

**COMMENTS AND OBSERVATIONS  
BY THE REPUBLIC OF SIERRA LEONE**

**On the International Law Commission's Draft Articles on the Immunity of  
State Officials from Foreign Criminal Jurisdiction as adopted by the  
Commission on First Reading during its 73<sup>rd</sup> (2022) Session  
13 March 2023**

**I. Introduction**

1. In accordance with paragraph 66 of the Report of the International Law Commission on the work of its Seventy-Third Session (A/73/10, Report of the International Law Commission, 73<sup>rd</sup> Session), the Republic of Sierra Leone appreciates the opportunity to submit its comments on the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, and accompanying commentaries, which were adopted on first reading.
2. We recall that the Commission added this important topic to its program of work in 2007, making it the longest running topic on the current agenda. Sierra Leone was therefore pleased that, on 3 August 2022, the Commission successfully completed its first reading and “decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.”
3. Sierra Leone, which remains firmly committed to the fight against impunity, attaches great importance to the work of the Commission and values all its many contributions to the field of international criminal law. We also value the specific work on this critical albeit sometimes sensitive topic. We are for these reasons grateful to all members of the Commission who have worked on this topic over the course of the past 16 years. Special appreciation must go to the two previous special rapporteurs on this topic, Ms. Concepcion Escobar Hernandez (who prepared eight reports on the topic) and Mr. Roman Koldokin (who prepared three reports), for their hard work and the results achieved.
4. We congratulate Mr. Claudio Grossman on his appointment as special rapporteur for this topic in summer 2023. His involvement in the work on the topic, over the past few years, gives us great confidence that he and the Commission as a whole (in its new composition) will not change the direction of this topic at this late stage. To do so, at the final reading stage, would introduce grave uncertainty in an already challenging topic. Even worse, it could be detrimental to the clarity and consolidation of the law of immunity under international law.
5. We note the importance for the Commission the views of the contemporary pluralistic international community and the need to ensure the views of countries in Africa, Asia and Latin America and the Caribbean are taken into account. It is States from these

regions that together make up the vast majority of the membership of the United Nations, and at the same time, are often subjected to the political abuse and misuse of the rules of immunity and universal jurisdiction against their officials. It is against this backdrop that Sierra Leone looks forward to the successful completion of the second reading, by the Commission, on this vital topic.

## **II. General Comments on the Draft Articles**

6. Sierra Leone would like to make two preliminary comments. First, Sierra Leone can support many of the Commission's 18 draft articles on this topic as adopted on first reading in August 2022. We consider that there are several draft articles that reflect extensive State practice and *opinio juris* thereby constituting codification of customary international law (for example, most of the draft articles in Parts Two (*Immunity ratione personae*) and Three (*Immunity ratione materiae*), especially Draft Articles 3 to 6).
7. We also consider that there are quite a few draft articles, especially some of the innovative ones contained in the procedural safeguards (in Part Four), that reflect proposals for the progressive development of international law rather than their codification. Nonetheless, Sierra Leone still finds the combination of texts of different normative value into a single set of draft articles consistent with the mandate of the Commission pursuant to Articles 1 and 14 of its Statute. Indeed, as was implied by paragraph 12 of the general commentary to the draft articles, they reflect the longstanding composite approach to codification developed by the Commission starting in the early 1950s.
8. Second, for the purposes of our observations, Sierra Leone will not attempt to be comprehensive. Rather, our comments will be selective as we are still studying the draft articles and their commentaries. For this reason, we focus below on two draft articles of particular interest to us. Nonetheless, our decision not to comment on the remaining draft articles should not be taken as an indication of Sierra Leone's endorsement of their full contents or their commentary. Sierra Leone therefore reserves the right to make additional comments on the remaining draft articles on this important topic at a later stage.

## **III. Comments on the commentaries and select draft articles**

### **A. The general commentaries: balancing principles of sovereignty against the fight against impunity**

9. Sierra Leone would like to make two points on the general commentaries. First, we generally agree with and thus welcome the general commentary. We further agree that the key challenge for the Commission and States in this topic is how best to strike a balance between the foundational principles of sovereign equality of States, which is

the very basis of immunity of State officials from foreign criminal jurisdiction, on the one hand, and the fight against impunity on the other. We agree that, as both imperatives are equally important for States and the international community, it is critical to ensure that the immunity of State officials from foreign criminal jurisdiction does not result in impunity for the most serious crimes under international law. Impunity must be tackled by both national courts, which have the primary responsibility to investigate and prosecute such crimes, and international criminal tribunals where they possess jurisdiction. Sierra Leone, as a State Party to the Rome Statute, has committed to the fight against impunity. It has also made its own contributions through the joint establishment with the United Nations of the innovative Special Court for Sierra Leone which today serves as one of the principal models of a hybrid court.

