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STATEMENT BY
MS. SARAH KHALILAH ABDUL RAHMAN, REPRESENTATIVE OF MALAYSIA

ON AGENDA ITEM 81 ENTITLED
“REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS
SIXTY-FIFTH SESSION”
(PART I)

AT THE SIXTH COMMITTEE OF THE SIXTY-EIGHTH SESSION
OF THE UNITED NATIONS GENERAL ASSEMBLY
NEW YORK, 30 OCTOBER 2013

Mr. Chairman,

Malaysia wishes to record its appreciation to the Commission for its comprehensive report on its 65th session. We would also like to congratulate Professor Bernd Niehaus for his appointment as Chairman of the Commission and thank him for his introductory remarks on the topics for discussion.

2. Over the years, Malaysia has followed with keen interest and participated in the enriching discussions on topics under the current programme of work of the Commission. Here, we would firstly like to make some observations on Chapter XII, in particular, as regards the inclusion of the topics “Crimes Against Humanity” and “Protection of the Atmosphere” under the Commission’s work programme, and thereafter present our substantive comments on the topics under Chapters IV and V of the Commission’s report.

3. With regard to the inclusion of the topic of “Crimes Against Humanity” in the long term programme of work of the Commission, Malaysia notes from the paper prepared by Mr. Sean D. Murphy that the prospect of the work on this topic is the elaboration of a set of draft Articles on “Crimes Against Humanity”. At this juncture, Malaysia would like to seek clarification on the urgency to conclude a Convention on the matter particularly as the Rome Statute of the International Criminal Court, which is already subscribed by 122 countries, also addresses crimes against humanity. Malaysia is of the view that the study should not undermine the intended universality of the Rome Statute. In addition, any further work on this should not overlap with existing regimes, but rather to complement it.

4. Malaysia further notes the inclusion of the topic “Protection of the Atmosphere” in the Commission’s programme of work under the stewardship of Mr. Shinya Murase. In light of this, Malaysia notes the limitations determined by the Commission for the topic and wishes to underscore the importance of the study in keeping with the parameters set for it, including among others, that it will not interfere with current negotiations tracks on climate change, ozone depletion, and long-range transboundary air pollution.

CHAPTER IV: SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO TREATY INTERPRETATION

5. Malaysia expresses its gratitude to the Special Rapporteur, Mr. Georg Nolte and the Commission for the First Report on the topic of Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, in particular for the five draft conclusions on this topic, provisionally adopted at its sixty-fifth session upon consideration of the Drafting Committee’s report.

6. Malaysia notes that Conclusion 1 (General rule and means of treaty interpretation) and Conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation) strive to set out the general aspects of the legal framework in respect of treaty interpretation. To the extent that these conclusions restate the rules on treaty interpretation contained in the 1969 Vienna Convention on the Law of Treaties as well as the legal status of those rules, Malaysia appreciates the importance of these conclusions in guiding treaty interpretation.

7. With regard to Conclusion 3 (Interpretation of treaty terms as capable of evolving over time), Malaysia is aware that support for an evolutive approach to treaty interpretation varies across various international courts and tribunals. Nevertheless, Malaysia is of the view that caution must be employed in the determination of the “presumed intention of the parties” at the conclusion of the treaty. The parties’ intention forms the basis of a treaty and therefore, extreme care should be exercised in determining such intention to avoid distorting, in any way or, departing from the letter and spirit of the treaty.

Mr. Chairman,

8. Malaysia notes the definitions of “subsequent agreement” and “subsequent practice” as stated in Conclusion 4 (Definition of subsequent agreement and subsequent practice). The clear distinction between “subsequent practice” in the context of Article 31(3)(b) and Article 32 is certainly helpful. However, Malaysia seeks further clarification as to the rationale for accepting the conduct of one party as subsequent practice under Article 32 and the adequacy of such subsequent practice as a supplementary means of treaty interpretation in support of Article 31.

9. Finally, in relation to Conclusion 5 (Attribution of subsequent practice), Malaysia notes the conclusion that only conduct that is attributable to parties to the treaty is accepted as subsequent practice relevant to treaty interpretation. Although Malaysia understands that the phrase “assessing the subsequent practice” should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance, our reservation would be on inclusion of non-State actors, more so where the “conduct” envisaged here is not one that is attributable to parties of the treaty.

CHAPTER V: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Mr. Chairman,

10. Malaysia notes the consideration of the Preliminary Report of the Special Rapporteur for the topic of Immunity of State Officials from Foreign Criminal Jurisdiction at the Commission’s sixty-fourth session, and the Second Report at its sixty-fifth Session. Malaysia would like to thank and congratulate the newly appointed Special Rapporteur for this topic, Ms. Concepción Escobar Hernández, for her presentation of the six draft Articles which capture the key issues pertaining to the immunity of State officials from foreign criminal jurisdiction, and of which Malaysia takes notes with great interest.

