



Permanent Mission of
Malaysia
to the United Nations

24

(Please check against delivery)

STATEMENT BY MR. UMAR SAIFUDDIN JAAFAR, REPRESENTATIVE OF MALAYSIA, ON AGENDA ITEM AGENDA ITEM 82: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS 59TH SESSION AT THE SIXTH COMMITTEE OF THE 62ND SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 25 OCTOBER 2007

Mr. Chairman,

My delegation would like to thank Mr Ian Brownlie, Chairman of the Commission for his excellent presentation of the report of the Commission. My delegation wishes to comment on the following chapters in this cluster under consideration in this debate.

A. CHAPTER VI: EXPULSION OF ALIENS

Mr. Chairman,

2. Malaysia welcomes the inclusion of the topic of expulsion of aliens in the ILC's work programme and extends its appreciation to the members of the ILC, and in particular to the Special Rapporteur, Mr. Maurice Kamto, for their efforts on the topic. Malaysia also welcomes the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) that proposed draft articles 1 to 7 respectively and the decisions by the ILC to refer the draft articles to the Drafting Committee.

3. In Malaysia, in some form the relevant laws relating to expulsion of aliens is found in the Federal Constitution, the Banishment Act 1959 [Act 79] (Revised 1972) and the immigration laws. Article 9 of the Federal Constitution (FC) makes provision for the prohibition of banishment where no citizen shall be banished or excluded from the Federation. The FC does not provide against expulsion of non-citizen. The Banishment Act [Act 79] is an Act relating to the banishment and expulsion from Malaysia of persons other than citizens. The Immigration Act 1959/63 [Act 155] distinguishes two main categories of migrants, namely, documented or 'legal' migrants and undocumented or 'illegal' migrants (irregular migrants). The first category includes people who enter and are allowed to stay in Malaysia and who hold passports, visas, work permits and other valid documents, as required by the immigration legislation.

4. Malaysia supports the view that the legal regime governing expulsion must take into account the distinction between these two categories of legal and illegal aliens. In view of the above, the **revised draft article 1(1)** is generally acceptable.

5. With regard to **the revised draft article 1(2)**, Malaysia wishes to state that our legal framework currently makes no distinction between refugees, asylum seekers and illegal immigrants. Non-citizens who entered Malaysia not in compliance with the provisions of our immigration laws are

regarded as illegal immigrants and are punishable under the Act. Likewise, illegal immigrants are subject to deportation in accordance with the law. Based on this consideration, Malaysia finds difficulty in accepting the revised draft article 1(2) on its current format.

6. On **draft article 2(1)**, Malaysia could not accept the usage of the term "*ressortissant*" which could be interpreted very widely and covers persons other than "citizens". In Malaysia, the Banishment Act 1959 [Act 79] (Revised 1972) is an Act relating to the banishment and expulsion from Malaysia of persons other than citizens. Our immigration law makes provisions for the removal of prohibited immigrants, illegal immigrants and persons unlawfully remaining in Malaysia.

7. Malaysia is of the view that as the use of the word "*ressortissant* of another State" is not used within the context of our legal framework and as it could be assigned to a broader meaning than "national", the term is not acceptable and Malaysia would propose the term to be substituted with the term "citizen" or "national".

8. Malaysia nonetheless takes note that the draft article 2 has been revised in particular with regard to the draft articles 2 paragraphs (a) and (b) on the definitions of "expulsion" and "aliens" respectively. The revised draft article has defined "alien" as a person who is not a national of the State he is physically present and reference of the term *ressortissant* has been omitted from the definition of "expulsion". In this regard, Malaysia is of the view that the current formulation in the **revised draft article 2** is generally acceptable.

9. On **draft article 3(1)**, Malaysia appreciates that it sets out that a State's right to expel aliens was presented as a right inherent in State sovereignty, deriving from the territorial competence of each State and therefore is generally acceptable. With regard to draft article 3(2), Malaysia understands the draft articles shall be applicable to all aliens, either lawfully or otherwise and shall include aliens with irregular status, refugees, stateless persons and migrant workers. Malaysia is currently not a party to any international conventions relating to refugees or stateless persons or migrant workers as well as the ICCPR and ICESCR and is therefore under no legal obligation to provide such protection and rights available under those treaties. Malaysia however had been treating illegal migrants with full respect to their dignity and based on actions on humanitarian grounds.

