No. 21-11083

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Alex Nain Saab Moran,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida, No. 1:19-cr-20450-RNS-1
The Honorable Robert N. Scola, Jr.

OPENING BRIEF FOR DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1-1 of this Court, Appellant certifies that the below listed persons and entities have interests in the outcome of this case:

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Comisión de Administración de Divisas (Commission for the Administration of Currency Exchange), International Interested Party

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The United States Government has alleged that the Bolivarian Republic of Venezuela and its instrumentalities are victims in this case, which the country's government has denied. There has been no finding of fact on this issue.

CORPORATE DISCLOSURE STATEMENT

There is no nongovernmental corporate party to this proceeding, and no association of persons, form, partnerships, or corporations that have an interest in this case or the outcome of the appeal.

July 6, 2021

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This appeal raises fundamental issues regarding diplomatic immunity and its impact on the applicability of fugitive disentitlement. Oral argument is presumptively required, *see* Fed. R. App. P. 34(a), and this case does not fall within any narrow exception to that rule. The Court should hold argument and do so expeditiously given the continued detention of the defendant in contravention of his immunity from arrest and prosecution.

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INTRODUCTION

The United States government brought this prosecution against Alex Nain Saab Moran, a diplomat of Venezuela, and sought and obtained his arrest while he was on a diplomatic, humanitarian mission to Iran to obtain food, fuel, and supplies to assist in Venezuela's fight against Covid-19. According to centuries of international-law norms and judicial precedent—including a foundational 1812 decision by Chief Justice John Marshall—Mr. Saab is entitled to immunity from prosecution in the United States. But the government has adopted the troubling view, dramatically at odds with U.S. international and domestic legal obligations, that diplomatic immunity reaches only diplomats accredited to the United States. It posits it is free to prosecute any diplomat of any nation, received by any other nation, so long as the United States itself is not the receiving nation.

The government appears to have advanced this view in no other case, ever, and it has repeatedly rejected other nations' efforts to intrude on its own diplomatic affairs in this way. And this view is plainly wrong. The 1961 Vienna Convention on Diplomatic Relations, and customary international law before it, clearly recognizes the *in transitu* privilege of diplomats traveling from one nation to another *through* a third-party nation. The privilege holds that the third-party state has no more a right to prosecute or molest in any way the diplomat than does the receiving state. This simple principle resolves this case and, indeed, deprives the district court of subject-matter jurisdiction.

But the district court refused even to consider immunity. It instead demanded that Mr. Saab consent to extradition to the United States *before* asserting

the defense, even though diplomatic immunity protects Mr. Saab from the arrest and extradition itself. That principle supersedes the judicially crafted "fugitive disentitlement" doctrine the district court erroneously applied, which cannot, in any event, reach the unique facts of this case.

This Court has collateral-order jurisdiction to review the district court's denial of immunity, and it should reject the district court's treatment of a foreign diplomat, whose only defiance of the district court has been asserting universally recognized defenses in legal proceedings, as a fugitive from justice. It also should reach the question of immunity, given the exigencies of this case, and order the district court to dismiss the indictment.

STATEMENT OF JURISDICTION

Jurisdiction is asserted in the district court under 18 U.S.C. § 3231, and that assertion remains to be vetted in adversarial proceedings. The district court entered an order on March 18, 2021, refusing to consider Mr. Saab's assertion of absolute diplomatic immunity. Appellant's Appendix Tab 46 (T46). Mr. Saab filed a timely notice of appeal on April 1, 2021. T47. This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral-order doctrine. *See* Argument § I, *infra*.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review an order refusing to consider Mr. Saab's claim to diplomatic immunity until after Mr. Saab surrenders benefits of that immunity.

2. Whether the district court erred in applying the fugitive-disentitlement doctrine to Mr. Saab, who has not fled from the United States and whose

assertion of diplomatic immunity in extradition proceedings does not flout the jurisdiction of the district court.

3. Whether Mr. Saab, a special envoy of Venezuela accredited to Iran, is entitled to absolute immunity from arrest and prosecution in the United States.

STATEMENT OF THE CASE

A. Statement of Facts

Alex Nain Saab Moran is a dual citizen of Colombia and Venezuela, who has served, and continues to serve, diplomatic roles on Venezuela's behalf. In April 2018, Venezuela's foreign minister appointed Mr. Saab as a "**Special Envoy** of the government of the Bolivarian Republic of Venezuela, with broad powers on behalf of the Bolivarian Republic of Venezuela…." T10-1 (Diplomatic Authorization). In April 2020, the Venezuelan government charged Mr. Saab with delivering diplomatic documents to Iran requesting humanitarian assistance needed in Venezuela to combat the Covid-19 pandemic. *See* T10-2; T10-3; T10-4. Mr. Saab was accredited to Ayatollah Ali Kamenei, Supreme Leader of the Islamic Revolution of Iran. T10-4. Venezuela sought fuel, medical supplies, and food from Iran. T10-4. Iran, in turn, approved the mission. T10-4.[1]

[1] Mr. Saab also holds the permanent diplomatic post of Alternate Permanent Representative of the Bolivarian Republic of Venezuela to the Africa Union, *see* T10-5, which the United States recognizes as a public international organization and with which it maintains diplomatic relations, *see* Congressional Research Service, N. Cook & T. Husted, The African Union (AU): Key Issues and U.S.-AU Relations 16 (2016).

On June 12, 2020, Mr. Saab was arrested during one of these missions in Cabo Verde, where his flight originating in Venezuela took a stopover to refuel en route to Iran. Cabo Verde detained Mr. Saab pursuant to a provisional arrest warrant request by the United States. T46 at 2. That request was predicated on this criminal action, which was commenced on July 25, 2019. T1. The government alleges that, in a loosely defined time period between 2011 and 2015, Mr. Saab worked with four other Colombian citizens, one identified (Alvaro Pulido Vargas) and three unnamed "co-conspirators," *id.* at *5–6, ¶¶ 6–10, in a cryptically alleged scheme to make "bribe payments to Venezuelan foreign officials," *id.* at *4–5, ¶ 3. These allegations are denied, they remain unproven, and they are, in any event, irrelevant to this appeal. Any ties between that scheme and the United States are, at best, attenuated. Mr. Saab is not alleged to have visited in the United States in connection with the alleged scheme, he has not traveled here for three decades, and no United States citizen is alleged to be either a perpetrator or a victim of the alleged scheme.

On June 21, 2020, the U.S. government submitted an extradition request to Cabo Verde concerning Mr. Saab. T46 at 2. The Venezuelan government opposes that request. Its minister of foreign affairs formally notified Cabo Verde's minister of foreign affairs that Mr. Saab is a diplomat protected by immunity. T43-1 at 10. Venezuela's foreign minister also ordered Mr. Saab in a letter dated July 1, 2020, to "take all necessary legal precautions to avoid extradition." T10-6 at 2. The correspondence refers to this prosecution as a "terrible injustice"; expresses the concern that, if Mr. Saab is extradited, the United States will put

him "under pressure, whether legitimately or not, to disclose" state secrets "and thus put our country at great risk"; and threatens Mr. Saab with prosecution for "treason" if he cooperates with the United States. *Id.* at 1–2.

Mr. Saab opposed extradition before a Cabo Verdean court, which rejected his arguments and approved extradition. T46 at 2. Mr. Saab appealed, and that decision was affirmed. *Id.* The case is now pending before the Cabo Verdean Constitutional Court. *Id.* Mr. Saab also filed an action in the Court of Justice of the Economic Community of West African States (ECOWAS) challenging his confinement, and he prevailed in that action. T46 at 2; *see also* T43-1. On March 15, 2021, the court issued a judgment holding that Cabo Verde's arrest of Mr. Saab "violated [his] human right to personal liberty" and continues to do so, and the court ordered Cabo Verde to pay Mr. Saab the equivalent of $200,000 in damages. T43-1 at 91. Cabo Verde has, to date, refused to comply with this judgment. The United Nations Human Rights Committee also requested the Cabo Verde refrain from extraditing Mr. Saab to the United States.[2]

B. Prior Proceedings

Mr. Saab was, as noted, not present in the United States at any relevant time, and he did not appear in the court below. On August 26, 2019, the district court issued an administrative order transferring Mr. Saab and his co-defendant to fugitive status. T5; T46 at 2. Mr. Saab subsequently sought leave to specially

[2] The positions of these respected international organizations illustrate how far this prosecution has departed from settled norms of international diplomacy and law.

appear, vacatur of the administrative fugitive-status order, and leave to file a motion to dismiss the indictment, asserting, *inter alia*, absolute diplomatic immunity. T10; T10-8.

On March 18, 2021, the district court denied that motion in an order issued in both sealed and unsealed versions. T45; T46. The district court first concluded that Mr. Saab is a fugitive from justice, even though he never fled from the United States (where he was never present in the first place). T46 at 3–5. The court first applied the doctrine of "constructive" flight to reach any criminal defendant, anywhere in the world, who "is aware of the indictment before he was detained and…has not appeared." *Id.* at 3. Given that designation, the district court deemed it Mr. Saab's obligation to "physically appear in this district as the Government has repeatedly requested" before obtaining a ruling on his immunity. *Id.* at 4. The district court rebuffed Mr. Saab's contention that submitting to arrest in the United States would impinge the very immunity asserted as a defense to arrest, reasoning merely that he "does not cite to any authority support-ing that proposition." *Id.* at 4. The district court also declined to exercise its dis-cretion to entertain Mr. Saab's immunity defense. *Id.* Mr. Saab timely appealed.[3] T47.

[3] On May 28, 2021, this Court directed the parties to address whether the order is immediately appealable. Both parties responded on June 11, 2021. This Court has issued no further ruling. Mr. Saab therefore addresses appellate jurisdiction again in this brief.

SUMMARY OF THE ARGUMENT

I. The Court has jurisdiction under the collateral-order doctrine over the district court's order deeming Mr. Saab a fugitive. The district court ordered Mr. Saab to surrender a cornerstone benefit of diplomatic immunity, freedom from arrest, as a prerequisite to asserting that very immunity. This appeal therefore asserts a "right not to be tried" and falls within the paradigmatic scope of the collateral-order doctrine. *United States v. Shalhoub*, 855 F.3d 1255, 1261–62 (11th Cir. 2017). It is not relevant that the district court did not issue a ruling on Mr. Saab's immunity defense because the practical effect of the order is to deny immunity. As the Seventh Circuit recognized in *United States v. Bokhari*, 757 F.3d 664 (7th Cir. 2014), an order declining to adjudicate an asserted right not to be tried because of a defendant's fugitive status operates as an effective denial of the right not to be tried. *Id.* at 670. Because the effect of the order below was to deny immunity, it is immediately appealable.

Even if that were not so, the Court still would have jurisdiction to issue an extraordinary writ commanding the district court to entertain Mr. Saab's immunity defense. Mr. Saab would (absent collateral-order review) have no adequate remedy to vindicate his claim of immunity *before* it is impinged. Mr. Saab has a clear entitlement to review of his defenses and a clear entitlement to immunity. And the unique circumstances of this case warrant exercise of this Court's extraordinary-writ power.

II. The district court erred in applying the fugitive-disentitlement doctrine as a bar to Mr. Saab's immunity defense. To begin, Mr. Saab is not a

fugitive from justice. He is a diplomat of a foreign sovereign, and his "unwillingness to submit to the Court's authority," T46 at 5, complies with that sovereign's directive, issued under the threat of prosecution for treason. "Sovereignty assertions…are different than blatant disrespect for the legal process." *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 427 (5th Cir. 2006). Mr. Saab did not flout the authority of the district court in lodging recognized defenses in legal proceedings. And this is not a case where a defendant utilizes extrajudicial means to flee the legitimate order of a single concerned sovereign to appear and defend a prosecution; Mr. Saab was confronted with competing orders of *two* sovereigns, and his ultimate choice to follow the directive of Venezuela, the nation he serves as a diplomat, by exercising recognized litigation rights is not the equivalent of flight from justice.

Furthermore, the district court abused its discretion in disentitling Mr. Saab, as none of the policies justifying "the harsh sanction of absolute disentitlement" reach this case. *Degen v. United States*, 517 U.S. 820, 827 (1996). As explained, the district court's jurisdiction is not offended by Mr. Saab's legitimate litigation actions, and there is no justification for delaying adjudication of Mr. Saab's immunity defense, which *would* be offended by the district court's assertion of custody over Mr. Saab. Meanwhile, this case implicates no interest in deterring flight from justice, as only the rarest of defendants can colorably claim a right not to be tried. Nor is there any advantage to disentitlement in this case: the government will, in all events, have to prevail in extradition proceedings and overcome Mr. Saab's immunity defense to obtain a conviction in the

United States. Adjudicating immunity now does not harm the government and benefits both parties in answering this question "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*).

III. The Court should reach Mr. Saab's claim to immunity, and ratify it, even though the district court declined to reach immunity. The Court has jurisdiction to review immunity because it is inextricably intertwined with the issue the district court did reach, disentitlement, and because immunity itself creates collateral-order jurisdiction. Nor would it be prudent to remand for district-court adjudication of the question in the first instance, given the exigencies of this case and the parties' need for clarity from this Court on this *de novo* question of law.

Mr. Saab's entitlement to immunity is indisputable under Circuit precedent, which holds that a special envoy is subject to all protections under the Vienna Convention on Diplomatic Relations (theVienna Convention) and customary international law. *See Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984). The government does not appear to dispute the fundamental point that a special envoy is entitled to diplomatic immunity. And there is no merit to the government's troubling argument that Mr. Saab's immunity only protects him from legal action in the receiving state, Iran. That argument contravenes two hundred years of precedent, settled international norms, the Vienna Convention itself, and the Diplomatic Relations Act (DRA), the legislation which implements the Vienna Convention. All of these sources of law confirm the *in transitu* privilege of diplomats to freedom from arrest, prosecution, or

any other form of coercion on their way to and from the receiving state. Any other fashioning of immunity would be disastrous for international relations. Except in relations between contiguous states, foreign diplomacy almost invariably involves transit through the territory of third-party nations, to which the diplomat is not accredited. The United States could hardly be expected to suffer indefinite detention, arrest, and trial of its own diplomats—traveling through foreign territory or through foreign airspace—simply because the offending state would not, in such instances, be the receiving state. International law requires the United States to afford Venezuela's diplomat the same immunity it would expect be accorded its own diplomats. This obligation is also reflected in American domestic law.

ARGUMENT

I. This Court Has Jurisdiction To Review the District Court's Order Refusing To Entertain Mr. Saab's Immunity Defense

A. Legal Standard and Standard of Review

"Although 28 U.S.C. § 1291 vests the courts of appeals with jurisdiction over appeals only from final decisions of the district courts, a decision final within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quotation marks omitted). Under the collateral-order doctrine, this Court has jurisdiction to review an order that "conclusively determine[s] the disputed question…resolve[s] an important issue completely separate from the merits of the action," and is "effectively unreviewable on appeal from a final judgment." *Flanagan v.*

United States, 465 U.S. 259, 265 (1984) (quotation marks omitted). This Court "must *sua sponte* examine the existence of appellate jurisdiction and review[s] jurisdictional issues *de novo*." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Wise Alloys, LLC*, 807 F.3d 1258, 1266 (11th Cir. 2015).

This Court also has jurisdiction under the All Writs Act "to issue a writ of mandamus to compel a district court to perform a particular duty within its jurisdiction." *Shalhoub*, 855 F.3d 1255, 1262–63 (11th Cir. 2017); *accord Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004); 28 U.S.C. § 1651(a). The mandamus inquiry entails three elements: (1) the party seeking mandamus must "have no other adequate means to attain the relief he desires"; (2) he must show "that his right to issuance of the writ is clear and indisputable"; and (3) the court "must be satisfied that the writ is appropriate under the circumstances." *Shalhoub*, 855 F.3d at 1263 (citation omitted).

B. The Court Has Jurisdiction Under the Collateral-Order Doctrine

1. This Court has jurisdiction under the collateral-order doctrine because the order below rejected Mr. Saab's assertion of a "a right not to be tried." *Shalhoub*, 855 F.3d at 1262. An order denying immunity qualifies for collateral-order review because (1) it is separate from the merits of an action; (2) once immunity is denied, there is "nothing the [defendant] can do under that [immunity] in the trial court to prevent the trial," and hence the ruling is final; and (3) there is no possibility of effective review because, after the prosecution proceeds, the core features of immunity have already been lost. *Helstoski v. Meanor*, 442 U.S.

500, 507–08 (1979); *Flanagan*, 465 U.S. at 266. Any "denial of a substantial claim of absolute immunity," like diplomatic immunity, "is an order appealable before final judgment," *Mitchell*, 472 U.S. at 525, because it is "in part an entitlement not to be forced to litigate." *Id.* at 527; *see also Shalhoub*, 855 F.3d at 1260 (discussing *Helstoski*, 442 U.S. at 506); *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1311 (11th Cir. 2009).

This case comfortably fits within that doctrine. Mr. Saab has a compelling claim to absolute diplomatic immunity under the Vienna Convention, and it is settled that "defendants are entitled to appeal [a] non-final order based on their claim of immunity from suit under the Vienna Convention." *Swarna v. Al-Awadi*, 622 F.3d 123, 141 (2d Cir. 2010). Mr. Saab's claim to immunity as a special envoy squarely rests on Circuit precedent, *Abdulaziz v. Metro. Dade Cnty.*, 741 F.2d 1328, 1331 (11th Cir. 1984), and it contains not only the absolute right not to stand trial but also freedom from "*any form of arrest or detention*" and from "criminal jurisdiction," Vienna Convention, Apr. 18, 1961, 23 U.S.T. 3227, arts. 29, 31 (emphasis added). Mr. Saab's defense, if meritorious, would destroy the district court's "very power to act." *In re Hijazi*, 589 F.3d 401, 408 (7th Cir. 2009). The issue of immunity is "separate from guilt or innocence" and, hence, is collateral to the issues pending in district court. *Flanagan*, 465 U.S. at 266. The ruling is final for collateral-order purposes because "appellate review must occur before trial"—indeed, before extradition—"to be fully effective." *Id.* And the ruling is conclusive because the district court will not revisit the issue until after Mr. Saab has already been subject to the arrest from which he is immune. *See*

Helstoski, 442 U.S. at 506 (quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)).

2. The government is incorrect that this case differs from other immunity cases on the ground "that the district court never decided the question of whether Saab is entitled to diplomatic immunity." U.S. Jurisdictional Br. 13 (filed June 11, 2021). The district court's denial of Mr. Saab's motion for an order permitting a special appearance and vacating the administrative order deeming him a "fugitive," in the context where the district court was fully apprised—in briefing and at oral argument—of Mr. Saab's entitlement to diplomatic immunity, is as much a denial of immunity as would be a formal denial of his motion to dismiss. The collateral-order doctrine applies to any order that "*effectively* den[ies] [a party] the right not to participate in this litigation." *Bouchard Transp. Co. v. Fla. Dep't of Env't Prot.*, 91 F.3d 1445, 1447–48 (11th Cir. 1996) (emphasis added). That is what the order below did. Mr. Saab is asserting a right to be free from arrest, and that right is denied by the district court's order commanding Mr. Saab to *submit to* arrest *before* asserting immunity from that very arrest.