11. Malaysia has been studying and closely following the development of the subject since the consideration for the inclusion of the topic in the Commission’s long-term programme of work during its fifty-eighth Session in 2006. Malaysia wishes to reiterate its views on the Preliminary Report prepared by the previous Special Rapporteur, Mr. Roman Kolodkin. Malaysia is of the view that the topic should focus on the immunities accorded under international law, in particular customary international law, and not under domestic law. There is also no necessity 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. Such categories of persons should be excluded from any definition of “State officials” for the purpose of this study.

12. Malaysia welcomes the proposed draft Articles and will study them further. As a preliminary, Malaysia notes that draft Article 1 deals with the scope of the topic and that it was drafted to set the parameters of the subject and the draft Articles, thereafter, taking into consideration issues that States commonly face in practice when dealing with the question of the immunity of State officials from criminal jurisdiction. Malaysia fully supports the establishment of such parameters to clearly determine the scope of the topic from the outset.

13. In this regard, Malaysia takes note that the Special Rapporteur has acknowledged the need to define the term “officials”, and that it will be used on a provisional basis until a decision on terminology has been taken. On this note, Malaysia is of the view that all State officials should be covered under the definition. A related consideration, particularly in the determination of immunity *ratione materiae*, would be whether officials who are employed on a contractual basis would be covered under such definition when they undertake the function of State officials.

14. Again, it is emphasized that since the Commission will exclude previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations, such categories of persons should be excluded from the definition of “State officials”.

15. As regards paragraph 2 of draft Article 1, Malaysia agrees that criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission, criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents, and immunities established under other ad hoc international treaties, should be excluded from the scope of the topic as they are settled areas of law, and should therefore be dealt with separately. Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory, should also be excluded from the discussion.

Mr Chairman,

16. It is noted that the terms “criminal jurisdiction”, “Immunity from foreign criminal jurisdiction”, “Immunity *ratione personae*”, and “Immunity *ratione materiae*” which had been defined in draft Article 3, have now been deleted. Malaysia is of the view that the definitions of such terms could be reconsidered at a later stage.

17. As regards draft Article 3, Malaysia notes that the Commission is considering to include other State officials in the list of the persons enjoying immunity *ratione personae*. This has been raised as a possibility by some members of the Commission in light of the evolution of international relations, particularly the fact that high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs are becoming increasingly involved in international forums. It is further noted that some members of the Commission have supported the view that other high-ranking officials should be included in draft Article 3, in consideration of the *Arrest Warrant* case.

18. Malaysia however is of the view that the immunity *ratione personae* should only be enjoyed by the officials who are listed under the *Troika* namely, the Head of State, Head of Government and Minister for Foreign Affairs. In this regard, Malaysia does not support the extension of immunity to other than the *Troika* unless there is a strong basis for such extension.

19. In addition to the above, Malaysia reiterates its view that the categories of persons considered as Heads of State and Heads of Government should be defined. Malaysia would suggest that the definition should include sovereign rulers who act as Heads of State. In Malaysia's context, the Head of State is the King who is known as the Yang di-Pertuan Agong (YDPA) and the Head of Government is the Prime Minister. Apart from the King, the Federal Constitution of Malaysia also recognizes other state Rulers¹ to be accorded immunity from criminal and civil actions.²

20. With regard to the material aspect of immunity *ratione personae*, the Special Rapporteur mentioned in the Second Report that during and only during the term of office, immunity *ratione personae* extends to all the acts carried out for both in a private capacity and official capacity. In this way, immunity *ratione personae* is configured as "full immunity" with reference to any acts carried out by any of the individuals as mentioned above. It is noted that this configuration reflects State practice.

21. The Special Rapporteur asserted that international jurisprudence, which refers to this type of immunity as "full", "total", "complete", "integral" or "absolute" immunity in order to show that it applies to any act performed by a person who enjoys immunity.

22. Since it has been concluded that immunity *ratione personae* would apply to all acts performed whether in a private or official capacity by the Troika, Malaysia is of the view that an in-depth study to the possible exceptions to this type of immunity should be undertaken, for instance, in the case of the immunity of Heads of States on the commission of international crimes, which has been a subject of debate in recent years.

23. Malaysia also proposes for further study to be conducted with regard to the relationship between immunity and impunity for the perpetration of heinous crimes in international law, for example: torture and genocide. Although these matters are not specifically addressed in the Commentary of the Commission, Malaysia regards this as an important aspect in relation to State immunity, and could therefore not be relegated to the background.

Thank you.

¹ There are thirteen states in Malaysia, each having a Ruler known as either *Sultan*, *Raja* or *Yang di-Pertua Negeri*. The Conference of Rulers is a council comprising of these thirteen Rulers. The council's main responsibility is the election of the *Yang di-Pertuan Agong* (King) and his deputy, the *Timbalan Yang di-Pertuan Agong*, which occurs every five years or when the positions fall vacant.

² According to Article 181(2) of the Federal Constitution of Malaysia, no proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court. The same applies for the King whereby Article 32(1) of the Federal Constitution of Malaysia provides that the King shall not be liable to any proceedings whatsoever in any court except in the Special Court.