



*Permanent Mission of*  
**Malaysia**  
*to the United Nations*

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**STATEMENT BY MS. BAIZURA KAMAL, REPRESENTATIVE OF MALAYSIA ON AGENDA ITEM 75: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORKS OF ITS SIXTIETH SESSION AT THE SIXTH COMMITTEE OF THE SIXTY THIRD SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 3 NOVEMBER 2008**

Mr. Chairman,

**A. Immunity of State officials from Foreign Criminal Jurisdiction**

Malaysia commends the Special Rapporteur for the detailed and well-researched preliminary report which identified key issues pertaining to the immunity of State officials from foreign criminal jurisdiction for the further consideration of the Commission at its sixtieth session. Malaysia also records its appreciation to the Commission for its clear report of the debates on this topic.

2. As stated during the 62<sup>nd</sup> General Assembly session, Malaysia supports the inclusion of this topic in the Commission's programme of work as it reflects a very topical area of concern where the applicable principles of international law are hampered by lacunae and uncertainty.

3. Malaysia also notes the Special Rapporteur's intention for the Commission's work in this area to result in either draft guiding principles or draft articles.

Mr. Chairman,

4. Malaysia notes the ongoing developments in this area of international law, not least through the decisions of the International Court of Justice in the Arrest Warrant case, the Pinochet case and the case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France).

5. On the issue of the appropriate boundaries for the Commission's study, Malaysia agrees that since the issue appears well-settled in the context of international criminal tribunals by their constituent statute or Article 27 of the Rome Statute of the International Criminal Court, it would suffice for the Commission to focus only on the immunity of State

officials from foreign criminal jurisdiction of States other than the State of nationality of the State official.

6. Malaysia also agrees that the topic should focus on the immunities accorded under international law, in particular customary international law and not under domestic legislation. Any attempt to undertake progressive development should however be undertaken with view of the debate over the actual trend of decisions even in the International Court of Justice.

Mr. Chairman,

7. As decisions on the invocation or waiver of immunity usually occur at the pre-trial stage and are resolved through the diplomatic channel, Malaysia would agree with the Special Rapporteur that the issue of establishment of criminal jurisdiction, though not to be analyzed per se under this topic, should also cover executive actions undertaken to determine the claim to jurisdiction.

8. Malaysia fully supports the position that the availability of immunity from foreign criminal jurisdiction to a State Official under international law in no way absolves the State official from the general obligation to abide by the laws of the foreign host State and from his responsibility in case of breach of that law. In this regard, Malaysia would also concur with the Special Rapporteur on the conceptual clarification that the immunity is actually to certain legal measures of criminal procedure (e.g. search or arrest) or criminal prosecution.

9. On the Special Rapporteur's proposal to consider the existing practice in relation to immunities of State officials and of the State itself from foreign civil jurisdiction on account of their common features with the present topic, Malaysia is of the view that those immunities are sufficiently different in nature for the practice thereon to be relied on for this topic.

10. Malaysia is also of the view that the distinction between immunity *ratione materiae* and immunity *ratione personae* should be retained with due regard that both are distinct from the immunity of the State itself although they flow therefrom. This distinction should also be borne in mind in determining the scope of the persons to be covered.

Mr. Chairman,

11. On the issue of the terminology, at this point it would appear sufficient to use "State officials". It would also appear appropriate for all State officials to be covered on the principle of immunity *ratione materiae*. However it may be either too narrow or too wide to define "State official" with reference to the national notions of "public service". As an example, Article 132 of the Federal Constitution of Malaysia provides that the "public services" are the armed forces, the judicial and legal service, the general public service of Malaysia, the police force, the specified joint Federal-State services, the State-level public services and the education service.

12. A related area for consideration is the issue of "contractors" such as private military security companies and whether they would come within the conceptual understanding of "State official" especially where they undertake State functions previously reserved for military officials of a State. This should be considered in addition to the question of immunity of military personnel deployed abroad in times of peace.

13. Further, if the Commission is not to re-examine previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations, these categories of persons should be excluded from any definition of "State officials" for the purpose of this study.

Mr. Chairman,

14. On the issue of immunity *ratione personae*, it would appear settled that the troika of Heads of State, Heads of Government and ministers of foreign affairs enjoy it while they hold office. Malaysia would not be in favour of extending these categories without a strong basis of necessity and State practice and further detailed study and discussion would be required on this aspect.