10. On **draft article 4(1)**, Malaysia notes that the draft article provides that a state may not exercise expulsion of its own national. This is in line with our constitutional provision which prohibits the banishment of citizen and therefore the draft article is acceptable. With regard to draft articles 4(2) and (3), Malaysia would follow the development of the ILC's consideration.

11. **Draft articles 5 and 6** in their current forms are not acceptable to Malaysia mainly because the concept of refugee do not exist in Malaysian legal framework and Malaysia is currently not a party to any international conventions relating to refugees and stateless persons and is therefore under no legal obligation to accord the status of refugees or stateless persons to illegal immigrants, or to provide such protection and rights available under those treaties.

12. On **draft article 7**, Malaysia is concerned that collective expulsions would prevent the proper identification of people entitled to special protection such as victims of trafficking. Malaysia is studying and following the discussion on this issue and at this juncture would like to associate itself with the view that there is presently no universal rule prohibiting the collective expulsion of aliens. It is therefore proposed that this article is subject to further consideration by the ILC.

B. CHAPTER VII – EFFECTS OF ARMED CONFLICTS ON TREATIES

Mr. Chairman,

13. Malaysia records its appreciation to Mr. Ian Brownlie, the Special Rapporteur for the topic “Effects of Armed Conflicts on Treaties” for his Third Report which was submitted for the consideration of the International Law Commission (ILC) at its 59th Session. We note with appreciation that many of the suggestions and concerns raised by delegations in the Sixth Committee in 2005 and 2006 have been addressed in the revised draft articles annexed to the Third Report and were further considered by the Commission at its 59th Session. We also reiterate our commendation to the Secretariat for its Memorandum on “The effects of armed conflict on treaties: an examination of practice and doctrine” (A/CN.4/550) which continues to be an important reference document.

14. In relation to **draft article 1**, Malaysia notes the recommendation of the Working Group that in principle the consideration of treaties involving international intergovernmental organizations be left in abeyance until a later stage and that in the interim the Secretariat will circulate a note to international organizations requesting information about their practice with regard to the effect of armed conflict on treaties involving them. This approach is welcomed to enable resolution of the issues arising from treaties between States first. There does not appear to be a need to radically revise the existing formulation. Due regard should however be taken of the application of the draft articles to treaties that are being provisionally applied that could also be affected by an armed conflict.

15. In relation to **draft article 2 and the definition of “treaty”**, Malaysia reiterates its concern if the scope of the draft articles is extended to include treaties involving international organizations. This is because the definition would have to be modified to accommodate the definition provided under Article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations. This would be a matter of concern to countries that are not parties to the 1986 Convention. Malaysia would also like to propose for the further consideration of the Drafting Committee the inclusion of a new paragraph in article 2 based on Article 2(2) of the Vienna Convention on the Law of Treaties (VCLT) for completeness.

16. With regard to the **definition of “armed conflict”**, Malaysia reiterates its support for the reformulation of the definition in line with the definition in the *Tadic* case and the 1954 Hague Convention on the Protection of Cultural Property. This would address Malaysia’s concern that “armed conflict” should include internal armed conflicts and military occupation in light of current world situations. This approach would negate the necessity for an additional compromise provision such as Article 3 in the VCLT.

17. On the proposal to find an alternative phrase for “state of war” on the ground that it is outmoded, Malaysia notes that this phrase is traditionally connected to situations where declarations of war have been made. Perhaps an alternative may be to retain this phrase, include the phrase “state of belligerency” to denote situations where such declarations have not been made and delete the words “regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict”. Malaysia also agrees that the definition should not expressly or implicitly include “police enforcement activity” which is undertaken for national security purposes.

18. In relation to **draft article 3**, Malaysia reiterates its concern on the substitution of the expression “*ipso facto*” with “necessarily” as these terms are not synonymous. One possibility to overcome this issue and address the need to maintain consistency between the title and the text would be to substitute the phrase “necessarily terminate or suspend” with the phrase “automatically lead to the termination or suspension, as the case may require, of”. Malaysia also notes the suggestion to

introduce a savings clause to the article for exceptional circumstances. Malaysia is of the view that although draft article 3 should not rule out possible automatic suspension or termination in certain cases, the use of the criteria of the lawfulness of the use of force gives rise to some concern. This criterium opens for debate who decides on the lawfulness or otherwise of the use of force. Malaysia also notes the draft article still does not provide sufficient clarity on which consequence is to be preferred between suspension and termination.