10. Second, bearing the above considerations in mind, we welcome that as explained by paragraph 10 of the general commentaries, “***the Commission has also borne in mind that, under certain circumstances, the exercise of criminal jurisdiction over officials of another State may be politically motivated or abusive, which in turn will create undesirable tension in the relations between the forum State and the State of the official.***” [Our emphasis]. This abuse and misuse of international law is a reality that has been experienced by many African and Global South States in respect of the treatment of their State officials in foreign criminal courts since the 1990s leading, inter alia, to the *Arrest Warrant Case* at the International Court of Justice.
11. We therefore strongly agree with the Commission that the present draft articles must necessarily be matched with “a set of procedural provisions and safeguards aimed at promoting trust, mutual understanding and cooperation between the forum State and the State of the official and offering safeguards against possible abuses and politicization in the exercise of criminal jurisdiction over an official of another State.” We underline that the safeguards are critical not just for Sierra Leone, but also for all other African States, as manifested in numerous African Union decisions and their placing on the Sixth Committee agenda in 2009 the agenda item on Scope and application of the principle of universal jurisdiction.

## **B. Draft Article 1**

12. Sierra Leone appreciates Draft Article 1 – the provision on the scope of the draft articles, which consists of three paragraphs. The first paragraph addresses the scope of the draft articles, making clear that it concerns the immunity of “State officials” (as defined in draft Article 2 (a) from the criminal jurisdiction of another State. The second paragraph underlines that the draft articles are “without prejudice” to the immunity from jurisdiction enjoyed under special rules of international law including those in respect of diplomatic and consular immunities. We support this second paragraph. That said, Sierra Leone has some doubts about paragraph 3, which

provides that “The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements”. Our doubts stem from two main considerations.

13. **First**, Sierra Leone, as a State party to the Rome Statute, does not consider that the rights and obligations it has under the Rome Statute can be affected by the Commission’s draft articles in respect of the relationship between itself and other 122 States Parties to the International Criminal Court. Those rights and obligations spelled out in the Rome Statute are not at all the subject of Commission’s draft articles, which as expressly noted in Draft Article 1(a) concerns only the immunity of State officials from the foreign criminal jurisdiction of another State instead of the immunity of State officials from the criminal jurisdiction of the International Criminal Court – a separate international organization with its own distinct legal personality under international law (as confirmed by Article 4 - Legal Status and Power of the Court - of the Rome Statute). Indeed, as regards immunity before the ICC, all States Parties have accepted Article 27 of the Rome Statute which establishes the irrelevance of immunities and special procedural rules of official persons under national and international law to prosecutions before the ICC.
14. Even assuming that the Commission draft articles were transformed into a convention, and Sierra Leone became a State party to that convention, there would be no basis in international law for such a treaty to regulate let alone affect the rights and obligations between Sierra Leone and the other States parties to the Rome Statute – an entirely separate international agreement covering a different subject matter due to the *pacta tertiis rule* contained in Article 34 of the 1969 *Vienna Convention on the Law of Treaties* and also reflective of customary international law.
15. We therefore call on the Commission to reconsider this paragraph and either delete it in its entirety, or since the issue of scope of the draft articles is already well covered in relation to special rules of international law in paragraph 2 or Draft Article 1, to add such arrangements into the latter paragraph. The Commission might even just explain any remaining concerns it may have as to how the draft articles might relate to International Criminal Courts in the commentary to current paragraph 2.
16. **Second**, were the Commission to retain the text of paragraph 2, Sierra Leone supports the member of the Commission whose view is mentioned at paragraph 25 of the commentary concerning the imprecise nature of the phrase “international agreements establishing international criminal courts and tribunals.” While the Commission notes, when reading the phrase together with “as between the parties to those agreements” the possibility that obligations may still be imposed on States by, for example the UN Security Council acting under Chapter VII of the UN Charter, the Commission might wish to revisit that language to make it clearer.

17. For instance, the Commission might reformulate the provision to read that the “present draft article do not affect the rights and obligations of States Parties under international ~~agreements~~ instruments establishing international criminal courts and tribunals as between the parties to those instruments ~~agreements~~.” Instruments is a broader term than agreements. It could encompass treaties or other agreements as well as binding resolutions of international organizations such as those taken under Chapter VII of the UN Charter to establish the International Criminal Tribunals for the Former Yugoslavia in 1993 and Rwanda in 1994.

