



**PERMANENT MISSION OF THE REPUBLIC OF
SIERRA LEONE TO THE UNITED NATIONS**

336 East 45th Street, New York NY 10017

Statement

by

H.E. DR. MICHAEL IMRAN KANU

Charge d'Affaires a.i.

Deputy Permanent Representative

at the 77th Session of the United Nations General Assembly

Agenda item 77:

**“Report of the International Law Commission on the
work of its seventy-third session”**

Cluster II:

*Chps: VI (Immunity of State officials from foreign
criminal jurisdiction) and IX (Sea-level rise in relation to
international law)*

New York, 28th October 2022

Check Against Delivery

Chair,

1. The delegation of Sierra Leone views the two topics in Cluster II of the debate on agenda item: "*Report of the International Law Commission on the work of its seventy-third session*", as important and highly relevant.
2. On the topic of high interest to member States, "**Sea level rise in relation to international law**", we note that during the 73rd session, the Study Group met to discuss the high quality second issue paper prepared by Co-Chairs **Ms. Patrícia Galvão Teles (Portugal)** and **Mr. Juan José Ruda Santolaria (Peru)**, focused on protection of persons affected by sea level rise, statehood and recognition respectively.
3. We further note that the Commission adopted the Draft Report of the Study Group, and we wish to underscore the point that on both the material scope and the temporal scope of the topic, the Study Group should not be prevented from reaching conclusions on whether existing international law would be sufficient to address the challenges faced or whether new rules or principles were required to fill potential gaps.
4. We agree that indeed "*in the particular circumstances of an extremely complex, existential and unavoidable phenomenon such as sea-level rise, where there [may be] limited State practice since no State [has] yet been fully submerged, the Commission might [...] have recourse to reasoning by analogy and interpretative norms, consistent with its mandate to progressively develop international law*".
5. On the important point sources of law, we see the relevance, inter alia, of the principle of international cooperation for the subtopics, that is, statehood and the protection of persons affected by sea-level rise, and the principle of common but differentiated responsibility.
6. The principle of cooperation, we agree, could play an important role for States to provide for their own preservation, as suggested by the Co-Chairs in the second issues paper. The very high cost of preservation measures such as the installation or reinforcement of

coastal barriers or defences and dykes, reinforces the importance of international cooperation “through technology transfer and the exchange of best practices”.

7. Further, we are of the view that the principle of common but differentiated responsibilities, insofar as the cost of addressing such a severe global environmental problem should be distributed among different States according to their historical responsibility and to their capabilities.
8. The second issues paper, offers important identification of principles relating to the rights and duties of States, including the unalienable right to take measures to remain a State; the relevant aspects listed for consideration on the issue of statehood relating to the phenomenon of sea-level rise; and the need to further develop the existing international legal frameworks potentially applicable to the protection of persons affected by sea-level rise owing to the present fragmentation.
9. Overall, we commend the Commission led by the Co-Chairs of the Study Group on the steady progress being made on the topic. We share the views expressed by the Co-Chairs in recalling that “sea-level rise is a global phenomenon, which is not uniform and poses serious threats to all States. For low-lying and small island developing States, the threat is existential in nature, and in the case of small island developing States, it concerns their very survival”. We also share the “sense of urgency given the issues at stake and the gravity of the situation”.
10. We take note that the Commission decided to request the Secretariat to prepare a memorandum identifying elements in the Commission’s previous work that could be relevant for its future work on the topic, in particular in relation to statehood and the protection of persons affected by sea-level rise, for its consideration at its seventy-fifth session.
11. As the Study Group plans to focus on the subject of sea-level rise in relation to statehood and protection of persons affected by sea-level rise at the Commissions seventy-fifth session (2024), the effort to take into account regional perspectives, including the views of

African States, in relation to the two subtopics this year but also all three topics before the study group including the critical questions relating to the law of the sea remains vital to ensure that whatever outcomes are generated, gain broader acceptance among the member states. We also welcome the plans to, at a later stage, consolidate the work of the study group with the view to drawing conclusions on a way forward on this critical topic.

Chair,

12. Turning to “**Immunity of State officials from foreign criminal jurisdiction**”, which has been the longest running topic in the current agenda, the delegation of Sierra Leone appreciates the Commission’s adoption of the text of the 18 Draft Articles on immunity of State officials from foreign criminal jurisdiction and their commentaries on First Reading. We thank the Special Rapporteur, **Ms. Concepción Escobar Hernández (Spain)** for leading the work of the Commission on this important topic to such a milestone. We thank her for excellent contributions, her hard work and dedication and her personal sacrifices for the benefit of the Commission, and ultimately, States and the international legal community as a whole.
13. This topic is of great interest to member States, including African member States, as the study of the topic implicates, inter alia, issues of State sovereignty, diplomatic relations and other topics being addressed in both the Sixth Committee and the Commission.
14. The Commission has invited States to comment on the Draft Articles until 1st December 2023, and Sierra Leone will offer some preliminary thoughts in this debate on the adopted Draft Articles on First Reading, noting that the Commission will apply equal weight to comments here in the Sixth Committee as it would to written submissions.
15. On Draft Articles 1 to 18 generally, from Draft Article 1 (**scope of the present draft articles**), which now includes a new paragraph 3, further to what was previously provisionally adopted, Sierra Leone takes note with interest of the inclusion of a without prejudice clause intended to ensure the separation and independence of

the draft articles and the special regime applicable to international criminal courts and tribunals from the regime of immunity applicable at the national level. This is done by essentially providing that the draft articles “*do not affect the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals and as between the parties to those agreements*”.