19. In relation to **draft article 4**, Malaysia reiterates its view that the intention of the parties to the treaty should be the principal criterium to decide the effect the armed conflict has on the treaty. The phrase "at the time the treaty was concluded" causes uncertainty only because parties do not usually contemplate the consequence of an armed conflict on the treaty at the time the treaty is concluded. If the deletion of this phrase would provide additional flexibility to the parties in light of the use of the other determinative factors to determine intention, this option may be further considered. Malaysia however notes that recourse to Articles 31 and 32 of the VCLT would only be applicable where the States are both parties to that Convention.

20. Malaysia notes the reformulation of the former draft article 5. Both **draft article 5** and the new **draft article 5bis** are generally acceptable. Malaysia also notes the deletion of **draft articles 6 and 6bis**. The reformulation of draft article 6bis as commentary to draft article 7 will be further considered once draft article 7 is finalized.

21. Malaysia welcomes the proposal to reformulate **draft article 7** wherein paragraph 1 will be moved closer to draft article 4 with the substitution of the phrase "object and purpose" with "subject matter". On the issue of placement, it is suggested that this new article be inserted between draft article 5 and 5bis to reflect the chronology of items under consideration.

22. On the proposal to convert paragraph 2 into an **Annex** to the draft articles, Malaysia reiterates its preference for a generic approach to identify treaties that by the nature of their subject matter must necessarily continue in operation in an armed conflict or at least some practicable definitive criteria for identifying subject matter that should be included in any proposed Annex. It is also noted that neither the Commission nor the Sixth Committee has embarked on a detailed analysis of the items that are currently in the proposed indicative list and this is an area still to be considered. Malaysia supports the proposal that discussion on the particular provisions or types of provisions within a treaty which would continue in effect is best dealt with in the commentaries. Some preliminary suggestions in this regard would be provisions relating to confidentiality of information and documents and the protection of intellectual property rights.

23. In relation to **draft article 8**, Malaysia agrees that in-depth discussion is still required on the consequences of the application of Articles 42 to 45 of the VCLT mode of suspension and termination to ascertain whether they are amenable to the context of suspending or terminating treaties in the event of an armed conflict. Alternative modes, especially simplified modes, should be further explored. This is particularly pertinent in relation to States that are not party to the VCLT. Consideration should also be given to developing separate procedures for suspension and termination.

24. In relation to **draft article 9**, Malaysia reiterates that the position favouring resumption of suspended treaties is acceptable. However the timeline for determining intention will still have to be resolved. The suggestion to provide for automatic resumption unless the contrary intention is expressed may be further considered. However even in the latter, the issue of determining that intention will still have to be addressed. It is also noted that a consequential amendment should be made to draft article 9(2)(b) for consistency with the reformulated draft article 4(2)(b).

25. In relation to **draft articles 10 and 11**, Malaysia welcomes the recommendation of the Working Group to redraft these provisions in line with articles 7, 8 and 9 of the resolution of the Institute of International Law (1985) (IIL resolution).

26. In relation to the adoption of article 8 of the IIL resolution, Malaysia suggests that the experience gained from recent Security Council Resolutions such as SCR 1373, 1540, 1718, 1737 and 1747 should be taken into consideration. It may thus be more effective to incorporate this language into specific Security Council resolutions where it is considered necessary rather than impose it as rule of general application. By virtue of Article 25 of the Charter of the United Nations, States would be bound to comply with the resolution. If contained in the draft articles, non-United Nation member States would not be bound to comply and hence suspend or terminate a treaty since they would not be bound to comply with the resolution itself. An ancillary issue which should be addressed is how is a State to determine the appropriate action between suspension or termination, or is it to be taken as progressive measures.

27. In relation to the adoption of article 9 of the IIL resolution, this may be further considered taking into consideration the developments on the definition of the crime of aggression being made through the Special Working Group on the Crime of Aggression.