**C. Draft Article 7 should be retained but be expanded to include slavery and slave trade crimes and the crime of aggression**

18. Sierra Leone fully supports Draft Article 7 which concerns crimes under international law in respect of which immunity *ratione materiae* shall not apply. Sierra Leone concurs with the Commission that the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearances are among the most serious crimes of concern for which functional immunity are not applicable at the horizontal level.
19. **On slavery and slave trade crimes**, Sierra Leone notes that the Committee had previously received several suggestions for crimes to be included in draft article 7, among them the international crime of slavery; yet, the Draft Committee had decided not to incorporate the suggestions. When draft article 7 was adopted after a recorded vote, at least three members commented with dissatisfaction on the inconsistency of the exclusion of the prohibition of slavery from the list of draft article 7 (1), despite it being the subject of international conventions and its *jus cogens* status (A/CN.4/SR.3378).
20. Sierra Leone considers both the slave trade and slavery to be among the crimes of greatest concern to the international community. A broad international consensus exists as to their definitions, as well as on the obligations to prevent and punish them. As outlined above, the slave trade and slavery have been addressed in treaties and are also prohibited by customary international law (A/77/10, p.236, para. 18). The exclusion of the slave trade and slavery under draft article 7 (1) presents an inconsistent drafting oversight, which can be rectified by the proposed inclusion.
21. Sierra Leone, recognizing the paramount significance of inclusivity, respectfully proposes the inclusion of the international crimes of the slave trade and slavery under draft article 7 (g) “Crimes under international law in respect of which immunity *ratione materiae* shall not apply.” Draft article 7 (1) currently identifies six crimes under international law in respect of which immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply, namely the crime of genocide (a), crimes against humanity (b), war crimes (c), the crime of apartheid (d), torture

(e), and enforced disappearance (f). it is imperative to underscore the discernible incongruity in their exclusion, prompting a call for rectification with utmost urgency.

22. The slave trade and slavery are distinct, stand-alone international crimes whose prohibition concerns peremptory norms of international law (*jus cogens*) with attendant *erga omnes* obligations of states. The status of slavery and the slave trade stands uncontested as treaty-based and customary-based international crimes and non-derogable human rights violations. The U.N. recognized the legal prominence of the prohibition of the slave trade and slavery early in its history. Its predecessor, the League of Nations, promulgated the 1926 Slavery Convention, uniformly condemning the slave trade and slavery. The 1956 Supplementary Slavery Convention, drafted under the U.N.'s auspices, reiterated condemnation of slavery and the slave trade as international crimes.

23. **On the crime of aggression**, Sierra Leone notes that, despite the views of at least seven Commission members to the contrary expressed at the adoption of Draft Article 7 on 10 July 2017, the Commission failed to expressly include the crime of aggression in the list of crimes in respect of which immunity *ratione materiae* shall not apply under Draft Article 7. With all due respect, like the members of the Commission who opposed this, Sierra Leone does not find convincing the explanation provided for this glaring omission.<sup>1</sup> Worse, the Commission has since issued shifting explanations, between the 2017 and 2022 annual reports, without transparently explaining the reasons for omitting some of the arguments it had used to justify the exclusion after they were superseded by events (such as the eventual activation of the crime of aggression by the ICC). There are additional reasons for our doubts, so well expressed by the minority of members at the time, but it is sufficient to highlight three of them which also find additional support in the legal literature.<sup>2</sup>

24. **First**, as a matter of principle, the Commission justified the inclusion of genocide, crimes against humanity and war crimes on the basis that they are mentioned in the Rome Statute as among the most serious crimes of concern to the international community. The crime of aggression is also included in the Rome Statute and by separating it from the other core crimes risks effectively downgrading its status.<sup>3</sup> So we do not find the argument compelling. Neither was the better argument based on gravity since the crime of aggression is arguably the gravest of the core crimes.

25. To us, as the Sierra Leonean member of the Commission explained, the crime of aggression should have been included as it has long been recognized to be among the most serious crimes of concern to the international community as a whole under international law. In fact, it is for that reason that the Nuremberg Tribunal Judgment

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<sup>1</sup> See the statements in explanation of vote by Mr. Tladi, Mr. Hmoud, Mr. Jalloh, Mr. Murase, Mr. Hassouna, Mr. Ouazanni-Chahdi, Mr. Park, [Provisional summary record of the 3378th meeting \(un.org\)](#) July 20, 2017.