16. As a State Party to the Rome Statute of the International Criminal Court (“ICC”), this is of particular interest, as between the States Parties to the Rome Statute, for instance, Draft Articles 3 and 4 (on **immunity *ratione personae***); Draft Articles 5 and 6 (on **immunity *ratione materiae***); Draft Articles 7 (**crimes under international law in respect of which immunity *ratione materiae* shall not apply**); and quite importantly, the procedural provisions and safeguards contained in Part Four, that is, Draft Articles 8 through to 18 will not be applicable. This must be read, in the case of the ICC, within the framework of the principle of complementarity, where the ICC is a Court of last resort.
17. Sierra Leone also supports draft article 7. We consider that, irrespective of whether codification or progressive development, the clarity provided in relation to some of the worst crimes known to international law is welcome and should enhance the possibility of justice for victims to obtain some justice for the pains and suffering that they endure. Moreover, and this is a critical point, ICC judicial interpretations of the obligations of States Parties under the Rome Statute, including in respect of immunity under article 27 and part 9 of the Rome Statute, are not in any way affected by the interpretations by the Commission including of ICC caselaw.
18. We shall now proceed to address Draft Article 14 (now (Determination of Immunity), 15 (Transfer of the criminal proceedings), and 16 (Fair treatment of the State official), some of the Draft Articles the Commission adopted before concluding its First Reading. We note that these Draft Articles, from 13 through 18 address State cooperation, dispute settlement regarding official immunity, and procedural and substantive safeguards of the rights of the official whose immunity is in question.

19. On **Draft Article 14, "Determination of Immunity"**, my delegation tends to agree with the early determination considering the diverse State practice and deems as appropriate the use of the terminological phrase "*competent authorities of the forum State*" since a determination can be made by a police officer, a prosecutor, or a foreign ministry official, before courts become involved. This also does not preclude the courts of the forum State having a say subsequently in our view.
20. My delegation will continue to examine the utility of retaining **Draft Article 8, "Examination of immunity by the forum State"** and **Draft Article 14**, and whether it may be necessary to retain both. The decision by the Commission to differentiate between determination (Draft Article 14) and examination (Draft Article 8) and retaining both articles is well noted.
21. My delegation agrees at this stage with the inclusion into the text in **Paragraph 1**, "*and in conformity with the applicable rules of international law*", as it emphasizes that, regardless of the flexibility envisaged with respect to the organs, laws and procedures of the forum State, the determination must nevertheless produce a result that is consistent with international law.
22. On **paragraph 2** of Draft Article 14, we tend to agree with the methodology of the use of a non-exhaustive list, the factors that need to be taken into account by the competent authorities when determining the potential applicability of immunity.
23. On **Paragraph 3**, Sierra Leone takes note of the robust debate in the Commission, including on the need to reference **Draft Article 7, "Exceptions to Immunity"**, and to provide procedural safeguards for the exceptions that are seen as very broad in scope. As we continue to study this aspect, the view is taken that the decision to include procedural safeguards specifically applying to and mentioning Draft Article 7 in paragraph 3 of Draft Article 14 may assist with clarity and address politicization, given the scope of possible competent authorities, notwithstanding if the competent authority is of the appropriate high level.

24. The use of the standard of proof already inspired by the Rome Statute of the ICC, that is, “*assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7*” although with a robust debate, further consolidates what will be the practice of at least 123 States. As this assures of a higher threshold of proof, it may also promote similar interpretation as that of the Rome Statute, even if this is not the stated objective.
25. Finally on this Draft Article 14, Sierra Leone wishes to signal support for the deletion of the provision that the official be present in the forum State when making a determination of immunity in relation to Draft Article 7.
26. On **Draft Article 15, “Transfer of the criminal proceedings”**, which is seen as an important safeguard, the Commission should bear in mind a balance of interests between the State of the forum and the State of the official. We note the limited approach in **Paragraph 1** to relations between the forum State and the State of the official, and this further builds on existing State practice regarding the complementary nature of the jurisdiction of the forum State.
27. Note is taken in this regard of **Paragraph 5** submitted by the Special Rapporteur to address concerns raised in the sense that the provision on transfer of proceedings does not address fully relations with third States and could conceivably create a conflict of obligations with respect to the obligation to extradite or prosecute provided for in various treaties in relation to crimes under international law.
28. There are broader implications of the text in Paragraph 5. It is not limited to “*an obligation in relation with criminal matters due by*” the forum State. It is framed in general terms and seems to cover both the obligations of the “forum State” and the “State of the official”, but with inroads for third States. This may not be helpful for greater certainty and Sierra Leone urges the Commission to revisit this paragraph to narrow the focus.
29. On **Draft Article 16, “Fair treatment of the official”**, we note that this is a safeguard provision to ensure fair treatment and fair process

of the suspect or accused official, and similar to the safeguards in the Crimes against humanity Draft Articles it adopted in 2019, and also referencing human rights and international humanitarian law and broad checks on personal and substantive rights abuses. As the Draft Articles would apply against the general background of the applicable law at the national and international levels, the inclusion of this additional safeguard, in addition to those already provided for in international law, may be of merit.

30. Sierra Leone takes note of the possibility now that there will be a new special rapporteur appointed for this topic by the Commission in its new composition. We call on the Commission, given the challenges this topic has faced in between transitions, to take into account the need for stability and continuity in the direction of the current work. That is vital to ensure the work of the Commission is ultimately more helpful to States in relation to the outcome of the present topic.
31. My delegation once more expresses appreciation for this important work and call on the Commission to be responsive to the views of States, particularly African States to ensure the Draft Articles does not enable politicization evidenced already in international affairs.
32. I thank you.