15. On the issue of recognition, Malaysia supports the proposal for the Commission to examine the consequences of the non-recognition of an entity as a State on the immunity of that entity's officials. Cases in point would be Israel and the Palestinian Liberation Authority's (PLA) officials in certain countries.

16. Malaysia also supports the exclusion of immunity of the family of State officials from the study by the Commission unless it is established that there is a legal basis for such immunity other than mere comity of nations.

17. On the possible exceptions to immunity, Malaysia considers it as settled international law that there should be no immunity for the international crimes of genocide, war crimes, crimes against humanity and crimes of aggression. Further limitations to the immunity also warrant further consideration for crimes of international concern such as piracy, drug trafficking, trafficking in persons, corruption, money laundering, as well as sabotage, kidnapping and murder by foreign secret service agents, aerial and maritime intrusion or espionage.

18. In conclusion, Malaysia looks forward to the subsequent studies by the Special Rapporteur on this topic and the further deliberations of the Commission.

## **B. Protection of Persons in the event of Disasters**

Mr. Chairman,

19. Malaysia commends the Special Rapporteur for his detailed Preliminary Report on the topic of "Protection of persons in the event of disasters". My delegation also commends

the Secretariat for the in-depth research that was undertaken to prepare the comprehensive Memorandum with its compendium on the relevant definitions and existing legal instruments and texts applicable to the different areas of disaster prevention and relief assistance.

20. On the issue of the form of the study on this topic, Malaysia welcomes the decision of the Commission that its customary practice will be adhered to and draft articles will be presented as the outcome of the study for further consideration without prejudice to the final form.

21. On the proposal to adopt a "rights-based approach" to this topic, Malaysia notes from the Report of the Commission that at least three perspectives will need to be accommodated: that of the victim, the donor State or non-State actors as well as the State where the disaster occurred. In Malaysia's view, all three aspects are pertinent and it is proposed that a further study be undertaken on the proper balance between the different approaches.

22. On the issue of the scope of the topic, Malaysia would favour a focused study on the areas of highest priority with a view to identifying and addressing gaps in the existing body of international disaster response law rather than duplicating existing provisions such as that found in the IHL regime in the context of armed conflicts. In this regard, Malaysia is of the view that it may be more relevant to focus on natural disasters for the time being and the response and assistance required and provided in the immediate aftermath of a disaster, alongside prevention during the pre-disaster phase. For this purpose, the compendium of almost 350 multilateral and bilateral instruments identified in the Memorandum by the Secretariat will be useful guides for the Special Rapporteur's study, including the ASEAN Agreement on Disaster Management and Emergency Response (AADMER) and its related instruments.

23. On the issue of "right to (provide/impose) assistance", it is noted that the principles of sovereignty and non-intervention should not in any way be impugned. A sovereign State and its Government should be the sole determinant of when and to what extent external assistance is required in any disaster. It should also be the sole determinant on when such assistance can be terminated. Based on the ILC discussion, there also appears to be ambiguity in the understanding of the phrase "right to humanitarian assistance" which will need to be resolved by the Special Rapporteur, due regard being taken of the decision of the International Court of Justice in the Nicaragua case.

24. Further on the question of the existence of a "responsibility to protect", Malaysia notes that as in the World Summit Outcome Document, this relates to responsibility to protect population from genocide, war crimes, ethnic cleansing and crimes against humanity. A larger debate would be required whether the Security Council's Chapter VII powers for the maintenance of international peace and security can be invoked to authorize "humanitarian interventions".

25. In conclusion, the issues identified by the Commission are core and complex issues to the topic under consideration and merit further study with a view to formulating practicable legal solutions. Malaysia is also of the view that whatever the shortcomings, the study should focus on identifying the law that currently exists before any attempt is made to develop the law to achieve an

### **C. Obligation to Extradite or Prosecute**

26. Malaysia commends the International Law Commission for preparing the Report on the work of its 60th Session and the work of the Special Rapporteur, Mr. Zdzislaw Galicki on the Obligation to Prosecute or Extradite.

27. Malaysia reiterates its view that the obligation to extradite or prosecute arises from treaties and not a general obligation under customary international law.

28. Malaysia acknowledged the progress made by the Special Rapporteur to elaborate draft articles on the obligation to extradite or prosecute.