The only case addressing fugitive disentitlement in this posture is the Seventh Circuit's decision in *United States v. Bokhari*, 757 F.3d 664 (7th Cir. 2014), and the decision squarely supports Mr. Saab. That decision held that an order asserting the fugitive-disentitlement doctrine against an absent defendant was immediately appealable with respect to an international-comity argument, which asserted a right not to be tried. *Id.* at 669–71. The court reasoned that,

although "the district court did keep open the possibility that Bokhari could return, or be extradited, to the United States and then have his motion to dismiss the indictment heard in the district court," immunity was effectively denied because "Bokhari would first have to give up his right not to return (or to resist extradition) to this country." *Id.* at 670. "The district court's decision therefore conclusively determined that issue, subject to our review." *Id.* So too here. In fact, this is a stronger case for collateral-order review because the international-comity argument in *Bokhari* was unrecognized and ultimately found to have "no merit." 757 F.3d at 673. Diplomatic immunity, by contrast, is an established defense under U.S. and international law. *See Swarna*, 622 F.3d at 141.

This Court in *Shalhoub* endorsed the reasoning of *Bokhari*, asserting that a ruling on fugitive disentitlement is appealable in a case asserting a "right not to be tried." 855 F.3d at 1262. The Court distinguished *Bokhari* precisely because the defendant in *Shalhoub* "assert[ed] no alleged right not to be tried." *Id.* Although *Shalhoub* found it unnecessary to decide "whether we agree with the Seventh Circuit that the decision of a foreign court not to extradite a defendant implicates a right not to be tried," *id.*, there can be no serious question that absolute diplomatic immunity, which Mr. Saab enjoys and asserts here, implicates such a right.

3. Other precedents confirm this Court's jurisdiction, demonstrating that the practical frustration of a right not to be tried is the lynchpin of jurisdiction. In *Bouchard Transportation*, this Court found collateral-order jurisdiction over a ruling that merely "deferred a ruling" on immunity. 91 F.3d at 1447.

There, a state agency asserted Eleventh Amendment immunity, and the district court declined to rule, instead imposing an intervening procedural step before considering the question. *Id.* at 1446. "Even though the district court deferred a ruling on Eleventh Amendment Immunity," this Court founded appellate jurisdiction on the asserted immunity, which shields a state from "the other burdens of litigation," including those the lower court imposed. *Id.* at 1447 (citations omitted); *see also Collins v. Sch. Bd. of Dade Cnty.,* 981 F.2d 1203, 1205 (11th Cir. 1993) (holding that an order declining to rule on qualified immunity pending trial is immediately appealable).[4]

That reasoning is equally applicable here. "[B]ecause the issue of whether [the defendant is] entitled to immunity determines whether [he] will be subjected to any further processes in the United States courts, a later recognition of immunity does not mitigate the harm and the order is 'effectively unreviewable on appeal from a final judgment.'" *In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 146 (2d Cir. 2017). Likewise, the possibility that, *after* Mr. Saab submits to extradition, his immunity position may be vindicated cannot justify the immediate infringement of Mr. Saab's immunity *before* that occurs. The effect of the district court's order is to finally and conclusively reject immunity before it can possibly be vindicated. And, because the issue is separate from

[4] This principle is also exhibited in the familiar circumstance of a civil appeal properly being taken at the motion-to-dismiss stage even though a second opportunity to raise the argument, before trial, is provided at the summary-judgment stage.

the merits of the government's prosecution, this Court has jurisdiction under the collateral-order doctrine.

C. The Court Has Jurisdiction To Issue a Writ of Mandamus, Which Is Appropriate Relief in This Exceptional Case

Even if none of the above analysis were correct, the Court would nonetheless have jurisdiction to issue a writ of mandamus. As explained in *Shalhoub*, "[t]he All Writs Act permits [the Court] to issue a writ of mandamus to compel a district court to perform a particular duty within its jurisdiction." 855 F.3d at 1262–63. In this case, the court has jurisdiction to order the district court to consider Mr. Saab's immunity defense. *See Hijazi*, 589 F.3d at 412 (issuing writ of mandamus to compel district court to consider motion to dismiss indictment). And courts long ago concluded that one appropriate use of mandamus is to "avoid unwarranted judicial action" when a party has an immunity claim. *Spacil v. Crowe*, 489 F.2d 614, 622 (5th Cir. 1974) (quotation marks omitted). All the elements of mandamus are met here.

First, without appellate review at this time, Mr. Saab will "have no other adequate means to attain the relief he desires." *Shalhoub*, 855 F.3d at 1263. Under the district court's order—if left unreviewed—Mr. Saab will have no choice but to trade his immunity from arrest and extradition for the opportunity to assert that very immunity. To be sure, this Court in *Shalhoub* found that a party challenging an indictment in the face of a fugitive-disentitlement finding had "an adequate remedy: appearance in the district court." *Id.* at 1265. But, as explained, *Shalhoub* involved no assertion of a right not to be tried. In this context,

suffering a violation of immunity is not an adequate remedy to assert that very immunity. When a party is a "representative[] of a foreign sovereign resisting" an order "on grounds of…immunity," it "satisf[ies] mandamus's requirement that no other adequate means of relief be available." *In re Papandreou*, 139 F.3d 247, 252 (D.C. Cir. 1998).[5]

Second, Mr. Saab has a clear and indisputable right to relief, for reasons explained below, Argument §§ II & III, *infra*.[6]

Third, mandamus is appropriate under the circumstances. Under this inquiry, courts "consider a range of factors, including whether the petition presents a novel and significant question of law or a legal issue whose resolution will aid in the administration of justice." *In re United States*, 945 F.3d 616, 628 (2d Cir. 2019). Courts evaluate how "weighty" are the "objections raised." *See Cheney*, 542 U.S. at 392 (exercising All Writs Act jurisdiction to review executive-privilege defense); *In re United States*, 945 F.3d at 628 (issuing writ because question whether a defendant may "argue jury nullification is novel and significant"); *In re Sec'y, Fla. Dep't of Corr.*, 2020 WL 1933170, at *3 (11th Cir. Mar. 30, 2020) (issuing writ to protect release of "sensitive prison security and safety information"). Courts also weigh the relative strength of the asserted legal arguments

[5] *Superseded on other grounds by statute as recognized in Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 358 (3d Cir. 2006).

[6] *Shalhoub* found no clear right to relief for a party asserting that the International Parental Kidnapping Crime Act has no international application. 855 F.3d at 1264. Mr. Saab's claim to immunity is nothing like that.

and the asserted harms from denying review. *See, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1206–07 (9th Cir. 2019); *In re Clinton*, 973 F.3d 106, 118 (D.C. Cir. 2020) (citing *In re Al Baluchi,* 952 F.3d 363, 368 (D.C. Cir. 2020)).

Under that analysis, this case merits extraordinary-writ review. Mr. Saab raises "novel and significant" questions of law, *In re United States*, 945 F.3d at 628, regarding the fugitive-disentitlement doctrine, which has never been applied to a foreign diplomat, and his absolute diplomatic immunity, which has never been denied on the basis that the diplomat is not accredited to a third state where the diplomat has no intention of travelling. Just as "an unwarranted impairment of another branch in the performance of its constitutional duties" merits extraordinary-writ review, *Cheney*, 542 U.S. at 390, so too does the government's unwarranted impairment of another nation's sovereignty.

Furthermore, denial of review would impose substantial harms. Mr. Saab is currently in custody, and he was detained in the very process of completing a humanitarian mission under the exceptional circumstance of a once-in-a-generation global pandemic. The harms of requiring Mr. Saab to stray further from his mission and submit to United States custody *before* adjudication of his immunity claim can scarcely be overstated. *See Hijazi*, 589 F.3d at 408. The government's stunning demand that a diplomat engaged in a diplomatic and humanitarian mission of paramount urgency be arrested and tried in an action with no meaningful United States interest presents an anomalous circumstance where the fugitive-disentitlement doctrine cannot apply. This Court should intervene to prevent it from applying.

II. The District Court Erred in Refusing To Consider Mr. Saab's Immunity Defense While Invoking the Doctrine of Fugitive Disentitlement

A. Legal Standard and Standard of Review

The fugitive disentitlement doctrine "limits access to the courts by fugitives from justice." *F.D.I.C. v. Pharaon*, 178 F.3d 1159, 1161 (11th Cir. 1999). "Although traditionally applied by the courts of appeal to dismiss the appeals of fugitives, the district courts may sanction or enter judgment against parties on the basis of their fugitive status." *Magluta v. Samples*, 162 F.3d 662, 664 (11th Cir. 1998). The doctrine "does not strip the case of its character as an adjudicable case or controversy," but rather "disentitles the [fugitive] to call upon the resources of the Court for determination of his claims." *Pharaon*, 178 F.3d at 1161 (quoting *United States v. Barnette*, 129 F.3d 1179, 1184 (11th Cir. 1997)). A court may only impose disentitlement if it finds that (1) the party seeking relief "is a fugitive," (2) the fugitive status "has a connection to" the court proceeding, and (3) the sanction "is necessary to effectuate the concerns underlying the fugitive disentitlement doctrine." *Magluta*, 162 F.3d at 664; *see also Barnette*, 129 F.3d at 1184. The doctrine must be "limited by the necessity giving rise to its exercise." *Degen v. United States*, 517 U.S. 820, 829 (1996).

This Court reviews a district court's order imposing the penalty of disentitlement "for abuse of discretion." *Pharaon*, 178 F.3d at 1162. But, "[o]f course, the district court must first be correct in its determination that the doctrine can be applied," *id.*, which is a legal question subject to *de novo* review, *Bright v. Holder*, 649 F.3d 397, 399 (5th Cir. 2011).

B. The Fugitive-Disentitlement Doctrine Cannot Properly Be Applied

The district court erred in deeming Mr. Saab a fugitive from justice, when none of the factors underpinning that designation obtain here.

1. Assertions of Sovereignty in Legal Proceedings Are Not Akin to Escape from Custody

a. Mr. Saab cannot reasonably be said to have exhibited "disrespect for the legal process." *Ortega–Rodriguez v. United States*, 507 U.S. 234, 246 (1993). The fugitive-disentitlement doctrine is, at base, a litigation-misconduct sanction, falling within courts' "inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen*, 517 U.S. at 823. "It is often said that a fugitive 'flouts' the authority of the court by escaping, and that dismissal is an appropriate sanction for this act of disrespect." *Ortega-Rodriguez*, 507 U.S. at 245. "Indeed, the premise of [the] disentitlement theory is that 'the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim.'" *Id.* at 246; *see also Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); *Lynn v. United States*, 365 F.3d 1225, 1240 n.27 (11th Cir. 2004).

"Sovereignty assertions, however, are different than blatant disrespect for the legal process." *Af-Cap, Inc.*, 462 F.3d at 427. For that reason, the Fifth Circuit in *Af-Cap, Inc.*, declined to utilize the fugitive-disentitlement doctrine, even though the Republic of Congo—the appellant before it—announced to the district court that it "would not follow" an order that court issued, "because it violated the country's sovereignty." *Id.* at 423. The Fifth Circuit declined "to extend

the fugitive disentitlement doctrine" to reach the nation's cogent (and ultimately meritorious) sovereignty assertions, reasoning that its legal strategy "was not designed to be disrespectful" and that "*Af–Cap* has failed to cite a single case in which the doctrine has been used against a foreign state." *Id.* at 427.

This case is not materially different. Mr. Saab's "unwillingness to submit to the [district court's]s authority" amounts to nothing other than advancing recognized defenses in extradition proceedings. To avail oneself of legal process is not to flout legal process. *Cf. Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (declining to disentitle person whose fight against deportation was not "an attempt to evade the reach of the law" and whose "pursuit of additional legal remedies…does not frustrate the execution of our judgment"). Further, Mr. Saab has not consented to extradition because his national principal, Venezuela, ordered him to "take all necessary legal precautions to avoid extradition." T10-6 at 4. The immunity Mr. Saab asserts "serves the needs of the foreign sovereign and…is 'merely incidental to the benefit conferred on the government he represents,'" which is Venezuela. *Abdulaziz*, 741 F.2d at 1330 (quoting *United States v. County of Arlington, Va.*, 669 F.2d 925, 930 (4th Cir. 1982)); *see also Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138–39 (1812). The assertion of immunity is no different from the "[s]overeignty assertions" found not to implicate the fugitive-disentitlement doctrine in *Af-Cap, Inc.*

b. Mr. Saab is not remotely like someone who has escaped or thwarted custody, such as a U.S. citizen who, in defiance of a Florida family court, "took the children [within the family court's jurisdiction] to Europe," and "removed

the children from school, left her primary residence, disconnected her cell phone, and blocked her email accounts." *See Ener v. Martin*, 987 F.3d 1328, 1330, 1332 (11th Cir. 2021); *see also Shalhoub*, 855 F.3d at 1258–59 (similar factual scenario). Nor is this case like *Barnette*, which disentitled a criminal convict who transferred forfeited shares of stock to his wife in a fraudulent transfer and then disappeared (along with his wife). 129 F.3d at 1181–82. Those cases, and every other one the district court and government have cited, conferred fugitive states on persons who "absented [themselves] from the jurisdiction with the intent to avoid prosecution." *United States v. Fonseca-Machado*, 53 F.3d 1242, 1244 (11th Cir. 1995). Here, by contrast, the nation Mr. Saab serves as a diplomat ordered him to resist extradition, which Mr. Saab has a legal right to do. Importantly, the directive Mr. Saab is executing is to "take all necessary *legal* precautions to avoid extradition," T10-6 at 4 (emphasis added), not *illegal* precautions.

c. In these circumstances, it is not enough, as the district court erroneously believed, that "Saab Moran has been aware of the charges against him for almost two years and has had ample opportunity to present himself to United States authorities." T46 at 4. This ignores that Mr. Saab faced competing directives of independent sovereigns. His ultimate choice to obey to the sovereign that directly commanded his allegiance was both rational and devoid of contemptuous intent or effect. The district court's contrary view impliedly posits that, once the U.S. Attorney for the Southern District of Florida publicized an indictment for Mr. Saab's arrest, Mr. Saab was obligated to disown Venezuela, renounce his diplomatic status, disobey Venezuelan authorities, risk prosecution

for treason in Venezuela, and commit his political allegiance to the United States. A person who declines to take those steps is not a fugitive from justice.

Quite the opposite. U.S. law has since the beginning recognized that a sovereign nation cannot be understood to "hazard his own dignity by employing a public minister abroad," and thus that employing diplomats does not subject sovereigns to "temporary and local allegiance to a foreign prince." *Schooner Exchange*, 11 U.S. at 139. Because U.S. law acknowledges that a sovereign "cannot intend to subject his minister in any degree to that power" of a foreign state, *id.*, it cannot coherently deem a diplomat who merely *asserts* freedom from that power as the legal equivalent of an escaped convict.

The district court therefore erred in requiring Mr. Saab to "physically appear in this district" before asserting immunity. T46 at 3–4. The court found this requirement would not "unduly harm Saab Moran," *id.* at 4, but ignored that the mere submission to extradition and appearance below would contravene the sovereign underpinnings of diplomatic immunity and Venezuela's order to Mr. Saab. Mr. Saab's request that the matter be adjudicated first, before extradition, does not manifest "contemptuous disrespect…directed at the District Court." *Ortega-Rodriguez*, 507 U.S. at 246. By contrast, the district court's demand that Mr. Saab renounce cornerstone features of immunity, in defiance of the nation he serves, manifests disrespect for Mr. Saab's diplomatic status, the nation of Venezuela and its sovereignty, and settled international norms. This holding ignored the Supreme Court's warning that "respect" due them "is eroded, not

enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." *Degen*, 517 U.S. at 828.

d. The district court's other reasons for extending fugitive disentitlement were erroneous. First, its reliance on the fact that "Cabo Verde does not oppose extradition," T46 at 4, makes no sense, when Venezuela is the nation whose sovereignty is impinged. Venezuela not only opposes extradition, but has ordered Mr. Saab to resist. There is no logic to predicating Mr. Saab's fugitive status, and the denial of immunity that status entails, on the will of Cabo Verde, which has no vested interest in Venezuela's sovereign dignity and lacks authority to waive Venezuela's immunity. Moreover, the United States has an independent obligation, under both international and domestic law, to respect Mr. Saab's diplomatic immunity. The fact that Cabo Verde appears to have ignored its own obligation so far does not excuse the United States from this obligation.

Second, the district court got the fugitive-disentitlement doctrine exactly backwards in finding it significant that "Saab Moran has not cited a case where the doctrine was not applied simply because a defendant intended to challenge the indictment on diplomatic immunity grounds." *Id.* It is equally true that the government did not cite any decision where the colorable assertion of immunity in legal proceedings was found to constitute flight from justice. In considering new applications of disentitlement, the district court was required to analyze whether an extension "would be an arbitrary response to the conduct it is supposed to redress or discourage." *Degen*, 517 U.S. at 828; *see also Af-Cap, Inc.*, 462

F.3d at 427 (treating absence of pertinent authority as a reason *not* to extend the doctrine).

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2. Mr. Saab Did Not Flee from the Jurisdiction of the District Court, Actually or Constructively

The absence of ties between Mr. Saab and the United States would, even aside from diplomatic immunity, defeat the fugitive-disentitlement doctrine. Although precedents of this Court recognize that a person may, "while legally outside a jurisdiction,…constructively flee by deciding not to return," *Barnette*, 129

F.3d at 1184, no decision of this Court treats as a fugitive someone who, having no ties to the United States, goes about his business after an indictment is issued, just as before. "A fugitive from justice has been defined as 'a person who, having committed a crime, flees from the jurisdiction of the court where a crime was committed or departs from his usual place of abode and conceals himself within the district.'" *Id.* at 1183 (11th Cir. 1997) (quoting *Empire Blue Cross & Blue Shield*, 111 F.3d 278, 281 (2d Cir. 1997)) (cleaned up); *see also Xiang Feng Zhou v. U.S. Atty. Gen.*, 290 F. App'x 278, 280 (11th Cir. 2008). "Mere absence from the jurisdiction in which a crime occurred does not render the suspect a fugitive from justice; he must be found to have absented himself from the jurisdiction with the intent to avoid prosecution." *Fonseca–Machado*, 53 F.3d at 1243–44. Mr. Saab, however, was never at any relevant time in the United States and had no reason to come here. He cannot reasonably said to have fled the district court's jurisdiction, actually or constructively.

In analogous circumstances, courts have rejected the fugitive designation. The Seventh Circuit in *Hijazi* concluded that fugitive disentitlement "does not apply" to a defendant charged in Illinois who "has never been in the country,…never set foot in Illinois, and…owns no property in the United States." 589 F.3d at 412. "He therefore did not flee from the jurisdiction or from any restraints placed upon him." *Id.* Likewise, the Second Circuit declined to impose fugitive disentitlement to defendants who "have resided in a foreign country all along, and were only 'present' in the Southern District in the barest sense necessary to support personal jurisdiction." *Motorola Credit Corp. v. Uzan*, 115 F. App'x

473, 474 (2d Cir. 2004). District courts, including in this Circuit, have likewise declined to impose the doctrine in the absence of evidence establishing "the *intent* to avoid criminal prosecution," including where the defendant "had no reason to maintain" presence in the United States. *United States v. Pub. Warehousing Co. K.S.C.*, 2011 WL 1126333, at *4 (N.D. Ga. Mar. 28, 2011) (citing *Fonseca–Machado*, 53 F.3d at 1244); *see also United States v. Kashamu*, 2010 WL 2836727, at *3 (N.D. Ill. July 15, 2010), *aff'd on other grounds*, 656 F.3d 679 (7th Cir. 2011) (declining to apply fugitive disentitlement to foreign residents who "had not fled the United States").[7] Here, because the government has cited no reason for Mr.