<sup>2</sup> See Chile Eboe-Osuji, [Late Effort at the International Law Commission to Decriminalize the Crime of Aggression Is Wrong in Law | Lawfare \(lawfaremedia.org\)](#)

<sup>3</sup> See the statement of Mr. Jalloh [Provisional summary record of the 3378th meeting \(un.org\)](#) July 20, 2017.

of 1946 concluded that “to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” [Our emphasis]

26. **Second**, the Commission itself, in a long list of its own previous works that date back to its formulation of the Nuremberg Principles, has always included the crime of aggression as foremost among the crimes against the peace and security of mankind which are crimes under international law that are punishable as such. In this regard, as exemplified by the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which was meant to apply at the national level, the crime of aggression, along with genocide, crimes against humanity, war crimes and other crimes, were condemned by the Commission as prosecutable. And irrespective of the official position of the individual who commits such a crime. Even if he acted as head of State or Government, that will neither relieve him of criminal responsibility nor will it mitigate his punishment.
27. **Third**, the Commission suggested that the crime of aggression is leadership crime that has political dimensions which warranted its exclusion from the list in Draft Article 7. Yet, it failed to complete the analysis in relation to the analogous core crimes which also implicate essentially the same leadership and political considerations that also give rise to genocide, crimes against humanity and war crimes. Indeed, all these crimes are committed more frequently or with graver implications when States and their officials go rogue - as was the case in World War II Germany and 1994 Rwanda. Genocide committed in Rwanda in 1994 was a direct result of this intersection between leadership and political power. Crimes against humanity, as defined in Article 7 of the Rome Statute, expressly incorporates a State or organizational policy requirement. In other words, those other core crimes are often also leadership crimes with political dimensions, similar to the crime of aggression.
28. For the above reasons, and others mentioned by the comments of other like-minded States and during the 2017 debate in the Commission, we call on the Commission to correct this glaring omission of the crime of aggression from the list of crimes for which immunity shall not apply in Draft Article 7. Sierra Leone’s concrete textual proposal is for the Commission to list the crime of aggression as paragraph 1 (a) of Draft Article 7 with the consequential changes renumbering the crime of genocide to paragraph (b) and the rest of the crimes listed through to enforced disappearance as paragraph 1(g).
29. With regard to the annex listing the treaties referred to in Draft Article 7, paragraph 2, which provides the definitions of the crimes, Sierra Leone would suggest a reference to Article 8bis of the Rome Statute by linking it to the ICC definition of the crime of aggression as follows: **Crime of aggression**, Rome Statute of the International

Criminal Court, 17 July 1998 (as amended by resolution RC/Res.6 of 11 June 2010), article 8 *bis*.

#### **IV. Comments on the Final Output of the Commission's Work on the Topic**

30. At paragraph (13) of the general commentary to the draft articles, the Commission indicated that it had not “yet decided on the recommendation to be addressed to the General Assembly regarding the present draft articles, be it to commend them to the attention of States in general or to use them as a basis for the negotiation of a future treaty on the topic.”
31. Sierra Leone notes that the preceding commentary foreshadows two main options will likely be given serious consideration by the new special rapporteur and the Commission. First, the possibility of recommending the draft articles to States generally. Second, the possibility of recommending that the draft articles be used as a basis for the negotiation of a treaty on the future.
32. We welcome the invitation of State comments on this issue and recognize that the decision will now be taken at the second reading stage. In Sierra Leone's view, given the nature of this topic and the current state of international law, taking into account the possibility that the conditions may not be present for a consensus decision to be taken in the Sixth Committee based on its recent practice, the Commission should not recommend the draft articles generally. Such a recommendation will not necessarily be well received on such a sensitive topic when, by the admission of the Commission in its general commentary, the draft articles contain elements of both codification and recommendations for progressive development of the law of immunity. Sierra Leone appreciates both prongs of the Commission's mandate. We are however mindful that there are quite a few States that appear to prefer only codification for this topic. If that assessment is true, it would seem unlikely they would join such consensus.
33. Moreover, balanced against considerations of sovereignty and the role of the Sixth Committee comprised of State delegates vis-à-vis the Commission comprised of independent experts, we would encourage the Commission to consider recommending, in line with Article 23 of its Statute, that the General Assembly *take note* of the draft articles in a resolution and that it annexes the draft articles to the resolution and encourage their widest possible dissemination.
34. The Commission could further recommend that the General Assembly consider, at a later stage and in light of the importance of the topic and the evolution of State practice in the fight against impunity, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to adopting a convention on the topic. We note in passing that the above approach would be consistent with the Commission's own approach in other benchmark projects, including the 2001 articles on the responsibility of States for internationally wrongful acts.



## **V. Concluding Remarks**

35. In conclusion, Sierra Leone again wishes to pay tribute to the Commission, its special rapporteurs for this topic, and entire membership for their outstanding work and dedication in the preparation of the present draft articles. Sierra Leone is hopeful that, as with the Commission's draft statute for a permanent international criminal court, this set of draft articles will in the future be viewed favorably by States and the General Assembly. We also hope that they will in the not-so-distant future come to join the pantheon of memorable Commission contributions to the progressive development of international criminal law and its codification.

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