29. With regard to Draft Article 1<sup>1</sup> on the "Scope of Application" of the obligation to extradite or prosecute, we note that three alternative wordings have been suggested. Malaysia's understanding of the first proposed wordings, namely the phrase "under their jurisdiction" is that the Requested State should be allowed to decide whether to extradite or prosecute the fugitive offender if the subject is under the jurisdiction of the State. This scope of jurisdiction is acceptable if it is applied on the territorial principle which is generally accepted by States.

30. On the other hand, the phrase "under their jurisdiction" could create controversy particularly on States that exercises extra-territorial jurisdiction and implement the other types of jurisdiction principles on other States. For example, a country that implements the universal jurisdiction principle can claim that the subject falls under their jurisdiction even though the subject may not be present in their territory.

31. For the second proposed wordings, namely the phrase "present in the territory of the custodial State", the State is required to impose this obligation when the subject is, firstly, present in the territory of the State, and secondly, in the custody of the State. Malaysia views this phrase to be less controversial as a person who is in the custody of a State should be present in the territory of the Requested State. These two requirements,

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<sup>1</sup> Draft Article 1:  
***Scope of Application***

***The present draft articles shall apply to the establishment, content, operation and effects of the legal obligation of States to extradite or prosecute persons [under their jurisdiction][present in the territory of the custodial State][under the control of the custodial State].***

vis-à-vis “present in the territory of the State” and “in the custody of the State”, complements each other and it connotes the application of the territorial principle.

32. For the third proposed wordings, namely the phrase “under the control of the custodial State”, Malaysia seeks clarification on the actual meaning of “under the control” as the word “control” is vague and could give rise to several interpretations.

33. Malaysia has incorporated the obligation to extradite or prosecute in section 49 of the Extradition Act 1992 [Act 479]. Section 49 of the Extradition Act 1992 [Act 479] provides that the determination of whether to grant the extradition request or to refer it to the relevant authority for prosecution lies with the relevant Minister. In doing so, the Minister would take into consideration the nationality of the fugitive offender and whether Malaysia has jurisdiction to try the offence committed.

34. With regard to Draft Article 2<sup>2</sup> on the “Usage of Terms”, Malaysia does not have a definition on “extradition”, “prosecution”, “jurisdiction” and “persons under jurisdiction”. However, under the Extradition Act 1992 [Act 479], there are definitions for “extradition offence” and “extraditable offence”. Both these definitions under the Extradition Act 1992 [Act 479] specifies the minimum threshold imprisonment for an offence to qualify as an “extradition offence” and “extraditable offence”. The threshold of imprisonment for not less than one year or with death is determined.

35. Furthermore, the definition of “prosecution” is also absent in Malaysia’s domestic legislation. However, section 377 of the Criminal Procedure Code [Act 593] explains on the “conduct of prosecution” which states the conduct of criminal prosecution in any court in Malaysia.

36. In this regard, Malaysia proposes that the definition section be reviewed after the completion of the whole draft articles to ensure its compatibility with the whole text.

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<sup>2</sup> Draft Article 2:  
*Use of Terms*

1. *For the purposes of the present draft articles:*

- (a) *“Extradition” means....;*
- (b) *“Prosecution” means....;*
- (c) *“Jurisdiction” means....;*
- (d) *“Persons under jurisdiction” means...*

2. *The provisions of paragraph 1 regarding the use of terms in the present draft articles are without prejudice to the use of those terms or to the meanings which may be given to them [in other international instruments or] in the international law of any State.*

37. With regard to Draft Article 3<sup>3</sup> on “treaty as a source of the obligation to extradite or prosecute”, for a dualist state like Malaysia, the obligation to extradite or prosecute arises from the domestic laws, i.e. the Extradition Act 1992 [Act 479]. It is also reflected in Malaysia’s bilateral and multilateral treaties in which Malaysia is a party to, and not a general obligation under customary international law.

38. Hence, Malaysia is generally agreeable with the proposed draft article 3 as it is in line with the Extradition Act 1992 [Act 479] and the treaties in which Malaysia is a party to.

39. Lastly, Malaysia welcomes the initiative of the ILC in conducting this study and look forward to contribute substantively in the future.

Thank you, Mr. Chairman.

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<sup>3</sup> *Draft Article 3:*

*"Treaty as a source of the obligation to extradite or prosecute"*

*Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.*