[7] Other decisions impliedly recognize this limit on fugitive disentitlement. This Court in *Xiang Feng Zhou* recognized that failing to affirmatively cooperate with authorities is not equivalent to affirmatively fleeing, as it declined to impose the doctrine on a deportation defendant who failed to appear for a hearing or notify the Department of Homeland Security of his address. 290 F. App'x at 280–81. The Second Circuit recognized that judicially crafted fugitive-disentitlement principles would not reach a defendant who "was not in the United States at the time of the alleged money laundering" and "was last in the United States in 1977," but affirmed disentitlement because the doctrine in that case was imposed by a statute, applied in forfeiture proceedings, that "extends beyond common-law fugitives to encompass persons who may never previously have been in the United States but who know that they are subject to arrest in this country." *Collazos v. United States*, 368 F.3d 190, 196–97 (2d Cir. 2004). Likewise, the Seventh Circuit doubted whether a person who "left the United States a few years before he was indicted" could be labeled a fugitive, reasoning that "the term 'fugitive' may take on subtly different meanings as it is used in a variety of legal contexts," but found it more straightforward to rule directly on the merits and bypass that question. *Bokhari*, 757 F.3d at 672–73. And the Fourth Circuit recently applied the doctrine only after concluding that the appellant was a "United States citizen who resided in this country prior to the initiation of this litigation" and "has remained overseas avoiding arrest pursuant to that warrant." *Enovative Techs., LLC v. Leor*, 2021 WL 1103590, at *1 & n.1 (4th Cir. Mar. 23, 2021).

Saab to come to the United States, his forbearance from doing so cannot reasonably be deemed flight.

The district court's bases for extending fugitive disentitlement to this new circumstance lack merit. The Court adopted an overly aggressive definition of "constructive flight," finding it sufficient that Mr. Saab "has not appeared in this case." T46 at 3. But the case language it quoted posited that the doctrine applies to a defendant who, "[w]hile legally outside the jurisdiction,…constructively flee[s] by *deciding not to return*." *Id.* (quoting *Shalhoub*, 855 F.3d at 1263)) (emphasis added). The court did not explain how Mr. Saab failed to "return" to Florida.

The district court also concluded that "the Eleventh Circuit [in *Shalhoub*] has declined to follow the Seventh Circuit [in *Hijazi*]," T46 at 3, but this misread *Shalhoub*. The Court only rejected *Hijazi* on the narrow issue of whether a fugitive has "an adequate remedy" for purposes of appellate mandamus.[8] *Shalhoub*, 855 F.3d at 1264–65. It does not follow that everything said in *Hijazi* is likewise rejected. To the contrary, *Shalhoub* distinguished *Hijazi* on the point relevant here, the significance of "contacts with the United States," on the ground that the defendant there "*has* significant contacts with the United States." *Id.* (emphasis added). Specifically, the defendant "once resided in the Southern District of Florida" and fled to Saudi Arabia with children whose custody was awarded

[8] Even on that point, as discussed above, *Shalhoub* recognized an exception in appeals asserting "a right not to be tried." 855 F.3d at 1261; *see* Argument § I.B, *supra*.

by a Florida court to his divorced spouse—an alleged violation of the International Parental Kidnapping Crime Act. *Id.* at 1265; *see also id.* at 1258–59. The district court identified no facts like that here.

C. Disentitlement Cannot Reach the Unique Circumstances of This Case

Even if it properly deemed Mr. Saab a fugitive, the district court erred in disentitling him from challenging the indictment. Because "[a] court's inherent power is limited by the necessity giving rise to its exercise," the district court was required to assess whether "the justice [of disentitlement] would be too rough." *Degen*, 517 U.S. at 829. Here, disentitlement was not "necessary to effectuate the concerns underlying the fugitive disentitlement doctrine." *Magluta*, 162 F.3d at 664.

First, as already explained, Mr. Saab's assertion of immunity "did not threaten the dignity of the court imposing the sanction." *Degen*, 517 U.S. at 825. The district court erred in failing to give that immunity any consideration. *See* T46 at 4. The Supreme Court has repeatedly ordered courts to "resolv[] immunity questions at the earliest possible stage in litigation." *Hunter*, 502 U.S. at 227. The district court failed to explain why that policy is subordinate to fugitive disentitlement.

Second, that failure also caused the district court to overlook the impingement on immunity embedded in its demand that Mr. Saab appear before asserting immunity. Mr. Saab's assertion of "a right not to be tried"—or even arrested—*Shalhoub*, 855 F.3d at 1262, invoked an overwhelming countervailing

interest that should have been weighed, and found overriding, in the "equitable" analysis. *Pesin v. Rodriguez*, 244 F.3d 1250, 1252 (11th Cir. 2001).

Third, Mr. Saab's conundrum in facing competing orders—indeed, threats—from different sovereigns shifts the equities decidedly against disentitlement. The district court erroneously focused only on the U.S. government's insistence on Mr. Saab's submission to U.S. authority and said nothing of Venezuela's competing threat of prosecution. The court abused its discretion in concluding that disentitling Mr. Saab will not "unduly harm" him. T46 at 4.

Fourth, there is little "risk in this case of delay or frustration in determining the merits of the Government's…claims or in enforcing the resulting judgment." *Degen*, 517 U.S. at 825. Mr. Saab is not at large, but in custody. It is unnecessary to disentitle Mr. Saab to ensure his eventual imprisonment in the United States, *if* the government is ultimately entitled to that result. *Cf. Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) ("In cases where escaped fugitives have been recaptured, courts have been reluctant to impose the severe sanction of disentitling them to access to the federal courts."). On the other hand, if the government is *not* entitled to that result, then the extradition proceedings are themselves a waste of time and affirmatively injurious. Meanwhile, any concern that Mr. Saab is not taking "the bitter with the sweet," *Degen*, 517 U.S. at 829, misses that "if [Mr. Saab] loses his challenge to the indictment, he faces a significant enough threat of prosecution in the United States to satisfy any mutuality concerns that may exist." *Hijazi*, 589 F.3d at 414; *see also Degen*, 517 U.S. at 829 (finding this interest insufficient to justify disentitlement). Yet

the district court inexplicably, and erroneously, deemed the ongoing proceedings as "weigh[ing] favor of applying the doctrine against him." T46 at 4. It should have held the opposite.

Fifth, whereas "[d]isentitlement 'discourages the felony of escape and encourages voluntary surrenders,'" *Degen*, 517 U.S. at 824, its application here serves no such purpose, where Mr. Saab is in custody and never escaped or fled from any detention or confinement. Precious few criminal defendants can colorably assert diplomatic immunity, or even the competing demands of independent nations.

Sixth, disentitlement is, for similar reasons, unnecessary "to avoid prejudice to the nonfugitive party." *Magluta*, 162 F.3d at 664. The government will, in all events, have to overcome two hurdles before prosecuting Mr. Saab. First, it will have to prevail in the extradition proceedings. Second, it will have to overcome Mr. Saab's assertion of immunity. Importantly, that latter inquiry will involve both a pretrial motion to dismiss in the district court and an interlocutory appeal to this Court, both before trial. Shifting that order of operations, and entertaining Mr. Saab's immunity defense alongside the extradition proceedings, does not harm the government. And doing so would serve the mutual benefit of clarity on an immunity question that must be resolved in any event.

III. Mr. Saab Is Entitled to Absolute Diplomatic Immunity.

A. Jurisdiction and Standard of Review

The Court has jurisdiction to review Mr. Saab's assertion of immunity, and it should address that issue. Although the district court did not address

immunity on the merits, it is settled that this Court has jurisdiction over issues "inextricably intertwined" with those addressed in the appealable order or those which are "necessary to ensure meaningful review." *Black v. Wigington*, 811 F.3d 1259, 1270 (11th Cir. 2016) (quotation marks omitted). As explained, diplomatic immunity is so thoroughly intertwined with the question of disentitlement that it establishes this Court's jurisdiction to review the district court's order. Just as in *Bokhari*, where the Seventh Circuit had jurisdiction to address the asserted right not to be tried along with the order declining to reach that issue, *see* 757 F.3d at 672–73, this Court has jurisdiction to review directly Mr. Saab's assertion of immunity.

Nor would this Court's discretion be wisely exercised by remanding on the question of immunity. The question must be examined *de novo* by this Court in all events. *See, e.g.*, *United States v. Al-Hamdi*, 356 F.3d 564, 569 (4th Cir. 2004). And the exigencies of this case, which have already been set forth, call for an immediate review of this question.

B. The Vienna Convention and Diplomatic Relations Act Confer Diplomatic Immunity and Require Dismissal.

1. Mr. Saab is special envoy of Venezuela to Iran. As such, he qualifies as a "diplomatic agent" entitled to immunity from "any form of arrest or detention" under the Vienna Convention Art. 29, 23 U.S.T. 3227, and that treaty's implementing legislation, the DRA, 22 U.S.C. §§ 254a–258a; *see also Abdulaziz*, 741 F.2d at 1331.[9] The DRA specifically provides that "any action or proceeding

[9] Indeed, the United States has also used this title and status for the head of its diplomatic missions. *See United States v. Abu Khatallah*, 151 F. Supp. 3d 116, 121

brought against an individual who is entitled to immunity…under the Vienna Convention of Diplomatic Relations…or under any other laws extending diplomatic privileges and immunities…shall be dismissed." 22 U.S.C. § 254d.

Mr. Saab's status as a special envoy qualifies him for diplomatic immunity. In *Abdulaziz*, this Court held that special envoys fall within the scope of the convention, reasoning that "[t]he broadness in the language of the Vienna Convention is necessary, since it is the foreign country that actually ranks its envoys, not the State Department." 741 F.2d at 1331. It also noted that "Article 14 of the Vienna Convention classifies 'envoys' as Heads of Missions" and that "Heads of Missions are defined in § 254a of the Diplomatic Relations Act, and are protected by the Act." *Id.*; *see* 22 U.S.C. § 254a(1)(A). *Abdulaziz* controls here and bars the prosecution of Mr. Saab.

2. Mr. Saab is independently entitled to immunity under customary international law. *See, e.g., United States v. Enger*, 472 F. Supp. 490, 505 (D.N.J. 1978) ("The United States has long recognized the responsibilities imposed upon individual nations by force of international custom and treats the Law of Nations as the law of the land."). Indeed, the Vienna Convention "codified longstanding principles of customary international law with respect to diplomatic relations," *Broidy Cap. Mgmt. LLC v. Benomar*, 944 F.3d 436, 441 (2d Cir. 2019) (quotation marks omitted), and binds even non-signatories, *Swarna*, 622

(D.D.C. 2015) (noting that the ill-fated United States mission in Benghazi, Libya, was initially headed by J. Christopher Stevens as special envoy, before his later appointment as ambassador).

F.3d at 135. Immunity therefore bars this case on its own force, with or without the DRA. *See Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) ("American Courts must dismiss" any proceeding (whether civil or criminal) "against anyone entitled to immunity under either the VCDR or other laws 'extending diplomatic privileges and immunities.'" (quoting 22 U.S.C. § 254d)).

Customary international law has long conferred the most fundamental diplomatic immunities, particularly personal inviolability from arrest or detention, on special envoys. *See* Michael Wood, *The Immunity of Official Visitors*, 16 Max Planck UNYB 35, 40 (2012) ("The custom of sending a special envoy on mission from one State to another, in order to mark the dignity or importance of a particular occasion, is probably the oldest of all means by which diplomatic relations may be conducted." (quotation marks omitted)).[10] The State Department's Legal Adviser acknowledged in 2007 that "special mission immunity" is "grounded in customary international law." *See* John Bellinger III, Department of State Legal Adviser, Immunities, OpinioJuris (Jan. 18, 2007);[11] *see also R. (on the application of Freedom and Justice Party) v. Secretary of State for Foreign and Commonwealth Affairs*, [2018] EWCA Civ 1719, [5], [32], [136] (Court of Appeal of England and Wales) (ADD9, ADD16, ADD38) (*FJP*); *Weixum v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008) (deferring to State's suggestion that a member of a special diplomatic mission from China enjoyed immunity).

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[10] *Available at* https://www.mpil.de/files/pdf4/mpunyb_02_Wood_16.pdf

[11] *Available at* http://opiniojuris.org/2007/01/18/immunities/

And the Court of Appeal of England and Wales held as much, relying on United States precedents and statements to conclude the special envoys are entitled to diplomatic immunity. *FJP*, *supra*, at [136] (ADD38). The court explained that "a rule of customary international law has been identified which now obliges a state to grant to the members of a special mission, which the state accepts and recognizes as such, immunity from arrest or detention (*i.e.*, personal inviolability)." *Id.*; *see also R (on the application of Hamed) & Others v. Sec'y of State For Foreign & Commonwealth Affairs & Others*, [2016] EWHC 2010 (Admin) [121–28] ("special mission immunity" should "be accorded to foreign officials" because it is "grounded in customary international law" and recognized in United States judicial precedents.) (ADD66–67); *see also FJP*, *supra*, at [32] (ADD16) (approving the Divisional Court's reliance on this statement).

3. Mr. Saab's claim to immunity as a diplomat is therefore not subject to any serious dispute. As this Court noted recently, "the Vienna Convention premises diplomatic immunity upon recognition by the receiving state, which requires notification from the sending state." *Ali v. Dist. Dir., Miami Dist., U.S. Citizenship & Immigr. Servs.*, 743 F. App'x 354, 358 (11th Cir. 2018) (cleaned up). Both elements are met here. Mr. Saab was duly appointed as Venezuela's special envoy by its foreign minister Mr. Jorge Arreazo Montserrat in April 2018. T10-1; T10-3. And Iran approved Mr. Saab's mission in its capacity as the receiving state. T10-4. Because he was recognized by Venezuela and Iran as Venezuela's representative to Iran, Mr. Saab qualifies as a diplomatic agent under the Vienna Convention and customary international law and is entitled to immunity.

C. Immunity Includes Inviolability and a Right of Free Passage

In the court below, the government did not contest a special envoy's claim to diplomatic immunity. Nor would such an argument have had merit when Circuit precedent rejects it. *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (restating the familiar rule that even "a panel" of this Court "cannot overrule a prior one's holding"). Instead, the government advanced the troubling argument that, because Mr. Saab was not accredited to the United States (or, presumably, Cabo Verde) he is not protected from arrest or prosecution in either nation. *See* Dist. Ct. Dkt. 24 at 17. It presented a letter from the Department of State indicating that Mr. Saab "has never been notified to the Department of State as a member or representative to any foreign mission in the United States, including the Venezuelan bilateral mission." *See* T24-3. This statement is both true and legally irrelevant. Mr. Saab was not accredited to the United States and had no plans to travel to the United States on his way to Iran. The State Department does not compile a registry of all of the diplomats in the world, and no sovereign state has ever sought to register its diplomats who are not posted to the United States with the Department of State. The government's argument espouses the perplexing and legally untenable position that diplomats are fair game for prosecution under the laws of any nation, except the receiving nation, that can gain custody of them. Given that diplomacy necessarily requires travel, including across the territory and airspace of nations physically standing between sending and receiving nations, the position would carve an enormous hole from the protections of immunity. That position is not the law.

1. To the contrary, the right of free or "innocent passage" afforded to diplomats is among the most basic and ancient requirements of international law. As one of the premier international-law authorities stated more than two hundred years ago concerning diplomatic ministers, "that prince alone to whom the minister is sent, is under a particular obligation that he shall enjoy all the rights annexed to his character: yet the others through whose dominions he passes, are not to deny him those regards to which the minister of a sovereign is intitled, and which nations reciprocally own to each other." Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* § 55 (Luke White ed. 1792);[12] *see also* H.W. Halleck, *Int'l Law, or Rules Regulating the Intercourse of States in Peace & War*, 233 § 32 (1861) ("In passing through the territory of a friendly state, other than that of the government to which he is accredited, a public minister, or other diplomatic agent, is entitled to the respect and protection due to his official character, though not invested with all the privileges and immunities which he enjoys in the country to whose government he is sent. He has a right of innocent passage through the dominions of all states friendly to his own country, and to the honors and protection which nations reciprocally owe to each other's diplomatic agents, according to the dignity of their rank and official character.").

[12] The fact that Mr. Saab was detained in Cabo Verde at the United States' insistence, rather than on U.S. soil, does not change his status or erase his immunity. Indeed, if he were to be transported here, his diplomatic status would not change, and the government would still be required to recognize his personal immunity from arrest and to release him to continue his mission.

This right has been codified in the Vienna Convention, Art. 40, and has long been accepted, promoted, and demanded by the United States. Thus, in 1790 the first Congress passed a law acknowledging a diplomat's right to "safe-conduct" while present in the United States, the violation of which was expressly deemed a violation of "the law of nations by offering violence to the person of an ambassador or other public minister" and a crime also punishable by up to three years' imprisonment. Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).[13]

[13] The earliest instance in which the U.S. State Department appears to have acknowledged and demanded *jus transitus innoxii* for an American diplomat was in the "Soulé affair" of 1854, involving the detention of the U.S. minister to Spain, Pierre Soulé, as he travelled through France to Madrid. *See* Moore, 4 *A Digest of Int'l Law* 557 (1906). Mr. Soulé was stopped by French authorities in Calais and the U.S. Minister to France "immediately addressed a protest to the French Government, not only against the interruption of Mr. Soulé's journey, but also against the refusal, as he supposed, of the French Government to permit Mr. Soulé to pass through that country." *Id*.

In response, the French minister of foreign affairs assured the United States that France had "not wished…to prevent an envoy of the United States crossing French territory to go to this post in order to acquit himself of the commission with which he was charged by his Government," but that the U.S. minister's actions had "awakened…the attention of the authorities invested with the duty of securing the public order of the country" and that "if Mr. Soulé was going immediately and directly to Madrid the route of France was open to him" but if he "intended to go to Paris with a view of tarrying there, that privilege was not accorded to him." *Id*. The U.S. Minister to France thereafter offered his thanks and indicated that the "recognition of this right is all that I have to ask of the Emperor's Government in the premises." *Id*. at 558.

