SUBMISSION OF THE REPUBLIC OF SIERRA LEONE
to the United Nations International Law Commission
on the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone

18 January 2023

Introduction

1. In reference to paragraph 5 (c) of United Nations General Assembly resolution A/77/103 on the "Report of the International Law Commission on the work of its seventy-third session" adopted on 19 December 2022, wherein the attention of Governments was drawn "*to the importance for the International Law Commission of having their views on the various aspects of the topics on the agenda of the Commission, in particular on all the specific issues identified in chapter III of its report*",[1] the Republic of Sierra Leone appreciates the opportunity to submit preliminary or initial views as requested regarding "*Subsidiary means for the determination of rules of international law*".

2. The Republic of Sierra Leone reiterates its support for the United Nations International Law Commission's decision to add "subsidiary means for the determination of rules of international law" to the current work programme in May 2022 and for the appointment of Prof. Charles Chernor Jalloh as Special Rapporteur for the topic.

Information on the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone

3. In view of the request of the Commission in the use of subsidiary means for the determination of rules of international law within the meaning of Article 38, paragraph 1(d), of the Statute of the International Court of Justice, the starting point for Sierra Leone is the Constitution of Sierra Leone, Act No. 6 of 1991 (hereinafter "the Constitution"). The Constitution does not directly address the issue of sources of international law generally nor the place of subsidiary means in the determination of rules of international law.

4. The Constitution, however, does address some questions of international law. This can be said to cover two main aspects. First, fundamental questions of State policy are addressed in Chapter II of the Constitution, and although not justiciable, mandate that all organs of government and persons exercising legislative, executive, or judicial powers must abide by them. These include Sierra Leone's foreign relations in respect of which Section 10 of Chapter II of the Constitution provides as follows:

[1] UN Doc. A/77/10 at paras. 8-9.

The Foreign Policy Objectives of the State shall be –
a. the promotion and protection of the National interest;
b. the promotion of sub-regional, regional and inter-African co-operation and unity;
c. the promotion of international co-operation for the consolidation of international peace and security and mutual respect among all nations, and respect for their territorial integrity and independence; and
d. respect for international law and treaty obligations, as well as the seeking of settlement of international disputes by negotiation, conciliation, arbitration or adjudication.

5. The second aspect addresses more directly the country's relation with international law. The Constitution makes clear that it is the executive branch, and specifically the President, who enters into treaties, agreements or conventions on behalf of Sierra Leone and who also bears the legal duty to ensures respect for treaties and international agreements.[2] In what has been judicially interpreted as a limitation on the power of the executive branch to execute treaties in the name of Sierra Leone, Parliament also plays an important role under the Constitution. Thus, treaties or agreements that are within the legislative competence of Parliament or that in any way alter the laws of Sierra Leone or that carry financial implications are subject to ratification typically via enactment of a legislative instrument[3] or a resolution adopted by no less than half of the members of Parliament.

6. The Constitution does not directly address the status of customary international law or general principles of law in the national law of Sierra Leone. This is also the case for subsidiary means within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice.

7. Sierra Leone, being a dualist system, requires that international agreements and treaties are domesticated in national law. This means that, even when questions of international law arise (whether directly or indirectly), they usually are dealt with by reference to the national law of Sierra Leone or based on judicial decisions from other common law jurisdictions which may provide persuasive authority. Frequent references are found to decisions of United Kingdom courts as well as the courts of other African common law jurisdictions such as Ghana and Nigeria.

8. From an Article 38(1) of the Statute of the International Court of Justice perspective, the treatment of questions of international law by the national courts of Sierra Leone suggest that reliance is often placed on judicial decisions of other national and

[2] See Chapter V, S. 40 of the Constitution of Sierra Leone, 1991 (as amended).
[3] For example, following the conclusion of an agreement between the Government of Sierra Leone and the United Nations to establish a special court for Sierra Leone, Parliament enacted on 29 March 2002 the Special Court Agreement, 2002 (Ratification) Act. No. 7 pursuant to ss. 4 of s. 40 of the Constitution of Sierra Leone, 1991.

international courts addressing the same question. Teachings of publicists may be used to elucidate the relevant points or to confirm the interpretation adopted by the courts.

