



**Statement**  
**on behalf of the Republic of South Africa**

**by**

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**before the Sixth Committee of the 77<sup>th</sup> Session  
of the United Nations General Assembly**

**Under Cluster 2**

***“Immunity of State Officials from Foreign  
Criminal Jurisdiction and Sea-level Rise in  
relation to International Law”***

**New York, 1 November 2022**

## Chairperson

This topic has been on the agenda of the International Law Commission for a very long time now. The Commission decided in 2007 to include the topic “***Immunity of State Officials from Foreign Criminal Jurisdiction***” in its programme of work and appointed Mr Roman Kolodkin as Special Rapporteur. The Commission in 2012 appointed Ms Concepción Escobar Hernández as Special Rapporteur to replace Mr Kolodkin, who contributed a lot to this topic. We commend the Commission and in particular the Special Rapporteur Ms Concepción Escobar Hernández for her guidance on the work done so far as great strides have been achieved on this difficult and very sensitive topic. The accomplishment of the Commission on the First Reading of this topic cannot go unnoticed. We are grateful for the excellent work put into this matter.

## Chairperson

The Commission’s work on the issue of immunity from foreign criminal jurisdiction is of vital importance as it goes into the fundamental principles of international law and will, without a doubt have implications on the relations between states. The work done by the Commission on this topic will make a significant contribution towards legal certainty regarding existing principles of international law as well as contribute to the incremental development of legal rules which can greatly enhance friendly relations between states as they will be reading from the same script on this topic.

## Chairperson

The States will need to strike a balance between the need to protect the well-established norm of immunity of state officials from foreign criminal jurisdiction, while preventing impunity for serious crimes. The States should always be mindful of their responsibility not to allow the political abuse of the immunity afforded to officials as the intention of immunity was never to afford invasion of responsibility and exacerbation of criminal behaviour but was to afford state officials an opportunity to perform their duties without interruption.

## Chairperson

On the Draft Articles before us, South Africa is pleased with the inclusion of safeguard provisions against the abuse, inconsistencies, and unfairness in the application of immunity of state officials from foreign criminal jurisdiction. We are also comfortable with the fact 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 (Draft Article 1(3)). We also support Draft Article 7(1) which clearly states that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; and (f) enforced disappearance. We are also comfortable with Draft Article 14(5) which alert us to the fact that any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without

prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

### **Chairperson**

Let me now turn to **Sea-level Rise in relation to International Law**. My delegation wishes to express our appreciation to the International Law Commission (“Commission”) on the decision to include this important topic of “**Sea-level rise in relation to International Law**” together with the adopted sub-topics of statehood and the protection of persons affected by the sea-level rise in its current programme of work and the formation of a Study Group. South Africa extends its deepest appreciation to the Co-Chairs of the Study Group on the Sea level rise in relation to international law, namely, Ms Patrícia Galvão Tales, Mr Bogdan Aurescu, Mr Yacouba Cissé, Ms Nilüfer Oral and Mr Jaun José Ruda Santolaria, and would like to congratulate them together with the members of the Commission for their excellent work on this topic. For the issues paper for this year, our special gratitude goes to Ms Patrícia Galvão Tales and Mr Jaun José Ruda Santolaria.

### **Chairperson**

South Africa recognises the importance of urgently addressing this issue, and shares the view that the rise of sea level as an effect of climate change is a global phenomenon, which will directly and indirectly affect the international community as a whole. This view was supported by the United Nations General Assembly and resulted in the adaptation of resolution A/Res/72/217 on 20 December 2017.

Africa is also facing its own challenges with the rising of sea level and erosion, which threaten to alter Africa’s shorelines, and destroying our important heritage monuments some of which are yet to be discovered. In South Africa, reports have identified *inter alia* the Orange River Mouth in the Northern Cape Province, De Mond in the Western Cape Province, and the iSimangaliso Westland Park located in the KwaZulu-Natal Province as areas which have the potential to be affected by the rise of sea level.

### **Chairperson**

We note the impact that a partial submersion or total physical disappearance of the territory of a State due to sea level rise could have on the criteria or requirements for a statehood. However, South Africa shares the view that a State can remain a subject of international law, and retain its sovereignty, despite the loss to its territory and its population forcefully displaced in the territory of another State or in several countries.

This presumption of continuity of statehood is supported by South Africa, as no criteria exists under international law which requires that the seat of the government of the State must be located within its own territory or a particular territory, but such a presumption also has its own limitations, i.e. whether the affected government which has been relocated to another State and with limited or no resources, will it be able to continue to exercise effective control over its territory and maritime zones, independently so from the receiving State or other entities.

### **Chairperson**

South Africa welcomes the alternative measures proposed by the Commission in its report, Member States, and international organisations in their written comments to the Commission on how affected States can prepare for a partial or total submersion of its territory, which suggested *inter alia* the creation of artificial islands and the possibility of leasing out territories from other State.

### **Chairperson**

Our government recognizes the potential threat to human rights enjoyed by a population or a community of people that might have migrated to a territory of another State as a consequences of sea level rise. It is upon Member States in general to respect the protection of human rights, including the right to self-determination, a right which is valued in Africa, and protected under Article 20(1) of the African Charter on Human & Peoples rights.

South Africa appreciates the contributions made by Member States, in particular the low-lying and small island developing States, including international organizations and relevant entities for their work in promoting measures to assist States to be prepared to deal with issues concerning the protection of human rights during climate displacement. Our government will continue to support and pledge its participation in the respective discussions in promoting a development of an international legal framework or a possible convention, regulating the protection of persons affected by the rising sea level.

### **Chairperson**

In conclusion, we note the list of information requested by the Commission in preparation for its seventy-fourth and seventy-fifth sessions in 2023 and 2024 respectively, and our government assures the Commission of its participation and to providing the requested information within the timeframes as set out.

**I thank you for your attention.**