The 1790 Act was "merely declaratory of the common law, of which the law of nations is a part." *Bergman v. De Sieyes*, 71 F. Supp. 334, 335 (S.D.N.Y. 1946); *accord* William Barnes, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under Int'l Law & Application in U.S. Practice*, 43 Dep't of State Bull. 173, 176 (1960). As a reflection of customary international law, the 1790 Act, formerly codified at 22 U.S.C. § 252, continued in force until 1978, when it was replaced by the DRA—which implements the Vienna Convention, including Article 40 guaranteeing the right of innocent passage.[14]

Indeed, the Executive Branch has long taken a broad view of the right to *in transitu* immunity as being grounded in the fundamental right of all states to send and receive diplomats (the right of legation), demanding it not only for American diplomats, but also for foreign diplomats traveling to take up their posts in the United States. This has been the case even in time of war. Thus, during World War I, the State Department demanded that *in transitu* immunity be extended to an Austro-Hungarian diplomat, accredited to the United States, who planned to embark from the neutral port of Rotterdam. He was,

[14] Notably, federal law still deems it a felony, punishable by up to ten years' imprisonment, to attempt or to "make[] a[] violent attack upon their person or liberty" of an "internationally protected person" or his "means of transport[.]" 18 U.S.C. § 112(a). This law applies extraterritorially to the acts of American nationals. *See* 18 U.S.C. § 112(e). Additionally, the statute makes it a felony to "willfully…intimidate[], coerce[], threaten[] or harass[] a foreign official or an official guest or obstruct[] a foreign official in the performance of his duties" or attempt to do so. 18 U.S.C. § 112 (b)(1)–(2). This portion of the law applies with respect to foreign ministers and ambassadors, among other high ranking officials. 18 U.S.C. §§ 112(c), 1116(b).

nevertheless, required to pass through sea lanes controlled by British and French vessels—Britain and France then, of course, being at war with the Habsburg monarchy and other Central Powers. 4 Hackworth, *Digest of Int'l Law*, 462–63 (1942) (Hackworth). Austria-Hungary requested safe passage from the British and French governments, but both refused due to the alleged hostile activities of Austro-Hungarian diplomats then posted to neutral countries. *Id*. at 463.

The State Department thereafter "instructed the [U.S.] Embassies in London and Paris to inform the Foreign Offices [of Britain and France] that it was surprised to learn of the refusal, that the *Government of the United States had an undisputed right to maintain diplomatic relations through accredited representatives with any nation, and that it could not believe that the British and French Governments intended to interfere with the exercise of this sovereign right*." *Id*. (emphasis added). The State Department "said that it expected those Governments to reconsider their action and to assure Count Tarnowski [the diplomat in question] and his suite that they would be unmolested in their passage for this country." *Id*. Shortly thereafter, both French and British governments replied that they would grant the Count safe passage to the United States. *Id*.

Similarly, in 1924, the State Department expressed its unequivocal intent to honor *in transitu* immunity when Charles Evans Hughes (then Secretary of State, later Chief Justice) wrote to the U.S. Minister to Panama regarding the U.S. government's customary international law obligation to allow third country diplomats—*i.e.*, those not accredited to Panama or the U.S.—to transit through the Canal Zone to and from their diplomatic posts. Secretary Hughes

advised the U.S. Minister, that while such diplomats' "status in the territory of the canal zone" was uncertain, "it would seem, however, that their status might be regarded as analogous to that of a diplomatic envoy traveling through the territory of a third state en route to his post." *Id.* at 461–62. Thus, "since the institution of legation is a necessary one for the intercourse of states and is firmly established by international law, there ought to be no doubt whatever that such a third state must grant the right of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or receiving state. The United States asserts that according to the law of nations a diplomatic officer is entitled to a right of transit to his post by sea, or through the national domain, whether land or water, of a state other than that to which he is accredited." *Id.*

2. U.S. courts (both federal and state) have likewise uniformly recognized a right of innocent passage in the limited number of cases in which it has been adjudicated. Thus, in *The Schooner Exchange*, the Supreme Court unanimously held that customary international law deprived U.S. courts of jurisdiction to adjudicate a civil claim against a French warship. 11 U.S. at 147. The schooner, which originally belonged to the complainants, was docked in the port of Philadelphia when the suit was initiated. *Id.* at 117. The district court concluded that under customary international law it lacked jurisdiction over the French sovereign's property while *in transitu*. *Id.* at 147.

The Supreme Court held in a unanimous opinion by Chief Justice John Marshall that there is a universally agreed-upon "exemption of the person of the sovereign from arrest or detention within a foreign territory." *Id.* at 137. The

Court also acknowledged the related principle that there is an "immunity which all civilized nations allow to foreign ministers," *i.e.*, diplomats. *Id.* at 138. This diplomatic immunity "is implied from the consideration that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission." *Id.* at 139. Thus, a sovereign appointing a diplomat "cannot intend to subject his minister in any degree to that power" of another sovereign and thus, the diplomat's reception "implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." *Id.*

While *The Schooner Exchange* involved the right of innocent passage for foreign naval vessels, the underlying rationale applies equally to the safe passage of diplomats. Like a warship, a diplomat "acts under the immediate and direct command of the sovereign; is employed by him in national objects." *Id.* at 144. And, as with warships, the sovereign "has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state" and "[s]uch interference cannot take place without affecting his power and dignity." *Id.*[15]

[15] Moreover, under the logic of *The Schooner Exchange*, a sovereign may refuse such *in transitu* immunity of a diplomat but it must do so expressly prior to the commencement of the passage, "in a manner not to be misunderstood"; otherwise, the sovereign's right to safe passage (and its corresponding diplomatic immunity) is implied as a matter of international law. *Id.* at 146.

The lower federal courts have likewise uniformly acknowledged the right of safe passage for a diplomat *in transitu*. The leading case is *Bergman*, 71 F. Supp. at 334, involving a French diplomat's claim of immunity from civil suit, after having been served in New York while *in transitu* to his post in Bolivia. The district court, after extensively examining existing precedent, State Department practice and that of other countries, as well as customary international law treatises, concluded:

> (1) that a foreign minister is immune from the jurisdiction, both criminal and civil, of the courts in the country to which he is accredited, on the grounds that he is the representative, the alter ego, of the sovereign who is, of course, entitled to such immunity, and that subjection to the jurisdiction of the courts would interfere with the performance of his duties as such minister; and (2) that a foreign minister en route, either to or from his post in another country, is entitled to innocent passage through a third country and is also entitled, on the same grounds, whether as a matter of right or of discretion, to the same immunity from the jurisdiction of the third country that he would have if he were resident therein.

Id. at 341.

The Second Circuit unanimously affirmed. Judge Learned Hand concluded that "there are better reasons for favoring the immunity of a diplomat *in transitu*" than that of those posted to permanent missions and thus, "the courts of New York would today hold that a diplomat *in transitu* would be entitled to

the same immunity as a diplomat *in situ*." *Bergman v. De Sieyes*, 170 F.2d 360, 363 (2d Cir. 1948).[16]

Like Mr. Saab, the diplomat in *Bergman* was not accredited to the United States, and had not yet reached his destination. Judge Hand found that "[i]t is scarcely necessary to add that immunity would be altogether frustrated, in the case of all diplomats seeking their posts for the first time, if it were limited to those already accepted by the sovereign to whom they are accredited." *Id.*

3. Thus, the fact that Mr. Saab is not a diplomat recognized by the Secretary of State does not negate his diplomatic immunity. The United States is bound by its treaty obligations and customary international law to recognize the diplomatic status of third country envoys engaged in diplomatic missions. Indeed, the State Department has itself specifically rejected the notion that *in transitu* immunity applies only to diplomats accredited to the United States. In a 1906 letter to the Secretary of Commerce—who had asked whether a poll tax could be imposed on a Russian diplomat traveling home from his post in Mexico—Secretary of State Elihu Root stated that:

> But it may be said that the immunity applies merely to diplomatic agents accredited to and actually residing within the United States. To which it is replied that such a construction is narrow and literal….The law of nations must be construed broadly and in a spirit to safeguard any right existing by the law of nations. It is

[16] Due to the case's procedural posture, the Circuit was technically construing New York law, although it clearly indicated that New York's conclusions concerning customary international law in this regard were correct.

> a separate system of jurisprudence although incorporated bodily in our fundamental law. It must therefore be construed with regard to the origin and nature of the right….
>
> If a diplomatic agent is privileged to enter and to leave an accrediting state, it follows that he must not be debarred the right of returning from his post by the act of a neighboring and friendly state. Otherwise the delay and inconvenience involved might seriously hamper the agent in discharging his duty to the home government.

Letter from Elihu Root to U.S. Sec'y of Commerce, Mar. 16, 1906, *reprinted in Hackworth*, at 459–61.[17] The United States has, in short, never conceded that its diplomats, while *in transitu* to and from their posts, do not enjoy the most basic immunities of personal inviolability and immunity to arrest and detention. It seems safe to say the United States would not, today, concede this. The purpose of diplomatic immunity is "to protect the interests of comity and diplomacy among nations, and, not incidentally, to ensure the protection of our own diplomats abroad." *Devi v. Silva*, 861 F. Supp. 2d 135, 143 (S.D.N.Y. 2012). There is no room for the government to deny immunity on grounds it would never concede strip its own diplomats of immunity. And, when the government fails to

[17] Secretary Root concluded that there was not much domestic law on the question of diplomatic immunity *in transitu*, but only because such a right was rarely violated: "If there is little law on the question that is due rather to a uniform practice than to any doubt as to the existence of the right or privilege in question." *Id*.

acknowledge these rules, it becomes the courts' duty to enforce its international obligations. This Court should fulfill that obligation and reverse.

CONCLUSION

The district court's order should be vacated and the case remanded with instructions to dismiss the indictment.

July 6, 2021

Respectfully submitted,

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ADDENDUM

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Vienna Convention on International Relations

April 18, 1961

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 31 (excerpt)

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.

Article 41

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs,

and to official communications and diplomatic bags, whose presence in the territory of the third State is due to force majeure.

22 U.S.C. § 254a

As used in this Act--

(1) the term "members of a mission" means--

(A) the head of a mission and those members of a mission who are members of the diplomatic staff or who, pursuant to law, are granted equivalent privileges and immunities,

(B) members of the administrative and technical staff of a mission, and

(C) members of the service staff of a mission,

as such terms are defined in Article 1 of the Vienna Convention;

(2) the term "family" means--

(A) the members of the family of a member of a mission described in paragraph (1)(A) who form part of his or her household if they are not nationals of the United States, and

(B) the members of the family of a member of a mission described in paragraph (1)(B) who form part of his or her household if they are not nationals or permanent residents of the United States,

within the meaning of Article 37 of the Vienna Convention;

(3) the term "mission" includes missions within the meaning of the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention; and

(4) the term "Vienna Convention" means the Vienna Convention on Diplomatic Relations of April 18, 1961 (T.I.A.S. numbered 7502; 23 U.S.T. 3227), entered into force with respect to the United States on December 13, 1972.

22 U.S.C. 254d

Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

R (on the application of the Freedom and Justice Party and others) v Secretary of State for Foreign and Commonwealth Affairs and another (Metropolitan Police Commissioner, interested party) (Amnesty International and another intervening)

[2018] EWCA Civ 1719

COURT OF APPEAL, CIVIL DIVISION

ARDEN, SALES AND IRWIN LJJ

21, 22 MARCH, 19 JULY 2018

Constitutional law – Diplomatic immunity – Immunity from legal process – Criminal proceedings – Special missions – Whether members of special mission entitled to immunity under customary international law from arrest and detention and criminal proceedings – Whether, if so, such immunity given effect by common law.

A special mission was a temporary mission, representing a state, sent by that state to another state with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task. Special missions were used in many situations where there was no permanent mission or for functions for which a member of a permanent mission would not be a suitable or the most suitable representative of the sending state. The UN Convention on Special Missions 1969 ('UNCSM') provided for special missions to have both core immunities from criminal proceedings and additional immunities. The UNCSM had been signed but not ratified by the United Kingdom. Only 39 states had ratified the UNCSM. The practice of the British government was to provide consent in advance in appropriate cases to special missions, but to leave the question of immunities to the courts. In 2015, the British government accepted the visit of H, an Egyptian military officer, and other members of his delegation as a special mission. The claimants were former members of the Egyptian government. Egypt had neither signed nor ratified the UNCSM. The claimants contended that H had been responsible for torture in the course of events that led to the downfall of the government of which they were members. They sought H's arrest. The British authorities refused on the basis of guidance that special mission members were immune from arrest. No action was taken, and H left the UK at the mission's end. The claimants challenged that decision. The material issues were: (i) whether under customary international law the receiving state had to grant, for the duration of the special mission's visit, the core privileges of personal inviolability (ie freedom from arrest or detention) and immunity from criminal proceedings in the same way that members of permanent missions were entitled to such

immunities; and (ii) whether such immunities were recognised by the common law. The Divisional Court held that customary international law required a receiving state to secure, for the duration of the visit, the core immunities for members of a special mission accepted as such by the receiving state and that that rule of customary international law was given effect by the common law. The claimants appealed.

Held – (1) To establish a rule of customary international law a party had to show state practice supporting the core immunities and opinio juris (ie a general recognition by states that the practice was settled enough to amount to a binding obligation in international law). To establish opinio juris, the state must believe that there was an obligation to grant the core immunities to special missions accepted and recognised by them as such. There was a very considerable amount of evidence of different types to satisfy those two elements and very little against. If an international court had to consider the question whether a member of a special mission enjoyed the core immunities as a matter of customary international law, it would have regard to the importance and long acceptance of the role of special missions. Special missions had performed the role of ad hoc diplomats across the world for generations. They were an essential part of the conduct of international relations. Special missions could not be expected to perform their role without the functional protection afforded by the core immunities. An international court would find that there was a rule of customary international law to that effect. As regards state practice, relevant states were those affected by the rule, ie those who either sent (or wished to send) or received and recognised special missions. There was nothing to suggest that any state affected in that sense had ever objected to the rule. It was not necessary to show acceptance of the rule by states that were simply not concerned with special missions because they did not receive or recognise them and did not send their own elsewhere to carry out tasks in other states. It was a particular feature of the rule that it only applied to a receiving state that agreed to receive a special mission as such. The rule was not one that imposed burdens on other states that did not wish to accept special missions. That was a feature that could be taken into account when determining whether a practice was sufficiently representative to give rise to a rule of customary international law. The failure of the UNCSM to gain greater acceptance was not evidence against the existence of the rule of customary international law supporting the core immunities for special missions. It had failed to gain support because of its inflexibility and the width of the immunities it conferred. Its presence indicated the general acceptability of the institution of special missions and that such missions should have some immunities to enable them to function effectively. Moreover, the core immunities had been demonstrated to exist in a way that was not subject to any qualification for any international crimes (see [12], [15], [78], [79], [82], [83], [87], [108], [109], [112], [136], below).

(2) In the case of a rule of customary international law, the presumption was that it would be treated as incorporated into the common law unless there was some reason of constitutional principle why it should not be. The recognition of core immunities was to be distinguished from the question whether a new crime that had emerged in customary international law should be recognised as part of domestic common law without the need for legislation. To treat the core immunities as part of the common law was to protect a person who had the benefit of them from criminal process. That was very different from

treating some new offence in customary international law as part of the common law, so that a person could be tried for that offence and be made subject to a criminal penalty in the absence of a law expressly created by Parliament. Unlike the constitutional principle that a new criminal offence in domestic law could only be created by Parliament, there was no equivalent constitutional principle in relation to recognition of immunities from process. Recognition of the core immunities at issue did not involve the court illegitimately trespassing on an area that Parliament regarded as reserved for itself. Far from conflicting with a principle of constitutional law, the recognition of the core immunities, as required by customary international law, ran with the grain of relevant legislation and legislative policy in the field and did not conflict with such legislation or policy. The rule of customary international law that had been found to be established was a narrow and simple one. It did not call for any legislative choices to be made. The effect of the immunity was clear. The persons to whom it applied were also clearly identifiable. No complex legislative definitions or machinery had to be put in place to make it workable. Although the special mission regime was an immunity regime the operation of which depended upon action by the executive, the fact that the relevant rule of customary international law was expressed to be dependent upon the decision of a receiving state whether to accept an individual as a member of a special mission, taken in combination with the principle in domestic law that the conduct of international affairs was a matter for the executive, did not mean that the courts should decline to receive the rule into the common law. It followed that, in accordance with the presumption that customary international law should shape the common law, immunity from arrest or detention and immunity from criminal proceedings for members of a special mission were recognised by the common law (see [12], [113], [117], [121], [124]–[127], [129], [134]–[136], below); *R v Jones, Ayliffe v DPP, Swain v DPP* [2006] 2 All ER 741 distinguished; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2016] 4 All ER 794 considered.

Decision of the Divisional Court [2016] All ER (D) 32 (Aug) affirmed.

Notes

For immunity of persons on special missions, see 61 *Halsbury's Laws* (5th edn) (2018) para 254.

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Vietnamese National Case OVG 8 S 39.06 (15 June 2006), High Admin Ct of Berlin-Brandenburg.

Appeal

The claimants, the Freedom and Justice Party and others and Yehia Hamed, appealed with permission from the decision of the Divisional Court (Lloyd Jones LJ and Jay J) of 5 August 2016 ([2016] EWHC 2010 (Admin), [2016] All ER (D) 32 (Aug)) dismissing their application for judicial review and finding that customary international law required a receiving state to secure, for the duration of the visit, the core immunities for members of a special mission accepted as such by the receiving state and that that rule of customary international law was given effect by the common law. The respondents were the Secretary of State for Foreign and Commonwealth Affairs and the Director of Public Prosecutions. The Metropolitan Police Commissioner was an

a interested party. Amnesty International and Redress were interveners and made written submissions. The facts are set out in the judgment of the court.

Sudhanshu Swaroop QC, *Tom Hickman* and *Philippa Webb* (instructed by *ITN Solicitors*) for the appellants.

b *Karen Steyn QC*, *Jessica Wells* and *Guglielmo Verdirame* (instructed by the *Government Legal Department*) for the Secretary of State.

Paul Rogers and *Katarina Sydow* (instructed by the *Director of Public Prosecutions*) for the DPP.

The interveners did not appear but made written representations.

Judgment was reserved.

c

19 July 2018. The following judgment was delivered.

ARDEN LJ.

OVERVIEW AND SUMMARY OF CONCLUSIONS

d [**1**] This is the judgment of the court to which all members of the court have contributed.

[**2**] This appeal concerns 'special missions'. We use the definition of 'special mission' found in the UN Convention on Special Missions 1969 ('the UNCSM'). That reads:

e > '[A] temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task …'

[**3**] States use special missions in international relations in lieu of or in addition to their permanent diplomatic missions in other countries. The issues f on this appeal are about the immunities to be given to special missions.

[**4**] A special mission could be a single envoy or a delegation. There is nothing in the definition in the UNCSM to limit the nature of the business with which it is engaged. It could be trade or other matters. The special mission is not a new development. The judgment of the Divisional Court g (Lloyd Jones LJ and Jay J) dated 5 August 2016 ([2016] EWHC 2010 (Admin), [2016] All ER (D) 32 (Aug)) and now under appeal explains that:

> 'Temporary missions were the earliest form of diplomatic missions but they fell into relative disuse in the seventeenth and eighteenth centuries as the practice of exchanging permanent envoys and embassies grew.'

h [**5**] This appeal is not, however, about the historic or current use of special missions, or their obvious usefulness. Special missions are clearly used in many situations across the world where there are no permanent missions or for functions for which a member of a permanent mission would not be a suitable or the most suitable representative of the sending state. Rather the issues are (1) whether under customary international law the receiving state must grant, j for the duration of the special mission's visit, the privileges of personal inviolability (that is, freedom from arrest or detention) and immunity from criminal proceedings (which we shall call the 'core' immunities) in the same way that members of permanent missions are entitled to such immunities under the Vienna Convention on Diplomatic Relations 1961 ('the VCDR'), and (2) whether such immunities are recognised by the common law.