28. Draft **articles 11 to 14** are generally acceptable. Malaysia however notes in relation to draft article 12 that the deletion of the words "as neutrals" may change the nature and purpose of the article and render it redundant in the context of these draft articles. Draft article 13 reflects the rules of general application in Articles 54, 57, 58, 60, 61 and 62 of the VCLT.

30. In conclusion, Malaysia reiterates its proposal for the Secretariat to facilitate the participation of Governments in the development of these draft articles through the circulation of focussed questionnaires.

C. CHAPTER VIII: "RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS"

Mr. Chairman,

31. Malaysia commends the work of the Special Rapporteur, Mr. Giorgio Gaja on the topic of responsibility of international organizations.

32. Malaysia expresses its appreciation to the International Law Commission for producing and adopting the draft Articles 31 to 45 which correspond to Part Two of the articles on Responsibility of States for Internationally Wrongful Acts.

33. With regard to **draft Article 33**, which requires the International Organization to cease the wrongful act if it is continuing and to offer appropriate assurances and guarantees of non-repetition if circumstances so require, Malaysia notes the lack of practice in this area. Malaysia also notes that in the commentaries by ILC, the obligation to offer assurances and guarantees of non-repetition may be regarded as new obligation that arises as a consequence of the wrongful act. Therefore, in this regard Malaysia is of the view that further examples of assurances and guarantees of non-repetition should be obtained to better assist in understanding the application of this obligation.

34. With regard to **draft Article 34**, which deals with reparation, Malaysia wishes to highlight the concerns shared by most States on the duty imposed to those Member States of an international organization that do not incur such responsibility. In this regard, Malaysia shares the view that such

member states should not be held responsible or obliged to provide the necessary means to face claims for reparation.

35. Therefore, Malaysia requests ILC to further study this matter and formulate an appropriate and reasonable solution to address this concern. For instance, Malaysia notes with interest the views by other States which suggested that a scheme of subsidiary responsibility for compensation could be established as a special rule.

36. With regard to **draft Article 36**, which deals with the scope of international obligations, Malaysia takes note that there are good reasons for taking a similar option with regard to international organizations and thus limiting the scope of Part Two to obligations that a responsible organization has towards one or more other organizations, one or more States, or the international community. Paragraph 1 of draft Article 36 is therefore generally agreeable.

37. However, as for **paragraph 2 of draft Article 36**, even though Malaysia notes the reasons of incorporating such provision as explained in the ILC commentaries, in particular with regard to employment, Malaysia is of the view that paragraph 2 will not have any bearing as the consequences of these breaches will not be covered under the draft Articles.

38. With regard to **draft Article 37**, which deals with forms of reparation, Malaysia takes note that this draft Article 37 is identical to Article 34 on States Responsibility. It is further noted that full reparation can either be taken singly or in combination, and in the forms stated in draft Articles 38, 39 and 40.

39. Malaysia would like to state that with regard to the idea of reparation for injury, due regard and consideration must be given to ensure an appropriate and reasonable scheme or solution under the draft Articles. This is particularly important in instances where member States are not held responsible for the wrongful act attributed to an international organization solely.

40. Therefore, taking into account the principle of justice and equity, ILC should further analyze this matter carefully. The same comments apply to draft Articles 38, 39 and 40, 41, 42 and 43.

41. With regard to **draft Article 38**, which deals with an obligation to provide restitution that to the effect re-establishes the situation which existed before the wrongful act was committed, it should be subject to such restitution not being materially impossible, and does not impose disproportionate burden on the responsible international organization. Malaysia takes note draft Article 38 is identical to article 35 on States Responsibility save for the term "State" was substituted with "international organization". The same comments on draft Article 37 is applicable in this Article.

42. With regard to **draft Article 39**, in relation to compensation, Malaysia is of the view that, in general, a responsible international organization should be liable to compensate for the damage caused. However, in a case of reparation by way of compensation, it would also imply some financial compensation that may exceed the budgetary resources of the international organization. In this regard, Malaysia notes the suggestion made by Belarus that a scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources. The same comments on draft Article 37 is applicable in this draft Article.

43. With regard to **draft Article 40**, it is observed that draft Article 40 corresponds to article 37 on States Responsibility with the replacement of the term "State" with "international organization". The modalities and conditions of satisfaction that concern States are applicable also to international

organizations. It is also noted that practice of satisfaction of international organizations are generally in the form of an apology or an expression of regret. The same comments on draft Article 37 is applicable in this draft Article.