9. As an illustrative example, in the judgment of the case S.C. NO. 1/2003, *Issa Hassan Sesay et al vs. The President of the Special Court, the Registrar of the Special Court and the Attorney-General and Minister of Justice*, delivered on 14 October 2005 (and annexed to this submission), the Supreme Court of Sierra Leone, which under our Constitution, is the final court of appeal and in relation to whose decisions on questions of law all other national courts are bound to follow under Chapter VII section 122(2), addressed several questions concerning the validity of the agreement between the Government of Sierra Leone and the United Nations establishing the Special Court for Sierra Leone including the question of immunity.

10. The Court, in addressing the aspect of the constitutionality in relation to immunity, relied on both the decisions of other national courts notably from the United Kingdom[4] and the International Court of Justice[5] as follows:

> *A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third States except if has been waived by the State concerned. The principle was applied by the House of Lords in the Pinochet proceedings….*

11. The judgment continued with a reference to the decisions of other national courts and international tribunals, and as almost a primary source, referred to the teachings of publicists:

> *In contrast, where the immunity is claimed by a Head of State before an international court the position to be inferred from the decisions of various national courts and international tribunals, and the writings of international jurists is that there exists no a priori entitlement to claim immunity particularly from criminal process involving international crimes." [Emphasis added].*

12. In a later part of the same judgment, the Supreme Court of Sierra Leone, in adverting to the distinction between the treatment of immunity before municipal courts and immunity from process before an international court, also referenced the statutes of other international courts and tribunals going back to the Nuremberg International Military Tribunal through to the ad hoc international tribunals and the Rome Statute of the International Criminal Court which it found, like the Statute of the Special Court for Sierra Leone, did not recognize immunity of any official before the international tribunal.

[4] See, in the judgement, the references to the rulings of the UK courts in Pinochet.

[5] The Court cited the Arrest Warrant Judgment delivered by the International Court of Justice.

13. Having referred to the specific provisions, the Supreme Court continued:

> *"The inclusion of such clause in the charters/statutes of international criminal courts from Nuremberg to the ICC has met with approval in all the relevant case law such as Pinochet in the House of Lords or in the Yerodia judgment of the ICJ. In addition a majority of academic commentary supports the view that an international criminal tribunal or court, may exercise jurisdiction over a serving head of state and that such person is not entitled to claim immunity under customary international law in respect of international crimes." [Emphasis added].*

14. A final relevant part of the Supreme Court for Sierra Leone's *Sesay et al*. judgment, in addressing the question of concurrent jurisdiction between the Special Court for Sierra Leone and the national courts of Sierra Leone, referenced the Statutes of the ICTY and the ICTR before turning to the Rules of Procedure and Evidence and mentioning two judgments of the ICTY in the *Tadic* and *Karadzic* cases to uphold the primacy of the jurisdiction of the international tribunal on the issue before it.

15. Thereafter, after having relied on those authorities to reach its finding that the primacy of the Special Court for Sierra Leone does not contravene section 125 of the Constitution dealing with the supervisory jurisdiction of the country's highest court, the Supreme Court of Sierra Leone quoted Prof. Yuval Shany's book on *The Competing Jurisdictions of International Courts and Tribunals*, at p. 140. In this instance, the quoted text appears to supply additional reasons for the position already adopted.

Conclusion

16. The International Law Commission's study of the "*Subsidiary means for the determination of rules of international law*", is important and supported since it has offered an opportunity to also examine the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone. Given the timeframe for the call for views and our submission, we have referred to one important case from the highest/constitutional court, to give an example of the practice in Sierra Leone. Sierra Leone hopes that this submission would prove useful to the work of the Commission in relation to our national judicial practice on the use of subsidiary means for the determination of rules of international law.