[6] The UNCSM was adopted by the General Assembly of the United Nations on 8 December 1969. It entered into force on 21 June 1985. Like the VCDR it was based on draft articles prepared by the International Law Commission ('the ILC'). The United Kingdom has signed but not ratified the UNCSM. We have set out extracts from the UNCSM in Appendix 1 to this judgment. It is understood that the reason why the United Kingdom has not ratified the UNCSM is that it provides that special missions should automatically have not only the core immunities but also other immunities extending beyond the immunities which the particular special mission might need for its visit, such as those in arts 25 to 28 and 31.2 of the UNCSM (included in Appendix 1) (see Response to consultation of the United Kingdom, [1967] Vol II YB ILC 395–396).

[7] As explained in the judgment below, the UNCSM was described in the UN General Assembly resolution of 8 December 1969 (A/RES/2530 (XXIX)) adopting it as a measure of 'codification and progressive development' of international law and the product of a project by ILC. The UNCSM itself is silent as to whether its provisions reflect customary international law.

[8] Indeed, the UNCSM has currently only been ratified by 39 states, though they are widely drawn from Europe, Africa, Asia and the Americas. The UNCSM was adopted by a UN General Assembly resolution with 98 states in favour, none against and one abstention on 8 December 1969. We have inserted '(p)' below next to the names of the states which are parties when we refer to them. The evidence of state practice in this case as to the rule of customary international law which the Divisional Court found to exist comes not simply from states which are not party to the UNCSM but also from states which are bound by it, though of course they are only so bound with regard to other contracting states.

[9] The practice of the British government is to provide consent in advance in appropriate cases to special missions, but to leave the question of immunities to the courts. This appears from a ministerial statement made by the Foreign Secretary, William Hague, to the House of Commons dated 4 March 2013, and the note which followed it.

[10] The Divisional Court held that customary international law requires a receiving state to secure, for the duration of the visit, the core immunities for members of a special mission accepted as such by the receiving state and that this rule of customary international law is given effect by the common law. Before expressing any view on the points decided by the Divisional Court, we pay tribute to the erudition and analysis in the judgment, which, despite the fact it extends to 180 paragraphs, plus a substantial annex, was a model of concision and clarity.

[11] The judgment of the Divisional Court on both those issues is challenged in this appeal, and we deal with them below separately.

[12] For the reasons given below, this court has concluded that the appeal should be dismissed. We consider that the evidence considered by the Divisional Court and further evidence which has since become available amply shows the existence of the rule of customary international law with which we are concerned. We also consider that this rule of customary international law is recognised by and accepted as part of the common law.

[13] Sudhanshu Swaroop QC, Tom Hickman and Philippa Webb appear for the appellants and Karen Steyn QC, Jessica Wells and Guglielmo Verdirame appear for the first respondent. Paul Rogers and Katarina Sydow appear for the second respondent, but they have not played any substantial part in the

submissions on this appeal as the Director's position is simply that she wishes to know the position in customary international law. In addition to leading counsel, we heard submissions from Mr Hickman and Mr Verdirame, and we therefore attribute some submissions to them. In this judgment, the acronym FCO will be used to mean either the first respondent or the Foreign and Commonwealth Office. The interested party and interveners did not appear but copies of the skeletons used below of the interested party (signed by Jeremy Johnson QC) and Interveners (signed by Shaheed Fatima QC and Rachel Barnes) have been provided to us, together with written submissions on the appeal from Ms Fatima QC, Ms Barnes and Daniel Machover for the Interveners. We are grateful for all these materials.

EVENTS GIVING RISE TO THESE PROCEEDINGS: VISIT BY EGYPTIAN DELEGATION AND APPELLANTS' OBJECTIONS

[**14**] These are explained in more detail by the Divisional Court. The appellants are former members of the Egyptian government. Egypt has neither signed nor ratified the UNCSM. They contended that a person whom we will refer to as Lt General Hegazy had been responsible for torture in the course of events which led to the downfall of the government of which they were members. In 2015 the FCO accepted the visit of Lt General Hegazy and other members of his delegation as a special mission. The appellants requested that he be arrested. FCO and Crown Prosecution Service ('CPS') guidance stated that special mission members were immune from arrest. No action was taken against Lt General Hegazy. He left the United Kingdom at the mission's end. The Divisional Court had first to consider the appellants' standing to bring this claim, but that issue is not under appeal and so we need say no more about it.

A. CUSTOMARY INTERNATIONAL LAW

1. Identifying customary international law

[**15**] The United Kingdom would be bound under international law to confer immunity on a special mission received and recognised by it only if customary international law required it to do so. Customary international law has to satisfy two requirements: there must be evidence of a substantial uniformity of practice by a substantial number of states; and *opinio juris*, that is, a general recognition by states that the practice is settled enough to amount to a binding obligation in international law. On occasion this recognition can be inferred from actual settled state practice (see the *Jurisdictional Immunities* case (*Germany v Italy: Greece Intervening* (*Jurisdictional Immunities of the State*) [2012] ICJ Rep 99, para 77), but this will not always be the case (see *SS Lotus* (*France v Turkey*) (1927) PCIJ Series A, no 10, 28, where the Permanent Court was not satisfied that the states had acted as they did out of any sense of obligation). Customary international law does not have to cover an entire field: it can, as the Divisional Court found in this case, cover certain core matters as a minimum.

[**16**] As Lord Sumption JSC, with whom Lady Hale, Lord Wilson, Lord Neuberger and Lord Clarke agreed, explained in *Benkharbouche v Embassy of the Republic of Sudan* (*Secretary of State for Foreign and Commonwealth Affairs and others intervening*), *Janah v Libya* (*Secretary of State for Foreign and Commonwealth Affairs and others intervening*) [2017] UKSC 62, [2018] 1 All ER 662, [2017] 3 WLR 957, the practice said to represent a rule of customary international law need not be universal but there must be a widespread, representative and consistent practice:

'[31] To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (opinio juris): see Conclusions 8 and 9 of the International Law Commission's *Draft Conclusions on Identification of Customary International Law* (2016) [A/71/10]. There has never been any clearly defined rule about what degree of consensus is required. The editors of *Brownlie's Principles of Public International Law* (8th edn, 2012), 24, suggest that "complete uniformity of practice is not required, but substantial uniformity is". This accords with all the authorities. In the words of the International Court of Justice—

> "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) [1986] ICJ Rep 14 (para 186).)

What is clear is that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law: *Fisheries Case* (*UK v Norway*) [1951] ICJ Rep 116 at 131.'

[**17**] The Divisional Court also pointed out that a practice need not be universal or totally consistent (Judgment, [78], citing the *North Sea Continental Shelf Cases* [1969] ICJ Rep 3 (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)).

[**18**] Since the decision of the Divisional Court, the ILC has published a further version of its draft conclusions on its project on the *Identification of Customary International Law*. There are 16 conclusions, which are set out in appendix 2 below, which must be read with the commentary published with them but not reproduced below (ILC Report, 68 GAOR Supp 10 (A/71/10) (2016)). They are subject to possible further, but likely to be minor, amendment before adoption. We are mindful of that, but also of the fact that they are the writings of some of the most qualified jurists drawn from across the world who have debated the matter most thoroughly between themselves over an extended period of time. We have found them a valuable source of the principles on this subject and, since they are not controversial between the parties, this judgment should be read on the basis that we have sought to follow them in our consideration of this appeal in view of their importance and scholarship. To do so does not appear to create any inconsistency between our approach and that of the Divisional Court. The appellants accept that even in their present form, they carry great weight.

[**19**] What is immediately apparent, as the appellants indeed submit, is that the ascertainment of customary international law involves an exhaustive and careful scrutiny of a wide range of evidence. Moreover, a finding that there is a rule of customary international law may have wide implications, including, as we discuss below, for the common law. As Lord Hoffmann held in *Jones v*

Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 All ER 113, [2007] 1 AC 270 (at [63]), quoted by the Divisional Court at para [81] of its judgment:

> 'It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.'

[20] The practice has to be virtually uniform and consistent but it need not be universal. It is sufficient that it is virtually uniform and consistent among those states which adopt the practice of recognising special missions and those states which are in a position to react to the grant of the core immunities. They must have acted so that their conduct evidences a belief that they are required to grant those immunities by the existence of a rule of law requiring it (see *Nicaragua v USA* (*Military and Paramilitary Activities in and against Nicaragua*) [1986] ICJ Rep 14 at 108–109).

[21] In this case, there is the added feature of the relationship of customary international law with treaty law because of the UNCSM, which has come into force as regards some other states. There is no automatic rule that treaty law must in those circumstances occupy the field and exclude customary international law. It is perfectly possible that customary international law predated the UNCSM, and that in relation to non-parties it has continued to exist. The first respondent cites the *Fisheries Jurisdiction Case* (*UK v Iceland*) [1974] ICJ Rep 3 at [52], in which a treaty provision on which states had failed to agree later crystallised into rules of customary international law. Another possibility is that the execution of a treaty leaves in place a rule of customary international law between non-parties. As Lord Sumption explained in *Benkharbouche* (at [32]):

> '… a treaty may have no effect qua treaty but nevertheless represent customary international law and as such bind non-party states. The International Law Commission's *Draft Conclusions on Identification of Customary International Law* (2016) proposes as Conclusion 11(1):
>
> > "A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
> >
> > (a) codified a rule of customary international law existing at the time when the treaty was concluded;
> >
> > (b) has led to the crystallisation of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
> >
> > (c) has given rise to a general practice that is accepted as law (opinio juris) thus generating a new rule of customary international law." '

2. Judgment of the Divisional Court

[22] The judgment of the Divisional Court ([2016] EWHC 2010 (Admin), [2016] All ER (D) 32 (Aug)) is very detailed and in this summary we provide the highlights on the main issues not already covered above, and the issues with which this appeal is concerned.

Work of the ILC 1960–1967 on Special Missions

[23] As already explained, the UNCSM was the product of the ILC's work on special missions. This work was in response to a request by the General Assembly of the United Nations in 1961. The judgment of the Divisional Court

discusses its work in great detail but for present purposes it is enough to select some of the points. The Special Rapporteur for that project was Mr Milan Bartoŝ, a law professor from Yugoslavia. He produced four reports on the subject (A/CN.4/166, *Report on Special Missions*, YILC 1964, Vol II; A/CN.4/177 and A/CN.4/179, *Second Report on Special Missions*, YILC 1965, Vol II; A/CN.4/189, *Third Report on Special Missions*, YILC 1966, Vol II; A/CN.4/194, *Fourth Report on Special Missions*, YILC 1967, Vol II), which summarised his earlier reports.

[**24**] Mr Bartoŝ carried out extensive research into special missions but in his 1967 report to the ILC he reported that he was unable to find very much to support any rules of positive law in relation to special missions. He strongly supported the idea that there should be privileges and immunities for special missions to complement those given by the VCDR of 1961. In due course, the ILC took the VCDR as the basis for its draft articles for a convention on special missions.

[**25**] There was a division of view in the ILC as to the position of special missions. The United States took the view that there was no need to make extraordinary arrangements for the ordinary flow of official visitors. Moreover, the United States expressed the view that there was growing concern and mounting opposition to further extensions of privileges and immunities in most states and a convention might make states less receptive to accepting official visits if every such visit had to be treated as an envoy extraordinary. A number of states, including the United Kingdom, took the point that the ultimate list of privileges went beyond that which was necessary for the functioning of the special mission. Other states took the view that there was no need for any special provisions for special missions as they did not cause any difficulty. Ultimately, and notwithstanding the view of the Special Rapporteur, the ILC took the view that it had become generally recognised since World War II that states were under an obligation to accord at least some diplomatic privileges and immunities to members of special missions, and that special missions should be granted the privileges and immunities which were essential for the regular performance of their functions, having regard to their nature and task. In the end, a large number of immunities were given including immunities for members of special missions and their families in line with the VCDR.

[**26**] Recognising that this was difficult to reconcile with the Special Rapporteur's original conclusions, the Divisional Court concluded that the work of the ILC on special missions could not be taken as evidence that the core immunities were part of customary international law. In its judgment, the highest it could be put was that—

> 'only limited weight can be given to the work of the ILC as supporting the existence of rules of customary law on this subject as at 1967. In our view, the most that can be said on the basis of this evidence is that:
>
> (1) There was some customary law on the subject which operated by way of legal obligation as opposed to comity or courtesy.
>
> (2) The solution proposed by the ILC in its draft articles was, in general, based on the rules in the VCDR concerning permanent missions, as opposed to an approach based on the grant of facilities, privileges and immunities to special missions limited to what was strictly necessary for the performance of the mission's task.

> (3) It is apparent from the work of the ILC that the purpose of according privileges and immunities to special missions and their members is, as in the case of permanent diplomatic missions and their members, to enable the mission to perform its functions. Diplomatic immunity is essentially a functional immunity. In this regard, it seems to us that the matters with which we are concerned—the inviolability and immunity from criminal proceedings of a member of a mission during its currency—are essential if a mission is to be able to perform its functions and that, accordingly, if there exists any customary law on the subject, it could be expected to include rules to that effect.' (Judgment, [101].)

[**27**] The Divisional Court went on at [102] to cite the assessment by a leading commentator on the subject, Sir Michael Wood, a former principal legal adviser at the FCO and member of the ILC ('The Immunity of Official Visitors' (2012) 16 MPUNYB 35 at 59–60), including this passage:

> 'The elaboration of the [UNCSM] had a major impact on the development of rules of customary international law; it was a focus for State practice … the [ILC] was of the opinion that its draft reflected, at least in some measure, the rules of customary international law and this does not seem to have been contested by States. While it cannot be said that all—or even most—of the provisions of the [UNCSM] reflected customary international law at the time of its adoption, it is widely accepted that certain basic principles, including in particular the requirement of consent, and the inviolability and immunity from criminal jurisdiction of persons on special missions, do now reflect customary law.'

Work of the ILC (2008) on Immunity of State Officials from Foreign Criminal Jurisdiction

[**28**] In 2008 the ILC began a project on the *Immunity of State Officials from Criminal Jurisdiction*. This work contained a further indication that there were no rules of customary international law in relation to the core immunities for the members of a special mission. Mr Kolodkin, Special Rapporteur for this project, in his preliminary report dated 25 May 2008, expressed the view that further work would be needed to determine whether there were rules of customary international law applying to the position of members of special missions. In other words, such rules were not self-evident. Mr Kolodkin noted that there were few parties to the UNCSM.

State practice: Treaties

[**29**] The Divisional Court considered the Havana Convention regarding Diplomatic Officers 1928, which gave members of non-permanent diplomatic missions the core and other immunities. This Convention had fifteen parties and six signatories, all American states. It was negotiated under the auspices of the Conference of American states. The Divisional Court did not place much reliance on this but noted that an earlier Special Rapporteur on an earlier special missions project of the ILC, Mr Sandström, had relied on it as sanctioning immunities he considered were generally accepted by publicists (that is, the leading jurists). The Divisional Court also referred to the VCDR, noting that it applied only to permanent missions.

Decisions of international courts and tribunals

[**30**] The Divisional Court rejected the argument that there were any significant matters in the jurisprudence of the ICJ. The ICJ had twice mentioned special missions in its judgments, once in *Democratic Republic of the Congo v Belgium* (*Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3, when the ICJ made the point that the parties had not ratified the UNCSM. The appellants invited the Divisional Court to attach weight to the fact that the ICJ made no reference to customary international law. In the second case *Certain Questions of Mutual Judicial Assistance in Criminal Matters* (*Djibouti v France*) [2008] ICJ Rep 177, the ICJ found that particular officials were not entitled to diplomatic immunity and did not refer to any immunity as a member of a special mission although earlier in the proceedings Djibouti had claimed that he was part of a special mission (Judgment, [185]).

State practice: the United Kingdom and Mongolia

[**31**] The Divisional Court made findings as to the evidence of state practice in the United Kingdom. In short, the Divisional Court held that there was some limited evidence in the decisions of district judges, and in the submissions of the FCO in *Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), [2013] QB 349, [2012] 3 WLR 180 ('the *Khurts Bat* case'). The case concerned the execution in the UK of a European arrest warrant in respect of the defendant in the proceedings. The FCO, represented by Sir Michael Wood, had there submitted that 'the current state of customary law does require the inviolability and immunity from criminal proceedings of members of special missions who are accepted as such by the receiving State'. The Government of Mongolia, represented by another eminent jurist, Sir Elihu Lauterpacht QC, also intervened in that case to make submissions on this topic. As recorded at [22], it was agreed by the FCO and the Government of Mongolia 'that under rules of customary international law the defendant was entitled to inviolability of the person and immunity from suit if he was travelling on a special mission sent by Mongolia to the UK with the prior consent of the UK'.

State practice: the United States

[**32**] The Divisional Court examined the decision of the US District Court for the Southern District of Florida in *United States of America v Sissoko* (1997) 995 F Supp 1469, in which the court, rejecting a claim for immunity by a member of a special mission which had not been accredited as such, observed that the UNCSM was not customary international law. The US District Court cited the *Restatement of the Law Third, Foreign Relations Law of the United States* (1987), published by the American Law Institute ('ALI'). The Divisional Court examined subsequent cases and the statement of John B Bellinger III, made when he was legal advisor to the US State Department. It concluded that the up to date position in relation to United States practice and case law was that the courts and the government in the United States considered that official visitors, accepted as such by the executive, were entitled to immunity for the duration of their visit. The Divisional Court agreed with the conclusion of Sir Michael Wood in (2012) 16 MPUNYB 35 at 97, that US practice supports the existence of customary rules regarding the immunity of special missions (Judgment [128]).

State practice: Austria (p), Belgium, Finland, France, Germany, The Netherlands

[**33**] The Divisional Court also considered the practice of a number of states mentioned by Sir Michael Wood in *The Immunity of Official Visitors* (2012) 16 MPUNYB 35.

[**34**] As to Austria (p), the Austrian decision in question had only referred to the UNCSM by analogy. As to Belgium, there was evidence in the form of the statement by the ICJ in the *Arrest Warrant* case (*Democratic Republic of the Congo v Belgium* (*Arrest Warrant of 11 April 2000*) [2002] ICJ Rep 3) and a provision of the Code of Criminal Procedure, both of which supported the view that a representative of a foreign state visiting Belgium with the consent of the Belgian authorities enjoyed immunity from the jurisdiction of the Belgian courts. As to France, the Divisional Court effectively adopted the conclusion of Sir Michael Wood in his article that 'French practice, particularly as evidenced by statements of the executive, tends to support the view that under customary international law official visitors to France enjoy immunity from criminal jurisdiction'.

[**35**] As to Germany, the Divisional Court noted that the German constitution prohibited the courts from taking jurisdiction over a foreign official present at the invitation of the German authorities. The Divisional Court referred to Sir Michael Wood's description in his article of two cases in Germany, *Tabatabai* (1989) 80 ILR 388 and the *Vietnamese National Case* OVG 8 S 39.06 (15 June 2006).

[**36**] As to The Netherlands, the opinion of jurists supported the view that 'temporary diplomats' enjoyed immunity from jurisdiction under customary international law.