44. With regard to **draft Article 42**, which deals with contribution to the injury by wilful or negligent action or omission, the phrase "or any person or entity" is open-ended and thus the application thereof will not be clearly understood, which may give rise to the implication that all entities may qualify as members of international organization. For the purpose of clarity and certainty, Malaysia proposes that the phrase "or any person or entity" to be clearly defined or at the very minimum certain criteria to be specified.

45. With regard to **draft Article 43**, which deals with effective performance of the obligation of reparation, Malaysia takes note that the members of a responsible international organization are required to take all appropriate measures in order to provide the organization with the means of fulfilling its obligation. In this context, Malaysia's concern as reflected in our comments in draft Article 37 is reiterated in draft Article 43.

46. With regard to member States that do not incur responsibility but are obliged to provide the international organization with the necessary means to face claims for reparation, special consideration should be given based on the principle of justice and equity in determining the extent of contribution by these member states in providing the international organization with the necessary means to face claims for reparation.

47. With regard to **draft Article 44**, which deals with breach of obligations under peremptory norms of general international law, the draft Article corresponds with article 40 on States Responsibility except for the placement of the term "State" with "international organization".

48. It is noted that the possibility of a breach of an obligation under a peremptory norm would be less likely by an international organization. However, should such breach occurs, the responsible international organization should be compelled to bring such breach to an end.

49. With regard to **draft Article 45**, Malaysia shares the views of other States that international organizations should be responsible akin to the responsibility of States to cooperate to bring the serious breach committed by an organization to an end. As pointed by the Russian Federation, States and international organizations were bound to cooperate to terminate unlawful acts by an international organization, just as if it were a State.

Mr. Chairman,

50. As for the questions raised by the ILC, in relation to question of whether the right to invoke responsibility can be practiced by other organizations or some of them, clarification needs to be sought on the rationale of extending the principle in Article 48 to international organizations as well.

51. Malaysia is generally of the view that the right to invoke responsibility can be considered as the principles contained in draft Articles on States Responsibility are equally applicable in these draft Articles on international organizations.

52. In relation to the question of whether the restrictions imposed on countermeasures can be applied to an international organization, although Malaysia at this juncture is of the view that the restrictions imposed on countermeasures provided in Article 49 to 53 could be applied vis-à-vis international organizations and similar restrictions could also be used, further deliberation on this

issue must be taken by the ILC to see if there are restrictions that can be imposed taken into consideration the nature and legal capacity of an international organization.

D. NEW TOPICS IN THE PROGRAM OF WORK OF THE ILC

Mr. Chairman,

a. Most Favoured Nation

53. Malaysia is supportive of the recommendation of the Working Group to include the topic of the "MFN clause" in the Commission's long-term programme of work. The Commission could play a useful role in providing clarification on the meaning and effect of the MFN clause in the field of investment agreements. The existence of a comprehensive model guideline and commentaries on MFN will serve as a ready reference and be a useful guide to all countries.

b. Immunity of State Officials from Foreign Criminal Jurisdiction

54. Malaysia commends the International Law Commission (ILC) for including the topic on "Immunity of State Officials from Foreign Criminal Jurisdiction" in its work programme. This is an important topic and it is timely for the ILC to reinitiate consideration of it. We also congratulate Mr. Roman A. Kolodkin on his appointment as the Special Rapporteur.

55. In Malaysia's view, although the issues of jurisdiction and immunity are separate, the principles of criminal jurisdiction, particularly the applicability of the principle of "universal jurisdiction", should also be studied in the context of this topic. This is because the national prosecutor and court concerned will have to establish the requisite jurisdiction prior to commencing any cases.

c. Protection of Persons in the Event of Disasters

56. Malaysia commends the International Law Commission for the inclusion of this topic in its work programme. We also commend Mr. Eduardo Valencia-Ospina on his appointment as Special Rapporteur.

57. In conclusion, Malaysia notes that the International Law Commission study on the "Protection of Persons in the event of disasters" is at a preliminary stage. Therefore although the issues identified merit further study and discussion with a view to proposing the best legal solutions, Malaysia is of the view that no decision on the final form of the outcome should be made at this time.

Thank you.