

# MALAYSIA

Permanent Mission to the United Nations, New York

Address: 313 East 43<sup>rd</sup> Street  
New York, NY 10017

Tel: (212) 986 6310  
Email: [mwnewyorkun@kln.gov.my](mailto:mwnewyorkun@kln.gov.my)

Web: [www.kln.gov.my/web/usa\\_un](http://www.kln.gov.my/web/usa_un)

draft Article 2 regarding the definition of piracy, Malaysia believes that the Commission could offer further clarification on the interpretation of the term “for private end”, particularly when the crime of piracy is committed for ideological or political ends. Malaysia views that such clarification is crucial taking into consideration the differing views and debates currently ongoing on this issue and the fact that piracy itself is a crime that could attract the exercise of universal jurisdiction.

3. With respect to draft Article 3, it is observed that the Commission decided to use the words “Armed robbery at sea” instead of “Armed robbery against ship” at the chapeau of the said draft article to avoid a restrictive definition. It is further stated in the commentary to the said draft article that armed robbery at sea does not necessarily involve two ships, which means it covers such acts committed by persons already on board the ship. The commentary, however, does not specify whether an act of such nature committed against other sea transportation, oil platforms, etc., is included in the definition. Nevertheless, from the plain reading of the draft Article itself, the term “directed against a ship or against persons or property on board such a ship” denotes that the definition does not extend to these entities, similar to the definition of piracy. Thus, Malaysia seeks the Commission’s further explanation on this issue to avoid any uncertainty.

4. Malaysia also observes that the commentaries for the newly introduced draft articles 4, 5, 6 and 7 are yet to be made available by the Drafting Committee. These commentaries serve as crucial tools in assisting states and international organizations to understand the reasoning behind the drafting as well as the application of the draft articles. As such, Malaysia intends to reserve our comments and observations on draft articles 4, 5, 6 and 7 for future sessions of the Assembly.

5. With regard to the final form of the draft Articles, Malaysia notes that there are differing views among the members on whether the draft articles could be a basis of binding instruments or be treated as guidelines aimed at harmonising national laws and identifying lacunae in the area of law. Malaysia believes that it is still premature at this stage to determine the final form or status of the draft articles.

6. Be that as it may, Malaysia remains committed to supporting the Commission's noble mission of advancing international law. We are confident that the Commission's ongoing efforts in this domain will contribute significantly to the global legal framework and foster a shared commitment among states to address the challenges pos(co)6(m)3(m)-6(itt)8(e)-3(

analysis of the origins, scope and critical elements of this timely topic. Malaysia values

they can enhance the ILC's work by reflecting the realities of international cooperation across different contexts.

12. Malaysia will now turn to address the key headings and questions raised in the Special Rapporteur's First Report and discussed by the Commission.

#### Title and Scope of the Topic

13. Malaysia adopts a practical and balanced stance in the ongoing discussions on non-legally binding international agreements. We believe the emphasis should be on the content and function of these instruments, rather than becoming entangled in debates over their labels. Whether called "agreement", "understanding", or "arrangement" the focus should be on the shared intention between States or international organisations, irrespective of whether they create legal obligations.

14. Malaysia acknowledges that different legal systems use varied terms when describing such instruments. In our case, the Malay term "perjanjian" is commonly

the flexibility to engage in non-binding commitments without needing to classify them as legally enforceable treaties from the outset.

Identification of questions to be examined: Criteria, Regime and Legal Effects

Criteria

18. Malaysia underscores the primacy of intent in determining the legal nature of non-legally binding international agreements. The parties' intention is critical in distinguishing

international agreements and respecting the executive's role in their negotiation and execution.

22. In conclusion, Malaysia advocates for a balanced approach in assessing non-legally binding agreements. The hybrid method, which combines both subjective intent and objective indicators, provides a comprehensive approach to address the complexities of these instruments. Additionally, judicial bodies should approach reclassification with caution, respecting the expressed intent of the parties and the executive authority in entering into such agreements.

### Regime

23. Much has been discussed in the reports regarding the careful application of treaty law by analogy, particularly where important principles such as jus cogens norms are concerned. Malaysia agrees with the Special Rapporteur and ILC members that non-binding agreements cannot violate peremptory norms, such as the prohibition of

and purpose of such agreements in good faith, their credibility and utility are diminished, thereby eroding the trust and respect upon which international relations depend.

21. Malaysia also supports the Special Rapporteur's conclusion that, in cases of conflict, treaties must take precedence over non-binding agreements. Treaties create binding legal obligations that cannot be superseded by the political or moral commitments made in a non-binding agreement. Nonetheless, Malaysia recognises that non-binding agreements may still influence treaty negotiations, serving as a framework or shaping the context in which treaties are concluded.

22. Malaysia shares the caution expressed by several ILC members regarding the creation of a parallel legal regime for non-binding agreements. The ILC's work should focus on clarifying the nature of these instruments without imposing rigid legal frameworks that could undermine their inherent flexibility. The true value of non-binding international agreements lies in their adaptability, especially in allowing states, intergovernmental parties to engage without the formality of binding legal commitments.

#### Potential Legal Effects

23. Malaysia takes keen interest in the discussions surrounding the questions of "legally binding force" and "legal effects" in relation to non-legally binding international agreements.

24. In Malaysia's view, legally binding force refers to an agreement's capacity to impose enforceable legal obligations, thereby allowing parties to seek formal legal redress in the event of a breach. This directly addresses whether an agreement can engage mechanisms for dispute resolution and enforcement of obligations. In our practice, the decision on whether to enter into a legally binding or non-legally binding instrument depends largely on the nature of the commitments and the appetite of the parties involved. While some agreements require the certainty of legally enforceable provisions, others benefit from the flexibility afforded by non-binding instruments.

25. However, even in instances where Malaysia enters into legally binding agreements, amicable dispute resolution mechanisms, such as consultations or negotiations through diplomatic channels, are often favoured over third-party adjudication in international tribunals. This underscores that legally binding force does not always necessitate strict enforcement through judicial means but can also rely on mutually agreeable mechanisms that respect the parties' intent.

26. Malaysia is keen to further examine the distinction between the question of “legally binding force” and “legal effects”, as this raises complex questions. The Special Rapporteur makes a clear distinction between the two: while legally binding force refers to the capacity to compel action or provide grounds for legal recourse, legal effects can arise from non-binding agreements even without formal enforceability. Malaysia notes



