating and incentivising bodies such as the UNHCR to operate effectively within our borders so as to achieve the same objectives, is just as important as requiring the State to directly provide relief and assistance to vulnerable groups.

DRAFT PRINCIPLE 9: STATE RESPONSIBILITY

7. With regard to draft principle 9, Malaysia observes that it will often be very difficult, if not impossible to re-establish the environment to the condition it was before by way of restitution. Hence, the more preferable and logical form of reparation in case of environmental damage would be compensation. However, compensation in the form of payment of restoration would account for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred. This was observed by the ICJ in the case of *Certain Activities Case (Costa Rica v. Nicaragua)* albeit not within the context of armed conflict.
8. Further, Malaysia observes that reparation for environmental damage during armed conflict has been limited, as have the international community's efforts to hold state parties responsible for the general consequences of armed conflict. Thus, Malaysia recommends for the ILC to study on the effective mechanism of enforcement to ensure that states are held accountable for their wrongful act during armed conflict which causes damage to the environment.

DRAFT PRINCIPLE 10: CORPORATE DUE DILIGENCE

9. While Malaysia recognizes the importance of having specific measures to ensure corporations and business entities exercise due diligence during armed conflicts, Malaysia views that it may not be suitable for States to do so by way of legislative measures especially considering the fact that due diligence exercise is a form of "self-regulation" intended to promote good corporate governance. In addition, legislative measures may not work during armed conflict especially in situations where there could be lack of enforceability of such measures considering that governmental machineries be it the executive or judiciary may not have the capability to enforce these measures.
10. In light of the above, Malaysia proposes for non-binding guidelines to be developed to assist corporations and business entities to understand their obligations and duties when operating in an area of armed conflict or in a post armed conflict situation. This would encourage voluntary due-diligence and development of a positive culture of self-regulation within entities operating in the areas of armed conflict with minimum or no enforcement framework.

DRAFT PRINCIPLE 11: CORPORATE LIABILITY

11. Malaysia wishes to highlight that the issue of law enforcement during the time of armed conflict should be addressed adequately by the Commission particularly in situations where either the judicial system of a state is virtually non-existent or the government itself is an accomplice to the alleged violations. In this regard, Malaysia takes note of the example given by the Commission whereby a home state to a corporation may acquire jurisdiction in a situation where the territorial state is unable to exercise jurisdiction.
12. Nevertheless, it should be stressed that jurisdiction is a sensitive and complicated issue in which States need to tread carefully. In this regard, the Commission should give thorough consideration to the procedural aspects of enforcing extra-territorial jurisdiction in such situations.

PRINCIPLE 18: PROHIBITION OF PILLAGE

13. Malaysia notes that the prohibition of pillage that is underlined in this draft principle focuses on the prohibition of pillages to natural resources. Malaysia believes that the act of plugging of natural resources will put an enormous strain on the environment as a result of predatory and exploitative practices which often lead to severe damage and the eventual depletion of resources. This, in turn, can undermine long-term livelihoods, trigger further violence, and lock communities in a vicious cycle of destruction.
14. The above circumstances have been taking place in many war torn States we see today, where the pressure of warfare, combined with the destruction of livelihoods, have resulted in mass displacement of populations, and to this day, have perpetuated tensions. Thus, Malaysia regards this principle as an important one to be incorporated in the body of rules on environmental protection in armed conflicts.

PRINCIPLE 19: ENVIRONMENTAL MODIFICATION TECHNIQUES

15. Malaysia observes that the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD) is not clear on whether the prohibition could be applicable in a non-international armed conflict. However, Malaysia notes that the underlying principles of ENMOD are based on Additional Protocol 1 which is applicable to both international and non-international armed conflicts. As such, Malaysia seeks clarification on the issue of applicability of this draft principle in the latter situation.
16. Malaysia also take notes that ENMOD has to date proven relatively successful and effective, as no other “Viet Nam scenarios” of large-scale environmental modification tactics have been reported since 1976. However, with the advancement of technology and continued development of military capability by States, the future is unpredictable and States must remain guarded against their unimpeded actions when having access to such technology. Thus, Malaysia understands the importance of the draft principle and supports the inclusion of the draft principle

