Malaysia
Permanent Mission to the United Nations

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STATEMENT BY MS. NORIZAN CHE MEH, REPRESENTATIVE OF MALAYSIA ON AGENDA ITEM 79: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD AND SIXTY FORTH SESSION AT THE SIXTH COMMITTEE OF THE SIXTY-SEVENTH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 06 NOVEMBER 2012

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CHAPTER VI: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDCITION

Mr. Chairman,

Malaysia notes that at the 3132nd meeting of the Commission, Ms. Concepcion Escobar Hernandez has been appointed as the Special Rapporteur for the current topic, in replacement of Mr. Roman Kolodkin who is no longer a member of the Commission. Malaysia would like to thank Mr. Roman Kolodkin for his previous works and contribution to the subject and welcome Ms. Hernandez to the Commission.

2. Malaysia notes that the Preliminary Report prepared by Ms. Hernandez is transitional in nature which aimed to clarify the debate and identify the principal points which remain. Malaysia also looks forward to Ms. Hernandez's future work, particularly draft articles on this topic.

Mr. Chairman,

3. Malaysia is well aware of the complexity of the topic and the political sensitivities that may arise for States. The principles of international law concerning the sovereign equality of States and non-interference in internal affairs are the governing principles of

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the topic. Most importantly, immunity of state officials allows the country's representative to carry out its functions and responsibilities without hindrance.

4. With regard to the issue of perceiving the topic *lex lata or lex ferenda*, Malaysia is of the view that the topic is still at a preliminary stage, and as various issues are still being debated and unresolved, it is paramount to look at the topic *lex lata*. Nevertheless, Malaysia is of the view that this topic cannot be addressed in isolation, either *lex lata* or *lex ferenda*. The appropriate approach would be to take into account *lex lata* considerations and to include an analysis of *de lege ferenda* of some topics. The simultaneous approach is consistent with the Commission's mandate to pursue simultaneously the codification and progressive development of international law.

Mr. Chairman,

5. With regard to immunity *ratione materiae*, the most prominent issue would be the definition of "official acts" and "acts done in the official capacity" to attract the invocation of immunity in foreign criminal jurisdiction. Similar concerns were raised by the current Special Rapporteur whether *ultra vires* and illegal conducts of the officials are covered under such immunities. Malaysia is of the view that the scope of such "official acts" or "acts done in the official capacity" ought to be determined before embarking onto other issues such as exceptions to such immunity or the waiver of immunity.

Mr. Chairman,

6. Immunity *ratione personae*, is often linked to its representative nature of state officials, on the "personification" of the State in those officials as the justification for immunity. This category of immunity is conventionally enjoyed by the "troika": Heads of State, Heads of Government and Ministers of Foreign Affairs. There have been questions as to the possibility to extend said immunity to persons falling outside the troika with representative status, or to the families residing in the foreign jurisdiction with the troika. To this end, Malaysia urges the Commission to be cautious while exploring the possibilities of extending such privilege outside the troika.

Mr. Chairman,

7. Malaysia notes that there have been suggestions that international crimes against humanity or *jus cogens* acts may fall as an exception to immunity of state officials. In this regard, Malaysia reiterates its view that the scope of immunity ought to be determined prior to the study of whether international crimes against humanity or *jus cogens* principles can be considered as an exception to immunity.

8. Malaysia proposes that would be useful if the Special Rapporteur further clarify what constitutes grave international crimes against humanity besides those listed as examples. Any exceptions to immunity must be cautiously considered as to achieve a balance between the different policy considerations. In addition, there should be studies on exceptions to immunity in respect of other grave international crimes such as maritime piracy, state sponsored terrorism and *etc*.

Mr. Chairman,

9. Malaysia understands that the effective exercise of foreign criminal jurisdiction over State officials occurs during judicial proceedings. However, the preparatory phase of those proceedings may also be raised. Malaysia supports the view that immunity of State officials from foreign criminal jurisdiction should, in principle, be considered at an early stage of the judicial proceedings, or earlier still, at the pre-trial stage, when a State exercising jurisdiction takes a decision on adopting criminal procedure measures precluded by immunity against an official. Otherwise, it would result in a violation of the obligations arising from immunity by the State exercising. Malaysia looks forward to the further discussions on this topic.

CHAPTER VII: FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

Mr. Chairman,

10. In respect of the topic of Formation and evidence of customary international law, Malaysia wishes to extend its appreciation to the Commission for the report and to Mr. Michael Wood for his Note at the sixty-fourth International Law Commission session. In this regard, Malaysia welcomes the effort by the Commission to include this topic in its long-term programme of work at the sixty-third session.

Mr. Chairman,

11. The question of sources of international law had been heavily debated among international scholars throughout the years. Views concerning as to what is or is not customary international law are evidently polarised. Malaysia is fully aware of the concerns raised and hence is of the view that there is a need to analyse the formation and identification of customary international law in depth.