The Committee of Legal Advisers on Public International Law

[**37**] The Divisional Court considered that their ultimate conclusion (see [9] above) was confirmed by a survey which the Committee of Legal Advisers on Public International Law ('CAHDI'), a committee of government legal advisers under the auspices of the Council of Europe, had conducted of its members starting in 2012 on immunities of special missions. In this survey, legal advisers were asked whether their state considered that any obligations regarding immunity of special missions derived from customary international law and to provide information on the scope of the immunities of special missions. The Divisional Court annexed to its judgment a summary of the answers which legal advisers gave on this topic. Some 24 states had responded at the time of the judgment of the Divisional Court (that number has since increased).

[**38**] The Divisional Court concluded:

> '[146] While the responses do not indicate an entirely uniform approach among the responding states, we consider that, with very limited exceptions, they fall into two broad categories. In the first the responses do not provide any evidence for or against the proposed rule either because the issue is not addressed or because the state concerned takes a neutral position. The responses of Andorra, Belarus, Denmark, Estonia, Georgia, Ireland, Latvia, Mexico, Norway and the United States fall into this category. In the second the responses are, at the least, consistent with the proposed rule and in many instances they provide unequivocal support for the proposed rule. The responses of Armenia, Austria, the Czech Republic, Finland, Germany, Italy, The Netherlands, Romania, Serbia, Switzerland and the United Kingdom fall into this category. The responses of Albania

and France require special mention because they state that immunity is limited to official acts of a member of the mission and would not therefore extend to immunity in the case of international crimes. However, they also appear to accept that the member of the mission would, nevertheless, be inviolable. Sweden considered that it was uncertain whether the Convention on Special Missions reflects customary international law. As we have seen, a number of other states, including the United Kingdom, have expressed the view that the Convention in its entirety does not reflect customary international law.

[147] However, the CAHDI survey does not cause us to doubt that the great weight of state practice summarised earlier in this judgment demonstrates the existence of the proposed rule of customary international law. On the contrary we consider that it is broadly consistent with or supportive of that conclusion.'

Views of jurists

[**39**] As to jurists, with the notable exception of Sir Arthur Watts, Sir Robert Jennings and Professor Sir Ian Brownlie, who doubted whether rules of customary international law had yet emerged on the immunities of special missions at the time of their writing, the preponderance of the opinions of jurists took the view that special missions enjoyed an immunity separate from sovereign immunity.

[**40**] The Divisional Court noted that Sir Michael Wood, writing in 2012, considered that some of the immunities in the UNCSM were part of customary international law (see [28] above). Similar views had been expressed by a significant number of authors, including Nadia Kalb, writing in the MPUNYB (2001); in *Brownlie's Principles of International Law*, in the 2012 edition by Professor James Crawford; in Fox and Webb *The Law of State Immunity* (3rd edn, 2015); in 61 *Halsbury's Laws* (2010) para 264; and C Wickremasinghe 'Immunity Enjoyed by Officials of States and International Organisations' in Evans (ed) *International Law* (4th edn, 2014) p 390.

[**41**] In the view of the Divisional Court, after its careful review of all the relevant materials:

'… the preponderance of the modern views of jurists strongly supports the existence of rules of customary international law on special missions which, at the least, require receiving States to secure the inviolability and immunity from criminal jurisdiction of members of the mission during its currency as essential to permit the effective functioning of the mission.' (Judgment, [162]).

Conclusions of the Divisional Court on customary international law

[**42**] The Divisional Court stated its conclusions on customary international law in the following terms:

'[163] This survey of state practice, judicial decisions and the views of academic commentators leads us to the firm conclusion that there has emerged a clear rule of customary international law which requires a state which has agreed to receive a special mission to secure the inviolability and immunity from criminal jurisdiction of the members of the mission during its currency. There is, in our view, ample evidence in judicial decisions and executive practice of widespread and representative state practice sufficient to meet the criteria of general practice. Furthermore, the requirements of

opinio juris are satisfied here by state claims to immunity and the acknowledgement of states granting immunity that they do so pursuant to obligations imposed by international law. Moreover, we note the absence of judicial authority, executive practice or legislative provision to the contrary effect.

[164] In a further submission the claimants maintain that, even if members of a special mission are entitled to immunity from criminal jurisdiction, this applies only in relation to official acts. They refer to the fact that the conduct alleged against Lt General Hegazy constitutes torture contrary to s 134, Criminal Justice Act 1988 and submit that, accordingly, it cannot be considered an official act. In our view, this submission is unfounded for a number of reasons. First, although there are instances where such a limitation has been suggested (see, for example, the case of Jean-Francois H, referred to at para [138] above), State practice in general does not support any such limitation on special mission immunity in customary international law. Thus, Kalb, writing in the *Max Planck Encyclopaedia of Public International Law*, refers to the current practice in the United Kingdom, where immunity has been upheld repeatedly at first instance notwithstanding that the intended proceedings allege conduct amounting to international crimes. She concludes that special mission immunity applies even in cases concerning international crimes. Secondly, any such limitation would be inconsistent with the rationale of the immunity which is a functional immunity intended to permit the mission to perform its functions without hindrance. Thirdly, any such limitation would be inconsistent with the personal inviolability of a member of a special mission which is now shown to be required by customary international law.

[165] For these reasons we consider that customary international law obliges a receiving state to secure, during the currency of the mission, the inviolability and immunity from criminal jurisdiction of a member of a special mission whom it has accepted as such.'

3. Submissions of the parties

1. Identifying customary international law

[43] Mr Swaroop submits that the evidence does not match up to the standard necessary for establishing a rule of customary international law. The evidence had to be of a 'consistent' and 'virtually uniform' practice accepted as law (citing *North Sea Continental Shelf*, at para 74, cited by the Divisional Court in [78] of its judgment, and draft ILC conclusion 8, in appendix 2 below). In *Mohammed v Ministry of Defence, Rahmatullah v Ministry of Defence, Iraqi Civilians v Ministry of Defence* [2017] UKSC 1, [2017] 3 All ER 179, [2017] AC 649, the Supreme Court held that there was insufficient consensus to give rise to a rule of customary international law permitting members of opposing forces to be detained in non-international armed conflicts.

[44] Moreover, to give rise to a rule of customary international law the relevant state practice has to be representative, as the Divisional Court held at [78] of its judgment, citing the ICJ's decision in *North Sea Continental Shelf* case. The need for the state practice to be representative is also stated in the draft conclusion 8.1 of the ILC (appendix 2 below).

[45] Mr Swaroop submits that the respondent failed to show that the rule was accepted in all regions of the world. This is not a case where the rule

relates to a unique geographical feature like an international canal so that only countries in a particular part of the world are involved. In this case, the respondents are (through the CAHDI survey) relying principally on the position in Europe alone.

[**46**] Mr Swaroop submits that, if there is no immunity under customary international law, ordinary principles of state immunity may apply but those principles would on his submission be limited to immunity *ratione materiae*, ie the immunity in respect of 'official acts' (see *Brownlie* (6th edn, 2003); cited by the Divisional Court at [157]. Mr Swaroop submits that state practice would be insufficient to support the core immunities if there is evidence that the rule does not afford immunity or inviolability for serious international crimes, or if the immunity were limited to 'official acts'. On the facts of this case, such a limitation would not protect Lt General Hegazy (see the judgment of the Divisional Court, at [146], [164]).

[**47**] Mr Swaroop submits that the UNCSM only confers immunity on the representatives of the sending state in the special mission and members of its diplomatic staff. Accordingly, submits Mr Swaroop, it does not extend to all members of the mission. For example, administrative and technical staff are omitted. There is no certainty regarding the extent of any immunities in customary international law, which is an indication that none can be identified. However, despite the best efforts of the appellants and the interveners in their researches for the case, not a single example of any state arresting or prosecuting a member of a special mission has been found.

[**48**] Ms Steyn relies on the ILC's draft conclusions as showing the criteria which apply to identifying international law. She points out that there is no absolute requirement for the practice to be representative. What is necessary is that it is 'sufficiently' widespread and representative (draft conclusion 8). The ILC's commentary (pp 94 to 95) makes it clear that universal participation is not required and states that: 'The participating States should include those that had an opportunity or possibility of applying the alleged rule.'

[**49**] The commentary gives the example of a rule of customary international law in relation to navigation in maritime zones. It would be necessary in that case 'to have regard to' the practice of the coastal states and the major shipping states. While the ILC commentary on this point concludes by saying that in many cases, all or virtually all the states will be equally concerned, a footnote to the sentence quoted in the preceding paragraph makes it clear a relatively small number of states might suffice if the practice is accepted as law (*opinio juris*).

[**50**] Ms Steyn submits that a particular feature of this case is the lack of contrary jurisprudence or practice. As draft conclusion 10 of the ILC's draft conclusions (appendix 2 below) states, inaction by a number of states over time may serve as evidence of acceptance of the practice as law (*opinio juris*), provided that the relevant states were in a position to react and the circumstances called for some action. But, as the ILC's commentary states, in order to ensure that the inactivity is not caused by something else, reaction must have been called for and the state which did not react must have known of the practice.

[**51**] Ms Steyn submits that immunities in international law are procedural immunities, whereas rules of international law relating to crimes under international law are substantive. Therefore the existence of an immunity is to be determined as a procedural matter and without any reference to any alleged

act contrary to international law. Unless Lt General Hegazy is entitled to special mission immunity, he has no other immunity as he was not a diplomat.

2. Work of the ILC 1960–1967 on special missions

[**52**] Mr Swaroop also submits that the discussions before the ILC during its special mission project were inconsistent with the rule of customary international law found by the Divisional Court. The participants were arguing that there should be no law but Mr Bartoš said that there should be a law and that there was nothing to show an obligation. The question was whether the immunity was accorded as a matter of courtesy or obligation. The ILC said that they were discussing a pragmatic solution which would involve following the VCDR. There was no reference to customary international law at the time of the adoption of the UNCSM. It was also the view of the FCO in the 1970s that the UNCSM did not reflect rules of customary international law: see judgment of the Divisional Court, [102], citing the 2012 article by Sir Michael Wood.

3. Work of the ILC (2008) on Immunity of State Officials from Foreign Criminal Jurisdiction

[**53**] In its judgment (at [101], set out at [26] above), the Divisional Court found that the ILC ultimately concluded in 1967 that there was some customary international law regarding immunity for members of special missions; that the purpose of any such immunities was functional, to enable the mission to perform its functions; and that the proper inference from this was that if any customary international law existed as to such immunity (which the ILC had said was the case) it must be taken to extend to the core immunities in issue in the present case. Mr Swaroop challenges this holding by reference to the statement by Mr Kolodkin on the later ILC project in 2008 (above, para [28]).

[**54**] Ms Steyn submits that the cautious approach by Mr Kolodkin does not represent the current position, which is better reflected in the preponderance of view among modern jurists referred to at [162] of the Divisional Court's judgment.

4. State practice: Treaties

[**55**] Mr Verdirame submits that the Havana Convention is evidence of state practice as between the parties to it in relation to the core immunities. In it, he submits, the Central and South American states explicitly stated that it expressed general international law principles even though (like the subsequent UNCSM) it was a work of both codification and progressive development. The text indeed avers that it is in accordance with principles accepted by all states. Also, like the UNCSM, it assimilates members of special missions to diplomatic officers. The UNCSM is also on his submission *opinio juris* as to the practice between its parties.

5. Views of jurists

[**56**] Mr Swaroop submits that, as appears from Sir Michael Wood's 2012 article, the trend in the writings of jurists was that up to 2012 there was no rule of customary international law about core immunities for special missions and international law and that following that date the views of jurists to the effect that there was such a rule were based on the decision of the Divisional Court

in the *Khurts Bat* case. In fact, however, there had been no decision on that issue in that case because immunity had been conceded. We make further reference to the *Khurts Bat* case in [61] below.

[**57**] Mr Swaroop disputes what the Divisional Court said (judgment, [80]) regarding evidence of *opinio juris*, namely that 'the ICJ will often infer the existence of *opinio juris* from a general practice, from scholarly consensus or from its own or other tribunals' previous determinations' (see Brownlie's *Principles of Public International Law* (8th edn, 2012) p 26 and the cases there cited at footnote 33). Mr Swaroop submits that the cases cited in support of this proposition do not in fact say that and that elsewhere in the book Professor Crawford explains that *opinion juris* cannot be readily inferred.

[**58**] By contrast, in the seventh edition of his work, the late Professor Sir Ian Brownlie wrote:

> **'Special Missions**
>
> Beyond the sphere of permanent relations by means of diplomatic missions or consular posts, states make frequent use of ad hoc diplomacy or special missions. These vary considerably in function: examples include a head of government attending a funeral abroad in his official capacity, a foreign minister visiting his opposite number in another state for negotiations and the visit of a government trade delegation to conduct official business. These occasional missions have no special status in customary law but it should be remembered that, since they are agents of states and are received by the consent of the host state, they benefit from the ordinary principles based upon sovereign immunity and the express or implied state. The United Nations General Assembly has adopted and opened for signature the Convention on Special Missions, 1969. This provides a fairly flexible code of conduct based on the Vienna Convention on Diplomatic Relations with appropriate divergences.'

[**59**] Mr Swaroop accepts that from 2012 there was a shift as described by the Divisional Court (judgment, [148]). For example, the eighth edition of Brownlie's *Principles of Public International Law*, updated by Professor James Crawford, and published in 2012, stated that the UNCSM conferred a higher scale of privileges and immunities upon a narrower range of missions than 'extant' customary international law, which had 'focussed on immunities necessary for the proper conduct of the mission, personal inviolability and immunity from criminal jurisdiction'. Mr Swaroop submits that little weight should be given to this as it was simply referenced to Sir Michael Wood's 2012 article.

[**60**] Ms Steyn makes the obvious point that all the current views of jurists placed before this court support the rule of customary international law upheld by the Divisional Court. She submits that it is unnecessary for her to show that the rule came into being at any particular date, so long as it can be shown to be in existence at the material time for the purposes of these proceedings.

6. Decisions of international courts and tribunals

[**61**] As noted above, Mr Swaroop contends that there is in general an absence of relevant decisions of international courts supporting special missions immunity. However, he had referred the Divisional Court to what he regarded as telling omissions in observations of the ICJ in *Djibouti v France* and the *Arrest Warrant* case. The Divisional Court considered that they provided no

assistance as those cases did not concern customary international law (judgment, [104]). We agree that they do not assist for that reason, and therefore we need say no more about them.

7. State practice: the United Kingdom and Mongolia

[**62**] In relation to the United Kingdom, the Divisional Court considered there was no authoritative decision of any United Kingdom court on the customary international law point. In the *Khurts Bat* case, the defendant to criminal proceedings sought to rely on special mission immunity under customary international law. His attempt to do so was forestalled by the certificate of the Secretary of State for the FCO that he had not been recognised by the UK as a member of a special mission. The parties agreed that a special mission would have been entitled to immunity from criminal jurisdiction but there was no decision to that effect (see [31] above).

[**63**] However, Mr Swaroop submits that state practice in the United Kingdom supports the alleged rule but that position had crystallised only recently. He relies on *R v Governor of Pentonville Prison, ex p Osman (No 2)* (1988) 88 ILR 378, which, he submits, supports the view that at least in 1988 neither the United Kingdom courts nor the executive considered that the alleged rule existed.

[**64**] Ms Steyn relies here again on her submission that she does not need to show that the rule of customary international law upheld by the Divisional Court came into effect at any particular date, but in any event she submits that the certificate by the Secretary of State in the *Khurts Bats* case was itself evidence of state practice which supported the existence of the relevant rule of customary international law, as did the position adopted by Mongolia in that case.

8. State practice: the United States

[**65**] Mr Swaroop submits that, contrary to the conclusion of the Divisional Court (judgment, [124]), recent US practice does not support the rule of customary international law contended for. In *Sissoko*, The US District Court clearly thought that special missions immunity was not yet customary international law (Divisional Court, judgment, [123]). The decision in *Sissoko* was consistent with the commentary in the *Restatement of the Law Third, Foreign Relations Law of the United States* (1987) vol 1, para 464.

[**66**] Ms Steyn submits that the Divisional Court was right for the reasons that it gave. She adds that the response of the United States to the CAHDI survey, which we consider at [98] below, 'taken as a whole' supports the position of the FCO.

9. State practice: Austria (p), Belgium, Finland, France, Germany, The Netherlands

[**67**] The Divisional Court reviewed the evidence of state practice from the states listed in the cross-heading (immediately above this paragraph) in an annex to Sir Michael Wood's 2012 article.

[**68**] **Austria** (**p**): Mr Swaroop submits that the Divisional Court also accepted that the decision relied on in relation to Austria (p) was not directly on point (Divisional Court, judgment, [130] to [131]) and so, he submits, this practice cannot support the alleged rule. Ms Steyn argues that the decision of the Divisional Court on this point was correct for the reasons it gave and its approach was in accordance with Austria's response to the CAHDI survey.

[**69**] **Belgium**: Mr Swaroop submits that there was no evidence of *opinio juris* in relation to Belgium. In the annex to its judgment, the Divisional Court described how Belgian law gave foreign representatives who visited on an official invitation immunity from enforcement of an arrest warrant in Belgium, but Mr Swaroop submits that this did not extend to immunity from prosecution. However, we consider that this clearly indicates that Belgium confers personal inviolability on a member of a special mission. Moreover, Mr Swaroop emphasises that the Code of Criminal Procedure, para 2 cited at [133] of the Divisional Court's judgment was not limited to representatives of a foreign state and applied only if the Belgium authorities made an 'official invitation' to another state, which is different from consent as a special mission. Ms Steyn submits that the first point shows only that Belgian law went further than the suggested rule of customary international law and that the second point demonstrated an over-technical approach to customary international law.

[**70**] **Finland**: Mr Swaroop submits that there was no evidence that Finland had adopted its new legislation in response to any obligation under international law. Furthermore, there are no official statements by Finland. Ms Steyn replies to this by emphasising that the Finnish legislation was consistent with the putative rule of customary international law and therefore it was open to the Divisional Court to find *opinio juris* by implication from Finland's conduct in passing the relevant legislation.

[**71**] **France**: Mr Swaroop submits that the decision of the Cour de Cassation in the *Case of Jean-Francois H, Director-General of Police of the Republic of Congo*, which the Divisional Court quoted from Sir Michael Wood's 2012 article, held that special missions immunity was limited to immunity for official acts and this decision did not therefore justify the conclusion in that article that it was evidence of state practice in support of immunity from criminal jurisdiction. (The Divisional Court also recorded that the response of France to the CAHDI survey confirmed the limitation of immunity to official acts.) Mr Swaroop submits that, if that immunity was limited to official acts, Lt Gen Hegazy would not have immunity in relation to allegations of torture.

[**72**] Ms Steyn submits that the Divisional Court's holding is supported by more recent evidence as to France's support for the proposed rule of customary international law. The Divisional Court noted in relation to France that it also took the view that it applied only to official acts. Oral submissions lodged by France in *Equatorial Guinea v France* (CR 2016/15) (18 October 2016) p 37, para 19) contends that senior officials representing their state enjoy immunity from criminal jurisdiction and personal inviolability when on special missions, but not otherwise. This evidence of state practice must have the effect of negating any adverse effect of earlier evidence as to French state practice to the effect that France took the view that special missions immunity applies only to official acts.