PRINCIPLE 26: RELIEF AND ASSISTANCE

17. Malaysia notes that draft principle 11 on Corporate liability makes explicit reference to compensation for “victims” which refers to “persons, whose health or livelihood has been harmed by the environmental damage” and that the “environmental damage may also affect other human rights such as the right to life and the right to food.” The Commission may want to consider doing the same for draft principle 26 and in its commentary, namely to establish a more concrete link between environmental damage and the importance of mitigating its impact on public health and on those who depend on the environment for their livelihoods. In addition, Malaysia recognizes that the draft principle highlights the collective responsibility of all States to commit to relief and assistance. However, this must be taken in light of common and differentiated responsibility of each State in the implementation the commitment.

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Mr. Chairman,

18. Malaysia would like to record its appreciation to the Special Rapporteur for her seventh report which, amongst others, addressed questions on the invocation of immunity and its waiver; further examined various procedural aspects of immunity and its waiver; as well as proposed nine draft articles. Malaysia believes that the work of the Special Rapporteur will go a long way in clarifying important questions of immunity of state officials from foreign criminal jurisdiction.
19. Malaysia remains committed to the rule of law and where demanded by the overriding demands of justice, is prepared to waive immunity of state officials to face foreign criminal prosecution. Malaysia will continue to abide by its international obligations under the Vienna Convention on Diplomatic Relations as well as the Vienna Convention on Consular Relations.

Mr. Chairman,

20. Malaysia considers diplomatic immunity as one of the bedrocks of international law which is developed based on the principle that sovereign equals do not have jurisdiction over each other. In that regard, there should always be a presumption of immunity of state officials until a contrary determination is conclusively made and that any exercise of jurisdiction by a forum State should only be taken when there is clear and definitive proof of the alleged offence. In this regard, Malaysia reiterates its view that international practice has not demonstrated the existence of a custom or consistent trend establishing exceptions to immunity.
21. As regards to draft article 9, Malaysia notes the Special Rapporteur's view that it would not be necessary to include a requirement for the State official to be in the territory of the forum State. This view, however, raises complex issues of primacy and conflict of jurisdictions, which if not clarified in the present draft articles, may lead to greater ambiguity in the development of these principles.

22. In relation to procedural safeguards under draft articles 12 to 15, Malaysia agrees that the balance of discretion should at all times lie with the State of the official asserting immunity. In this regard and with specific reference to draft article 14, Malaysia agrees with the Special Rapporteur that the transfer of proceedings to the State of the official will go a long way in striking a balance between the principle of sovereign equality of States and ensuring that there is no impunity for crimes. While noting the explanation of the Special Rapporteur, Malaysia is of the view that draft article 14 as presently drafted, allows for a divergence in interpretation on whether it is the forum State or the State of the official who is to initiate the transfer of proceedings and thus it is necessary that this issue be clarified.
23. Lastly, Mr. Chairman, on the final form of the project, Malaysia agrees with the Special Rapporteur that it would be premature at this juncture to decide on the elaboration of a treaty.

SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW

Mr. Chairman,

24. Malaysia welcomes the inclusion of the study of Sea-Level Rise in relation to International Law which will be conducted by a Study Group to be co-chaired on a rotating basis by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.
25. Malaysia appreciates the introduction of the subject matter and views that giving it the due attention it deserves is timely, considering the fact that rising sea-levels are a real threat to communities around the world, regardless of whether they are situated at low-lying coastal areas or otherwise. Given the magnitude of problems that could arise with territories disappearing due to rising sea-levels, it is best that the issue be addressed before it manifests as an eventuality, by which time it would most likely be too late.

Mr. Chairman,

26. Malaysia notes that the Study Group will approach the issue through three (3) distinct areas which are related to the law of the sea, statehood and the protection of persons affected by sea-level rise. In this regard, Malaysia is of the view that these areas warrant focus as these are paramount concerns at the forefront of popular global opinion, seeing that they affect the lives and livelihood of those most vulnerable to the menace of rising sea-levels.
27. Malaysia looks forward to the outcome of this endeavour.

Thank you.