12. Concerning the proposition on the scope of the topic, Malaysia emphasizes the importance of taking into account the State practices from all of the principal legal systems of the world and from all regions. With reference to discussing the use and meaning of terminology/definitions, it is urged that the Commission takes into account the widest possible States practices and their approaches relating to the relevant terminology/definitions, before a common understanding could be reached. In Malaysia's view, the initial work of establishing an acceptable common understanding is pertinent as it will inevitably affect future appreciation of the whole topic.

Mr. Chairman,

13. While each State's practice may differ from one to another, Malaysia acknowledges that there exists several inherent difficulties in the form of uniformity of

practices across States and also the prescribed duration in which such practices have existed before they are accepted as customs. Therefore, Malaysia agrees with the Special Rapporteur's proposal to focus on the practical aspects of the topic rather than the theoretical aspect.

14. In conclusion, Malaysia reiterates its support to the Commission for its work on this topic and draws further emphasis on the abovementioned matters, which are of primary concern at this preliminary stage, to ensure that the final outcome of this topic will be of utmost benefit and of practicality to States.

CHAPTER IX: THE OBLIGATION TO PROSECUTE OR EXTRADITE *(AUT DEDERE AUT JUDICARE)*

Mr. Chairman,

15. Turning to the topic of the Obligation to prosecute or extradite, Malaysia would like to record its appreciation to the former Special Rapporteur, Mr. Zdzislaw Galicki, for his continuous efforts in paving the way for the discussion of this topic by coming up with the four reports considered by the Commission at its fifty-eighth (2006), fifty-ninth (2007), sixtieth (2008) and sixty-third (2011) sessions consecutively.

16. Malaysia also welcomes the establishment of the open-ended Working Group at the sixty-fourth session for the purpose of evaluating the progress of work on this topic in the Commission and exploring possible future options for the Commission to take. It is hoped that the Working Group under the chairmanship of Mr. Kriangsak Kittichaisaree would bring some light on the progress of this topic.

Mr. Chairman,

17. Malaysia notes that the Working Group had requested its Chairman to prepare a working paper on the topic to be considered at the sixty-fifth session of the Commission with particular focus on the judgment of the International Court of Justice of 20 July 2012 on the Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Although the judgment did not seem to have the effect of rendering the obligation to extradite or prosecute as a customary international law, it shed some light as to how the provisions containing such obligation should be interpreted, applied and implemented in a treaty. In this relation, Malaysia reiterates its view that the Commission must ascertain the status of the obligation as it requires further clarification to the meaning and the nature of the obligation before it embarks on progressive development on this area of international criminal law.

Mr. Chairman,

18. Responding to the major issues highlighted by the Working Group with regard to the harmonization, the interpretation, application and implementation as well as the

progressive development of international law and its codification, Malaysia wishes to highlight that its obligation to extradite or prosecute is based on its domestic law, namely the Extradition Act 1992 [Act 479] and also the bilateral and multilateral treaties to which Malaysia is a party.

19. It is noted that some members of the Working Group had recalled that the relationship between the obligation and other principles such as *nullum crimen sine lege* and *nulla poena sine lege* should also be considered in carrying out the obligation. For Malaysia, such safeguard is guaranteed under its Federal Constitution.

CHAPTER XI: MOST-FAVOURED-NATION CLAUSE

Mr. Chairman,

20. Finally, on the topic of Most-Favoured-Nation clause, Malaysia notes the Report of the 64th ILC Commission Session on this topic. The Study Group continued discussion on various factors which influence arbitral tribunals in interpreting MFN clauses. While acknowledging the need to safeguard against fragmentation of international law and ensure *jurisprudence constant*, substantive MFN application *per se* has not necessarily been controversial, but rather "legal import of better procedural treatments" from other treaties is the issue that requires critical analysis.

Mr. Chairman,

21. The trend shows diverging jurisprudence on whether MFN clause can be used to override procedural pre-condition constituting circumvention of "admissibility" requirements, or whether jurisdiction can be formed by "incorporating" provisions from another treaty by means of an MFN clause, or whether MFN clause should *in principle* be capable of being applied to dispute settlement provisions. Malaysia is of the view that it is prudent to take great heed of State's intention when the MFN clause in their treaties. As such, the application of MFN clause should be interpreted without it being prejudicial to State's interest with respect to treatment that they wish to accord.

22. With respect to the Study Group's on-going discussion, Malaysia notes that the Study Group had confirmed the possibility of developing guidelines and model clauses on MFN clause. In this regard, Malaysia is of the view that such guidelines should not limit the inherent flexibility and sovereignty of States to determine what is appropriate for them to interpret and apply the MFN clause. Thus, the elaboration of the MFN Clause should remain as a non-legally binding set of guidelines that should not crystallize into States' practice or customary international law.

Thank you, Mr. Chairman.