[**73**] **Germany**: Mr Swaroop submits that the Divisional Court misread the decision of the Federal Supreme Court in *Tabatabai* (1989) 80 ILR 388–424, and that the Divisional Court's judgment also misunderstood the decision of the Higher Administrative Court of Berlin-Brandenburg in the *Vietnamese National Case* OVG 8 S 39.06 (15 June 2006). The Divisional Court analysed these cases at [140] to [142] of its judgment. Ms Steyn seeks to uphold the analysis of the Divisional Court, but it is not necessary to go into the details of either case because, as Ms Steyn pointed out, Germany's response to the CAHDI survey was in any event that the immunity of special missions from 'judicial, in particular criminal proceedings' was part of customary international law.

[74] **The Netherlands**: Mr Swaroop submits that the judgment of the Divisional Court ([143]) misstated the evidence on state practice there, but, as Ms Steyn points out, that evidence made it clear that the Dutch government accepted that members of special missions had full immunity as diplomats under customary international law for the duration of their visit.

10. State practice: CAHDI

[75] Mr Swaroop makes three general points about the CAHDI survey:

(a) as mentioned in para [71] above in connection with Finland, he submits that where a state had adopted legislation, there had to be some pre-existing statement of policy or legislation evidencing acceptance of a practice as binding because it was required by customary international law;

(b) a number of states were unclear as to whether they were referring to the UNCSM or practice amounting to customary international law, and

(c) the replies were not sufficiently representative.

[76] Mr Swaroop dealt with individual replies to the CAHDI in detail. It is not enough that there is an immunity for high-ranking officials, or official acts or acts other than torture or that (as in the case of Israel) a minister has discretion to grant an immunity. On his submission, the CAHDI survey showed that eleven states did not support the alleged rule, which was accordingly not virtually uniform or consistent as required by ILC draft conclusion 8.

[77] Ms Steyn submits that the CAHDI replies which regard the grant of the core immunities to special missions as obligatory are evidence of both state practice and *opinio juris*. She submits that the vast majority of the replies support the rule found by the Divisional Court. Some replies come from states outside Europe, such as Mexico, Japan and the United States. Ms Steyn accepts that Japan's reply is consistent with the appellant's case. Mr Verdirame dealt with many of the individual replies.

4. Does customary international law require states to accord special missions the core immunities?—The court's conclusions

Overview of conclusions

[78] As explained at [15] above, to establish a rule of customary international law the respondents had to show state practice supporting the core immunities and *opinio juris*. Moreover, to establish *opinio juris*, the state must believe that there is an obligation to grant the core immunities to special missions accepted and recognised by them as such. We conclude that the judgment of the Divisional Court shows that there is a very considerable amount of evidence of different types to satisfy these two elements and very little against. We need to deal with the submissions of the appellants in turn but our overall point is that they cannot demonstrate that the conclusions of the Divisional Court should not stand. Moreover, additional evidence which has become available since the date of its judgment has only served to reinforce its conclusion.

[79] The point, in our judgment, is even more fundamental than that. If an international court had to consider the question whether a member of a special mission enjoyed the core immunities as a matter of customary international law, it would have regard to the importance and long acceptance of the role of special missions. Special missions have performed the role of *ad hoc* diplomats across the world for generations. They are an essential part of the conduct of international relations: there can be few who have not heard, for instance, of special envoys and shuttle diplomacy. Special missions cannot be expected to

perform their role without the functional protection afforded by the core immunities. No state has taken action or adopted a practice inconsistent with the recognition of such immunities. No state has asserted that they do not exist. We do not, therefore, doubt but that an international court would find that there is a rule of customary international law to that effect. We consider that the Divisional Court was right in their conclusion and that this court should uphold it.

[**80**] We now turn to deal with the principal submissions in order.

Identifying customary international law

[**81**] The appellants submit that the evidence in this case of a practice of granting core immunities to recognised special missions is not sufficiently representative and point in particular to the fact that most of the states which responded to the CAHDI survey were European states. But there is also evidence from the CAHDI survey from the Middle East (Israel), the Far East (Japan) and the Americas (the United States, and Mexico) and, through the Havana Convention, from the 15 Havana Convention states. Many more states, including Canada and Australia were actively involved in the ILC's project on special missions and they were drawn from a wide range of countries and regions.

[**82**] In our judgment, we should be concerned with affected states. The states affected by this rule are primarily those who either send (or wish to send) or receive and recognise special missions. There is nothing to suggest that any state affected in that sense has ever objected to the rule. The modern practice on special missions is thought to have developed since World War II. That period is certainly long enough to enable a rule to achieve that degree of consistency and virtual uniformity necessary for a finding of customary international law. We do not consider that it is necessary to show acceptance of the rule by states which are simply not concerned with special missions because they do not receive or recognise them and do not send their own elsewhere to carry out tasks in other states.

[**83**] It is also relevant in our judgment that a particular feature of the rule of customary international law in this case is that it only applies to a receiving state which agrees to receive a special mission as such. The rule is not one which imposes burdens on other states which do not wish to accept special missions. In our judgment, this is a feature which can be taken into account when determining whether a practice is 'sufficiently representative' to give rise to a rule of customary international law.

Work of the ILC 1960–1967 on special missions

[**84**] The negotiation of the draft articles which led to the UNCSM revealed a difference of view about the then current rules of customary international law about the immunities to be accorded to special missions. Thus, these negotiations showed at the very least a foundation for the emergence of customary international law rules should there remain space in the international legal order for customary international law to operate. One of the circumstances in which such customary international law could emerge would be if the UNCSM (as it became) was ratified by some only of the states sending or receiving special missions. As it happened only a very few states did ratify the UNCSM, which left space in which customary international law could grow and crystallise.

[**85**] The UN General Assembly voted to adopt the UNCSM and open it for signature by a resolution passed on 8 December 1969 which referred to it as the product of work by the ILC on 'codification and progressive development of the topic of special missions'. We agree with the Divisional Court about the limited weight that can be given to the UNCSM (see the Divisional Court's judgment at [101], set out at [26] above).

Work of the ILC (2008) on Immunity of State Officials from Criminal Jurisdiction

[**86**] In the light of our overall conclusion on customary international law we agree with Ms Steyn's submission that the view expressed by Mr Kolodkin in 2008 (see [28] above) does not accurately reflect the current state of the relevant customary international law.

State practice: Treaties

[**87**] The failure of the UNCSM to gain greater acceptance in the international community is not evidence against the existence of the rule of customary international law supporting the core immunities for special missions. It has failed to gain support because of its inflexibility and the width of the immunities it confers. Its presence indicates the general acceptability of the institution of special missions and that such missions should have some immunities to enable them to function effectively. Far from rejecting the concept of *ad hoc* diplomacy, states have created substitute mechanisms in the form of recognised special missions with limited immunities.

[**88**] The Havana Convention of 1928 is important as showing the activity in the Americas supporting the same points: the institution of the special mission and the acceptance that it should enjoy immunities extending at least to the core immunities. The fact that the Havana Convention gave more immunities than the core immunities does not detract from this point.

[**89**] Thus, these treaties are clearly evidence not only of state practice but also *opinio juris* regarding the core immunities as between the parties to them.

State practice: the United Kingdom and Mongolia

[**90**] As Ms Steyn submits, the *Khurts Bat* case demonstrates state practice in terms of the position of the executive (the FCO), as recorded in the judgment of Moses LJ. It also demonstrates state practice of Mongolia to the same effect. The Divisional Court also referred to decisions of magistrates in extradition and similar cases which are also relevant as showing the emergence of the rule of customary international law with which this case is concerned.

State practice: the United States

[**91**] We are persuaded that the case law since *Sissoko* examined by the Divisional Court and some of the further case law cited in Sir Michael Wood's 2012 article (at pp 94–98) support the conclusion of the Divisional Court, in the case of the former group of cases for the reasons which the Divisional Court gave.

[**92**] The case cited in Sir Michael Wood's article which we consider most directly relevant is *Republic of Phillipines v Marcos* (1987) 665 F Supp 793 (ND Cal) concerning the Solicitor General of the Philippines. He was neither a member of the permanent diplomatic staff nor was he one of the 'troika', that is the head of state, prime minister or foreign minister who are entitled to state immunity. He was, however, visiting the United States as a representative of the Philippines. He could only have immunity, if at all, by virtue of being an

official. The State Department recognised him as in effect a special mission (albeit after his arrival in the United States and service of process) and issued a suggestion of immunity (which serves a similar function to a FCO certificate in UK practice). The court held that he was entitled to diplomatic immunity. Sir Michael Wood in his 2012 article assumes that this must mean special missions immunity. We agree with him given that the Solicitor General of the Philippines was not otherwise entitled to immunity. Moreover, we would add that it is not necessary for the purpose of identifying customary international law that the court of a state should have used the correct label for the immunity that it has found to exist: in state practice, it is the action of the state that counts (see *North Sea Continental Shelf*).

[**93**] The court asked the parties to consider three further cases, and we are grateful for their further written submissions on them but consider that they do not take the matter any further. In the first, *Lewis v Mutond* (2017) 258 F Supp 3d 168, immunity was given to Congolese generals who were alleged to have committed torture. But it is not clear that they were on a special mission. In the second, *Doğan v Barak* (No 15-cv-08130) 2016 WL 6024416, the defendant was a Head of State and therefore there was no doubt but that he was entitled to immunity. The third case was *SACE SpA v Republic of Paraguay* (2017) 243 F Supp 3d 21. This does not concern immunity of an official. Accordingly, it is of no assistance.

[**94**] The reply submitted on behalf of the United States to the CAHDI survey is set out in the annex to the Divisional Court judgment and reads as follows:

> 'The United Sates has noted that while the full extent of special missions immunity remains unsettled, there is a widespread consensus that, at a minimum, it is generally inappropriate for States to exercise jurisdiction over ministerial-level officials invited on a special diplomatic mission. The United States has noted that special missions immunity would not, however, encompass all foreign official travel or even all high-level visits of officials. For example, no personal immunity is extended to persons based on their mere assignment to temporary duty at a foreign mission for a brief period of time. We are continuing to review and evaluate our practice in this area and look forward to understand the practices and policies of other states in this area.'

[**95**] In its annex the Divisional Court recognises that the response to the CAHDI survey is not evidence which shows that the United States has a state practice but takes the view that the case law described in the judgment is evidence of state practice. We agree. The response of the United States to the CAHDI survey is not clear since it only accepts that it is 'generally inappropriate' to exercise jurisdiction over 'high-level ministerial visits'. The practice in relation to visits by representatives other than ministers is not clear.

[**96**] Nonetheless, doing the best we can with the evidence before us, we take the view that there is sufficient here to conclude that the state practice of the United States recognises special missions and that members of them are entitled to the core immunities.

[**97**] For completeness, the ALI is currently working in this field and the *Restatement of the Law Fourth, Foreign Relations Law of the United States*, approved by the ALI in 2017 awaits publication. It is not a point of criticism of the parties

that we were not shown the published drafts of this *Restatement* but a signal to future readers of this judgment that there may be more up to date and valuable material from the ALI in future.

State practice: Austria (p), Belgium, Finland, France, Germany, The Netherlands

[**98**] We have summarised Mr Swaroop's submissions at paras [68] to [75] above. In our judgment, Ms Steyn's answers to his submissions are sufficient to dispose of them. Any doubt about the position of France is fully met by its revised reply to the CAHDI survey of November 2017, after the Divisional Court's judgment. This states that France is of the view that the immunities set out in the UNCSM (which of course include the core immunities) reflect customary international law.

State practice: CAHDI survey

[**99**] We start with the headline points from the CAHDI survey. The Divisional Court carefully considered the responses to the CAHDI survey that were available to it and (as we explain in greater detail below) it divided them into two categories (1) responses from ten states which were neutral or expressed no view on the putative rule of customary international law and (2) responses from 12 states whose responses were consistent with it (or indeed unequivocally supported it) (see [37] to [38] above). Sweden was not included in these figures. We have had the benefit of seeing some 36 responses to the survey and can test the Divisional Court's analysis in a slightly different way. We recognise that some of the responses, for example Moldova and Mexico, are not wholly clear and require some interpretation, and that some responses are fuller than others. We too have considered the responses with the benefit of counsels' submissions. Doing the best we can, we find that the following countries indicated that customary international law requires immunity to be given to special missions to some extent, or recognise that customary international law may have that effect: Albania, Armenia (but limited to immunity for criminal acts), Austria, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Mexico, Netherlands, Romania, Serbia, Slovenia, Spain (though this is by implication), Switzerland, the UK and Ukraine (23 states). Bulgaria, Ireland, Japan, Malta and Norway (five states) considered that customary international law may so require. Andorra, Georgia, Hungary, Israel, Latvia, Moldova, Sweden and the US (eight states) have not expressed a view on the position in customary international law. In summary, the CAHDI survey with the further responses available to us seems to us to be more supportive of the existence of customary international law on immunities for special missions than it was at the time of the Divisional Court's judgment.

[**100**] The Divisional Court held that category 1 responses did not provide any evidence for or against the proposed rule. It has been urged on us that acceptance as law is not always shown by inaction: it all depends on the circumstances. As already explained, the ILC's draft conclusion 10(3) states that: '3. Failure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction.'

[**101**] The Divisional Court did not treat those states whose responses did not support the proposed rule as not providing any relevant evidence of state practice for or against the proposed rule of customary international law. There are nine states in this category. They did not express any view on the question

whether customary international law would require states to grant the core immunities to any special missions they accepted. This does not amount to treating evidence of their inaction as evidence of acceptance of law. These are not states which accept special missions but do not accord them core immunities but states which do not accept special missions outside the UNCSM at all.

[**102**] The replies to the CAHDI survey included replies from France and Albania which the Divisional Court singled out for special mention. We have already dealt with the position of France. In the case of Albania, the Divisional Court did not include them in category 2 (see para [38] above) because Albania also only recognised special mission immunity for official acts and not for serious crimes, but their position is otherwise consistent with the proposed rule of customary international law. On the basis of state evidence before us, the limitation to official acts and exclusion of serious crimes is clearly now very much a minority view.

[**103**] There are a large number of countries who are not covered by the CAHDI survey, including India, China, Canada, Australia and countries in sub-Saharan Africa (other than Rwanda, which has ratified the UNCSM). However a practice does not have to be universal. It has to be *sufficiently* uniform, and in assessing sufficiency it seems to us that we should take account of the totality of the evidence not simply one strand of it, such as the CAHDI survey replies.

[**104**] Mr Swaroop gave the example of *opinio juris* for the purpose of identifying customary international law as the relevant state providing special missions immunity having either legislation or some pre-existing statement of policy making it clear that the state considered that it was bound to afford the core (or, if it so chose, wider) immunities because of the operation of a rule about special missions immunity in customary international law. We do not consider that this is a requirement of state practice. It is necessary to show that the state considers that it is bound to provide the core immunities but this may be demonstrated in any appropriate way. So the weight to be given to the responses to the CAHDI survey is not diminished, for instance, by the fact that it is not clear in some cases whether the state in question thought that it was bound to provide those immunities not by customary international law but by a mistaken belief that the immunities provided by the UNCSM were required to be given to special missions from non-parties to that Convention.

[**105**] On a point of detail, Mr Swaroop submits in relation to Israel that the presence of a discretion made it impossible for there to be relevant state practice from that source. However, in our judgment, the presence of a discretion is not necessarily fatal in that way provided that it is understood that it would be exercised conformably with international law.

[**106**] After circulating a draft of this judgment to the parties, the appellants sent us a copy of a new version of the CAHDI survey published by the Council of Europe on 28 June 2018. From the index, we note a new response from the Russian Federation also dated 28 June 2018. (In addition, the name of Switzerland has been inadvertently left out as its response in the form we have already seen is still in the body of the document.) As with the previous version there is no analysis of the responses and so it appears that the only new matter is the response of the Russian Federation. The Russian Federation is not a party to the UNCSM, but its response shows that its legal order recognises customary international law as a source of law. There is no specific legislation dealing with special missions but they are recognised on a case by case basis. As regards their

immunities, we have not had the benefit of full submissions but would provisionally make these points in response to a submission from the appellants that the immunity of members of special missions is limited under the law of the Russian Federation to official acts. The Russian legal order recognises that certain (unspecified) provisions of the UNCSM reflect customary international law. The response does not address all eventualities, but, as we read it, in regard to criminal responsibility the law of the Russian Federation recognises immunity for special missions in accordance with the norms of international law on diplomatic, consular and specialised agencies' immunity. Immunity may, therefore, extend beyond to official acts. The overarching point is that the response clearly recognises that immunities and privileges are to be extended to special missions as a matter of customary international law, and therefore we do not consider that we need to request further submissions on this new material.

Views of jurists

[**107**] The challenge was principally based on a comparison between the eighth edition of Professor Sir Ian Brownlie's *Principles of Public International Law*, and earlier editions of that work, in which he had, as explained in [58] above, written that special missions enjoyed no special status in international law. The eighth edition (the current edition), discussed in [57] and [59] above, now edited by Professor James Crawford, does not contain that observation but states that the UNCSM has influenced customary rules, developed largely through domestic case law, for special missions, citing *Khurts Bat*. It also made the further statement about the content of 'extant' customary international law, which is consistent with the declaration made by the Divisional Court. The current edition, therefore, reinforces the Divisional Court's decision. The earlier observations of Professor Sir Ian Brownlie are now against the preponderance of current opinion among jurists, and we, like the Divisional Court, consider the preponderant view more accords with the position in customary international law. Moreover, in our judgment, where there is as much evidence, as there is in this case, of the existence of a rule of customary international law, little weight should be given to a single text when there are some nine other texts containing the views of jurists to the contrary.

Is there an exception to the core immunities for serious international crimes?

[**108**] The Divisional Court finally (so far as this part of the case was concerned) rejected the submission that special missions immunity would not apply where the alleged acts were acts of torture (see judgment, [164], set out in para [42] above). The point has been argued on this appeal but little time was spent on oral submissions on this point. (No reliance has been placed on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, which imposes obligations on the state in relation to individuals physically within its jurisdiction). The short point is that a special missions immunity has been demonstrated to exist in customary international law at least at the present time which is not subject to any qualification for any international crimes. In short, we agree with the reasons given by the Divisional Court.

[**109**] As appears from the *Jurisdictional Immunities* case, there is no conflict between this customary rule of immunity for members of a special mission and the prohibition of torture as a norm of *jus cogens*. The ICJ regards *jus cogens* as a rule of substantive law and immunity as a matter of procedural law and

accordingly it does not recognise acts of torture as providing an exception to immunities. The fact that the alleged acts involve a breach of *jus cogens* does not confer on a court a jurisdiction which it does not otherwise possess (see *Jurisdictional Immunities* case, [92]–[97]). There was no conflict between *jus cogens* and state immunity. The decision of the House of Lords in *Jones v Saudi Arabia* is authority to the same effect, and the position was affirmed recently by the Supreme Court in *Benkharbouche* at [30]. The ICJ left open the question of the immunity of a state official from criminal jurisdiction, but if, as here, there is immunity of a state official, that general point would remain unless and until the appellants are able to show that an exception to immunity exists as a matter of customary international law, which they are unable to do.

[110] Accordingly, we too would reject this submission.

