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STATEMENT BY
MS. EDORA AHMAD
DELEGATE
ON AGENDA ITEM
REPORT OF THE INTER-COMMITTEE
SIXTH LEVEL
CLUSTER
CHAPTER VI : IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW
CHAPTER VII : CRIMES AGAINST HUMANITY
CHAPTER VIII : SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE
RELATION TO THE

AT THE SIXTH COMMITTEE OF THE
76TH SESSION OF THE GENERAL ASSEMBLY

NEW YORK, 6 NOVEMBER 2021

CHAPTER VI – IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

Mr. Chairman,

1. On behalf of Malaysia, I would like to extend my warmest greetings to the Special Rapporteur on the topic of Customary International Law. In this regard, Malaysia notes that there has been tremendous progress in this topic since the proposal was first proposed by the Special Rapporteur.
2. While welcoming this progress, Malaysia believes that this topic is crucial to the progressive development of international law and will carry substantial weight in the future of international law, therefore



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ii) Decisions of national law (Draft conclusion 5.14)

In relation to this draft conclusion, Malaysia notes that draft conclusion 5.14 refers to 'decisions of national law'. While Malaysia is at present in the process of drafting national law on the acceptability of this draft conclusion, the draft conclusion is subject to further commentaries.

iii) Teachings (Draft conclusion 5.15)

While Malaysia notes that the provision is derived from Article 38 (1) (d) of the ICJ Statute, Malaysia is of the view that the term 'highly qualified publicists' is subjective and may attract many definitions. It looks to work with other States to the commentaries to this draft conclusion to provide a clear definition and explanation of the term 'highly qualified publicists'.

4. Additional to taking into account

wishes that the Commission should take into account the work of the Asian-African Legal Consultative Organization (AALCO) and other regional organizations at the stages of this work. The Commission should also take into account the work of the Informal Group of Experts on the Law of the Sea.

i) Assessment of evidence for the two elements (Draft conclusion 2.14)

Despite the need to assess the two elements of the existence of customary international law separately, Malaysia notes that there are various forms of evidence that may be assessed in a holistic manner. It looks to work with other States to the commentaries to this draft conclusion to provide a clear definition and explanation of the term 'highly qualified publicists'.



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practice and *opinio juris* are related but distinct requirements for evidence of each element may overlap. In this regard, Malaysia would like to clarify that it does not agree with the view that the *opinio juris* of a State may be used in determining the two elements. Nonetheless, Malaysia would like to further clarify on instances where the same form of evidence of materiality may be used to establish both *opinio juris*.

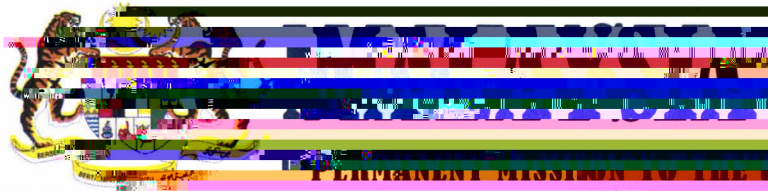
ii) The practice must be general (Draft conclusion 5)

The requirement of widespread representativeness is not absolute. Pursuant to this, due consideration must be given to the practice of especially affected States in the determination of customary international law.

Mr. Chairman,

5. Malaysia reiterates that despite the existence of evidence of custom, States are bound by the dualist nature of the Malaysian legal framework. However, Malaysian Courts have consistently held that international law will prevail over domestic laws.

6. To conclude, taking into consideration the work at the ILC and ARESU Working Group level, Malaysia firmly believes that the principle of *opinio juris* will truly be an area in international law.



CHAPTER VII. CRIMES AGAINST HUMANITY

Mr. Chairman,

7. Moving on to the appreciation of the First Report by Mr. Sean D. Murphy, Special Rapporteur for the topic which proposed two draft articles relating respectively to the definition of Crimes Against Humanity and to the definition of Crimes Against Humanity.

8. Malaysia is firmly committed to ending impunity and will continue to support any effort of the ILC towards that end, including the current work in relation to Crimes Against Humanity. Malaysia notes that based on the First Report of the Special Rapporteur, the objectives of having a Crimes Against Humanity Convention, which would be a treaty, ready to be signed and punishing Crimes Against Humanity in the rest of the world, have not been fully addressed in a few international instruments, such as the Statute of the International Criminal Court, which is a treaty, and which substantially reflects Article 7(1) of the Rome Statute.

9. Based on the concept of complementarity, which is a principle that there may be a need to have a Convention on Crimes Against Humanity, which would be a treaty, ready to be signed and punishing Crimes Against Humanity in the rest of the world, have not been fully addressed in a few international instruments, such as the Statute of the International Criminal Court, which is a treaty, and which substantially reflects Article 7(1) of the Rome Statute.



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remains unclear... address... who had not... that the draft... on this should...

Mr. Chairman,

10. Malaysia believes... perpetrators of international crimes, including Crimes Against... urgent attention, are practical issues... such offences, including international cooperation amongst States. In this regard, Malaysia looks forward to future draft Articles addressing... State cooperation... persons. In addition, Malaysia is... such as universal jurisdiction, primary or jurisdiction and immunity of State officials... merit consideration in discussing the draft Convention.

11. Further, as far as Malaysia's current national law... Crimes Against Humanity may be... Penal Code. In relation to international cooperation, this is mainly governed by Mutual Assistance... Act 1999.

12. Malaysia wishes to take this... the ILC to focus on... draft... adopted or to be used as guidance for States in developing domestic legislation... Crimes Against Humanity.



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**CHAPTER VIII. CSDB
IN RELATION TO THE INTERPRETATION OF TREATIES**

Mr. Chairman,

13. Last but not least, on the topic **Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties** to the Special Rapporteur's **interim conclusion** which had been provisionally adopted.

Mr. Chairman,

14. During the previous sessions, the views of draft conclusions 1 to 10 which still stand at the moment in this regard. Malaysia wishes to iterate her previous view that subsequent agreement and subsequent practice which includes subsequent practice in the interpretation of a treaty is Malaysia's view that the modification or amendment of a treaty in line with articles 39-41 of the Vienna Convention on the Law of Treaty (VCLT).

Mr. Chairman,

15. With regard to the present **interim conclusion 11** which is addressing the role of subsequent agreement and subsequent practice in the interpretation of a treaty, Malaysia greatly appreciates the importance of this draft conclusion.