[111] We would also reject Mr Swaroop's submission that the immunity should be limited to official acts, since that would involve an invasion of the immunity to determine whether or not the act was an official act. The evidence of state practice and *opinio juris* shows that the relevant immunity is wider than this. Mr Swaroop contended that there is no clarity that administrative and technical staff are included within the immunity. However, if they are accepted by the receiving state as members of a special mission, there is no absence of clarity: they will be protected by the core immunities in issue in these proceedings. And if they are not so accepted, they will not be.

[112] It follows that we would dismiss the appeal against the Divisional Court's decision on customary international law. Our reasoning is substantially the same as that of the Divisional Court on this issue.

B. COMMON LAW

[113] The second issue on this appeal is whether the rule of immunity in customary international law for members of special missions accepted as such by the receiving state should be regarded as adopted into and forming part of the common law in England and Wales. The Divisional Court held that it should. We agree, for reasons which in substance reflect the reasons given by the Divisional Court.

[114] In older authorities the view of the relationship between the common law and customary international law was that customary international law simply was part of the common law: see eg *Triquet v Bath* (1764) 3 Burr 1478 at 1481, (1764) 97 ER 936 at 937–938 and *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] 1 All ER 881, [1977] QB 529. However, more recently it has been recognised that the better view is that customary international law is a source of common law rules, but will only be received into the common law if such reception is compatible with general principles of domestic constitutional law. Thus in *R v Jones, Ayliffe v DPP, Swain v DPP* [2006] UKHL 16, [2006] 2 All ER 741, [2007] 1 AC 136 the House of Lords held that the crime of aggression, recognised as a rule of customary international law, did not establish the creation of such a crime domestically in the common law, because the creation of new criminal offences is solely a matter for Parliament: see [20]–[23] per Lord Bingham of Cornhill and [60]–[62] per Lord Hoffmann. At [23] Lord Bingham approved as a general proposition that 'customary international law is applicable in the English courts only where the constitution permits'. At [63]–[66] Lord Hoffmann gave a second reason why the crime of aggression could not be treated as received into the common law, namely that this would be 'inconsistent with a fundamental principle of our constitution' ([63]), in that the decision to go to war is a matter for the executive and not subject to review

by the courts. The other members of the appellate committee agreed with Lord Bingham and Lord Hoffmann. See also *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] 4 All ER 794, [2016] AC 1355 (at [144]–[146] and [150] per Lord Mance JSC).

[115] On the appeal in the present case, it was common ground that Lord Mance JSC accurately stated the position in *obiter* comments he made in *Keyu* at [150], as follows:

> 'Speaking generally, in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.'

[116] In the *Keyu* case, an obligation to investigate a death caused by state agents was found not to be incorporated into the common law because (i) no such obligation was found to be established in customary international law and in any event (ii) Parliament had already legislated to cover the area of obligations to investigate deaths, hence it would be inappropriate for the common law to be developed in the same area, especially where the obligation alleged would potentially have wide and uncertain ramifications: see [112] and [117] per Lord Neuberger PSC and [151] per Lord Mance JSC.

[117] The presumption is that a rule of customary international law will be taken to shape the common law unless there is some positive reason based on constitutional principle, statute law or common law that it should not (for ease of reference, we refer to these together as reasons of constitutional principle). The presumption reflects the policy of the common law that it should be in alignment with the common customary law applicable between nations. The position is different from that in relation to unincorporated treaty obligations, which do not in general alter domestic law. In part, since the making of treaties is a matter for the executive, this reflects the principle that the Crown has no power to alter domestic law by its unilateral action: see *JH Maclaine Watson and Co Ltd v Dept of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523 at 544, sub nom *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418 at 499–500 (Lord Oliver) and *R (on the application of Miller) v Secretary of State for Exiting the European Union, Re Agnew and ors' application for judicial review (reference by the Attorney General for Northern Ireland), Re McCord's application for judicial review (reference by the Court of Appeal (Northern Ireland))* [2017] UKSC 5, [2017] 1 All ER 593, [2017] 2 WLR 583. The common law is more receptive to the adoption of rules of customary international law because of the very demanding nature of the test to establish whether a rule of customary international law exists: see above. That is not something that the Crown can achieve by its own unilateral action by simple agreement with one other state. Accordingly, in the case of a rule of customary international law the presumption is that it will be treated as incorporated into the common law unless there is some reason of constitutional principle why it should not be. In the case of an obligation in an unincorporated treaty the relevant rule is the opposite of this, namely that it will not be recognised in the common law.

[118] It is worth emphasising these points, because they mean that one has to be cautious about observations by Wilcox J sitting in the Federal Court of

Australia in *Nulyarimma v Thompson* (1999) 165 ALR 621, (1999) 96 FCR 153, on whose judgment Mr Hickman particularly sought to rely. At [20], Wilcox J emphasised that ratification of a treaty does not affect domestic law in Australia unless it is implemented in legislation, and then sought to argue from this principle to the conclusion that a highly restrictive approach should be adopted to receipt of a norm of customary international law into domestic law, since otherwise 'it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention [i e a treaty]'. But, at least in English law, this is not a curious result at all. The different principles governing the absence of domestic legal effect for an unincorporated treaty, on the one hand, and the presumption that a rule of customary international law is received and incorporated into the common law (as stated by Lord Mance in *Keyu*), on the other, show that a different approach is required in the two cases.

[**119**] The Federal Court of Australia refused to acknowledge the crime of genocide under customary international law as forming part of the common law in Australia. In that regard, its decision is fully in line with the decision of the House of Lords in *R v Jones*, referred to above. The particular passage in the judgment of Wilcox J on which Mr Hickman relied is at [26]:

> '… domestic courts face a policy issue in deciding whether to recognise and enforce a rule of international law. If there is a policy issue, I have no doubt it should be resolved in a criminal case by declining, in the absence of legislation, to enforce the international norm. As Shearer pointed out ([Professor Ivan Shearer, "The Relationship Between International Law and Domestic Law" in Opeskin *International Law and Australian Federalism* (1997)] at 42), in the realm of criminal law "the strong presumption nullum crimen sine lege (there is no crime unless expressly created by law) applies". In the case of serious criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved before a person is put on trial for an offence as horrendous as genocide.'

[**120**] In our view, this passage does not support the appellants' argument on this appeal. First, to say that the court faces a policy issue regarding the reception of the rule of customary international law in our case into the common law suggests that the issue is at large for the court, whereas it is common ground that the proper approach is that set out by Lord Mance in *Keyu*, above. Wilcox J's formulation here seems to reflect the unduly restrictive approach to reception of customary international law indicated by him earlier in his judgment at [20], discussed above.

[**121**] Secondly, the context for Wilcox J's discussion, much as in *R v Jones*, is the question whether a new crime which has emerged in customary international law should be recognised as part of domestic common law without the need for legislation. In giving a negative answer, Wilcox J identifies a range of difficulties of principle and practice which would otherwise arise. However, it by no means follows that the same negative answer should be given to the different question, whether recognition should be given to the core immunities in customary international law from criminal process which are in issue in this case. To treat the core immunities as part of the common law is to protect a person who has the benefit of them from criminal process. This is

very different from treating some new offence in customary international law as part of the common law, so that a person may be tried for that offence and be made subject to a criminal penalty in the absence of a law expressly created by Parliament.

[**122**] Mr Hickman submitted that incorporation of the core immunities recognised in customary international law into domestic law was a matter to be left to Parliament, to be achieved by legislation. The courts should not treat the common law as modified to reflect customary international law in this respect. In support of this general submission he focused on three particular arguments: (i) the question of immunity from criminal process is intrinsically a matter to be left to Parliament, just as the creation of a new criminal offence would be (see *R v Jones*); (ii) creating an immunity from criminal process requires judgments to be made about its ambit which are legislative in nature, as illustrated by the fact that Parliament has legislated extensively to deal with immunities; and (iii) the common law should not be adapted so as to create what is in effect a non-reviewable discretion in the executive to confer immunity from criminal process upon individuals simply by agreeing to accept them into the United Kingdom as members of a special mission. This would be contrary to the rule of law and the strong domestic legal tradition against recognising any legal power in the executive to disapply or change the law of the land—see the decision of the Supreme Court in *R (on the application of Miller) v Secretary of State for Exiting the European Union, Re Agnew and ors' application for judicial review (reference by the Attorney General for Northern Ireland), Re McCord's application for judicial review (reference by the Court of Appeal (Northern Ireland))* [2017] 1 All ER 593, [2017] 2 WLR 583 and art 1 of the Bill of Rights 1689, which forbids the suspension of laws or dispensation against the execution of law 'by regall authority' (ie by the executive).

[**123**] We do not accept these submissions. Mr Hickman's general argument that a change in the law to reflect a rule of customary international law must be left to Parliament proves too much, because it is contrary to the approach and the presumption identified by Lord Mance in *Keyu*. The presumption is that a rule of customary international law will be adopted into the common law without the need for legislative intervention unless there is some positive constitutional principle which would prevent this. In our view, Mr Hickman has identified no constitutional principle which is relevant in our case.

[**124**] As to point (i), Mr Hickman's attempt to argue that the position is the same as in *R v Jones* and *Nulyarimma v Thompson*, because those cases and the present case all involve the application of the criminal law, fails. As we have observed, and as the Divisional Court correctly held at [171]–[172], the recognition of an immunity from criminal process is very different from the creation of a new criminal offence. The reasoning in *R v Jones* and *Nulyarimma v Thompson* does not apply. Unlike the constitutional principle that a new criminal offence in domestic law can only be created by Parliament, there is no equivalent constitutional principle in relation to recognition of immunities from process.

[**125**] In our view, recognition of the core immunities in issue in this case does not involve the court illegitimately trespassing on an area which it can see that Parliament regards as reserved for itself. On the contrary, the usual assumption when interpreting legislation is that, absent some indication to the contrary, Parliament intends to legislate in a manner which conforms with the United Kingdom's obligations under international law. There is no legislative indication that Parliament would expect the courts to refuse to recognise a

relevant rule of customary international law, in line with the presumption set out in *Keyu* by Lord Mance. Indeed, when Parliament enacted the State Immunity Act 1978, as a statutory regime for certain matters regarding amenability to court process in the United Kingdom, it expressly excluded from its scope immunity from criminal jurisdiction: see s 16(4). The inference is that this was a topic to be left to the general common law, informed by and developed in line with customary international law, in the same way that the law in relation to state immunity had developed previously, as illustrated by the *Trendtex Trading Corp* case. As the Divisional Court correctly observe at [176], citing *Holland v Lampen-Wolfe* [2000] 3 All ER 833 at 845, [2000] 1 WLR 1573 at 1585–1586 per Lord Millett, Parliament has never purported to create an exclusive code on immunity.

[**126**] Mr Hickman pointed out that Parliament has created particular powers in other legislation for the executive by Order in Council to confer privileges and immunities on foreign officials travelling to the United Kingdom: see eg the London Summit (Immunities and Privileges) Order 2009, SI 2009/222 made in exercise of the power conferred by s 6 of the International Organisations Act 1968. That power relates to conferring immunities on representatives at international conferences in the United Kingdom. The 1968 Act is concerned generally with privileges and immunities in respect of certain international organisations and persons associated with them. Neither s 6 nor the 1968 Act as a whole purports to regulate the question of immunities for members of special missions. In our view, the main inference to be drawn from the 1968 Act and other legislation in the field of diplomatic agents and members of international organisations to which Mr Hickman referred is that Parliament is concerned to ensure that the United Kingdom facilitates the smooth and effective conduct of international affairs, including by conferring immunities where required to facilitate the discharge of relevant functions. On this view, far from conflicting with a principle of constitutional law, the recognition of the core immunities in this case, as required by customary international law, runs with the grain of relevant legislation and legislative policy in the field and does not conflict with such legislation or policy.

[**127**] As to point (ii), the rule of customary international law which the Divisional Court and we have found is established is a narrow and simple one. It does not call for any legislative choices to be made. The effect of the immunity is clear. The persons to whom it applies are also clearly identifiable. No complex legislative definitions or machinery have to be put in place to make it workable: contrast *Keyu* at [117] per Lord Neuberger.

[**128**] Mr Hickman says that there is a grey area outside the core immunities in respect of how far a member of a special mission might be protected as a matter of international law, and that Parliament therefore has to define the extent of the protection to be conferred. We do not accept this contention. The courts in these proceedings have only been required to address the particular case before us, which is concerned with the core immunities. There is no difficulty about the courts finding that those immunities are now part of the common law, whatever might be the position about other privileges or immunities which are not presently in issue. We would also observe that on this argument for the appellants Parliament would only need to intervene to give specification to a rule of customary international law if that rule is unclear; but if it is unclear, it will not be established as a rule of customary

international law. Conversely, if a rule is established as a rule of customary international law, there is no need for intervention by Parliament to say what the rule is.

[**129**] As to point (iii), it is fair to say that this is an immunity regime the operation of which depends upon action by the executive, ie whether it recognises someone as a member of a special mission or not. However, we do not consider that the fact that the relevant rule of customary international law is expressed to be dependent upon the decision of a receiving state whether to accept an individual as a member of a special mission, taken in combination with the principle in domestic law that the conduct of international affairs is a matter for the executive, means that the courts should decline to receive this rule into the common law.

[**130**] The international rule is qualified in this way so as to enable a state to protect itself against having to confer immunities upon anyone that the sending state wishes to designate as a member of a special mission. It is not contrary to domestic constitutional principle that the United Kingdom should be able to protect itself in this manner. Since the courts may properly decide that the United Kingdom should have this ability, in accordance with the rule of customary international law which they are invited to recognise, it is in line with—and not contrary to—domestic constitutional principle that it is for the executive to decide who should qualify as a member of a special mission for the purposes of that rule. The rule is concerned to facilitate the effective conduct of international relations, which in terms of domestic constitutional principle is properly the subject of action by the executive: see eg the *Miller* case at [54] in the judgment of the majority. The executive can be expected to act responsibly in deciding whether and when to issue an invitation to persons to constitute a special mission.

[**131**] The proper analysis here is that the reception of the relevant rule of customary international law into the common law means that a rule of law is recognised according to which the exercise of prerogative powers may produce domestic law consequences. That is not contrary to domestic constitutional principle, but falls within a recognised category of case: see the *Miller* case at [52] in the judgment of the majority. As is said there, 'While the exercise of the prerogative power in such cases may affect individual rights, the important point is that it does not change the law, because the law has always authorised the exercise of the power.' On this analysis, where the executive exercises its power under the relevant rule of international law, as received into the common law, to invite someone to come to the United Kingdom as a member of a special mission, it is not suspending or disapplying the law of the United Kingdom, contrary to art 1 of the Bill of Rights. The executive would be making use of a power conferred on it by the relevant rule of domestic law.

[**132**] It is not necessary for the purposes of this judgment to take a view about whether the exercise of such a power and any certificate issued to inform the court about it would be wholly unreviewable in all circumstances, as both sides for their separate reasons contended. It is possible to imagine wholly egregious scenarios, very unlikely to occur in practice, such as bribery of a minister to issue a certificate, in which it might be difficult to support that conclusion. But our analysis does not depend upon exploring the possibility that there might be a challenge by judicial review to a certificate issued by a minister that someone was in the United Kingdom as the member of a special mission.

[**133**] As a distinct submission, Mr Hickman contends that the scope of the immunity is properly a matter for Parliamentary deliberation in view of what he says is a 'real tension' between the conferral of such immunity and the United Kingdom's obligations under the UN Convention Against Torture to criminalise torture on an extraterritorial basis and to investigate and prosecute in respect of acts of torture occurring abroad where the perpetrator is in this country. The interveners made written submissions to similar effect.

[**134**] In our view, these submissions fail to identify any constitutional principle which could override the presumption stated by Lord Mance in *Keyu*. On proper legal analysis, there is no conflict between the United Kingdom's obligations under the UN Convention Against Torture and its obligations under the rule of customary international law at issue in this case: see para [107] above. It is in accord with constitutional principle in the present case that the courts should act to ensure that the United Kingdom abides by its obligations under international law by recognising that rule of customary international law as a norm forming part of the common law.

[**135**] For these reasons, we dismiss the second ground of appeal.

C. OVERALL CONCLUSION

[**136**] For the reasons given above, the appeal is dismissed. We conclude that the Divisional Court was correct to hold that a rule of customary international law has been identified which now obliges a state to grant to the members of a special mission, which the state accepts and recognises as such, immunity from arrest or detention (ie personal inviolability) and immunity from criminal proceedings for the duration of the special mission's visit. We further conclude that, in accordance with the presumption that customary international law should shape the common law, such immunities are recognised by the common law.

Appeal dismissed.

Aaron Turpin Barrister.

APPENDIX 1
THE CONVENTION ON SPECIAL MISSIONS 1969

Recital

Recalling that the importance of the question of special missions was recognized during the United Nations Conference on Diplomatic Intercourse and Immunities and in resolution I adopted by the Conference on 10 April 1961,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations, which was opened for signature on 18 April 1961,

Considering that the United Nations Conference on Consular Relations adopted the Vienna Convention on Consular Relations, which was opened for signature on 24 April 1963,

Believing that an international convention on special missions would complement those two Conventions and would contribute to the development of friendly relations among nations, whatever their constitutional and social systems,

Realizing that the purpose of privileges and immunities relating to special missions is not to benefit individuals but to ensure the efficient performance of the functions of special missions as missions representing the state,

Affirming that the rules of customary international law continue to govern questions not regulated by the provisions of the present Convention,

Article 1
Use of Terms

For the purposes of the present Convention:

(a) a 'special mission' is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task …

Article 2
Sending of a Special Mission

A State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel.

Article 25
Inviolability of the Premises

1. The premises where the special mission is established in accordance with the present Convention shall be inviolable. The agents of the receiving State may not enter the said premises, except with the consent of the head of the special mission or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the receiving State. Such consent may be assumed in case of fire or other disaster that seriously endangers public safety, and only in the event that it has not been possible to obtain the express consent of the head of the special mission or, where appropriate, of the head of the permanent mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the special mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the special mission, their furnishings, other property used in the operation of the special mission and its means of transport shall be immune from search, requisition, attachment or execution.

Article 26
Inviolability of archives and documents

The archives and documents of the special mission shall be inviolable at all times and wherever they may be. They should, when necessary, bear visible external marks of identification.

Article 27
Freedom of Movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the special mission such freedom of movement and travel in its territory as is necessary for the performance of the functions of the special mission.

Article 28
Freedom of Communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its other special missions or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers and messages in code or cipher. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State …

Article 29
Personal Inviolability

The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

Article 31
Immunity from Jurisdiction

1. The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. They shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless the person concerned holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person concerned in the receiving State outside his official functions;

(d) an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned …

Article 43
Duration of Privileges and Immunities

1. Every member of the special mission shall enjoy the privileges and immunities to which he is entitled from the moment he enters the territory of the receiving State for the purpose of performing his functions in the special mission or, if he is already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other organ of the receiving State as may be agreed.

2. When the functions of a member of the special mission have come to an end, his privileges and immunities shall normally cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, in respect of acts performed by such a member in the exercise of his functions, immunity shall continue to subsist …

APPENDIX 2
TEXT OF THE DRAFT CONCLUSIONS 1 TO 11 ON IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW ADOPTED BY THE INTERNATIONAL LAW COMMISSION IN AUGUST 2016

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two
Basic approach

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Conclusion 4
Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paras 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7

Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

Conclusion 8

The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Part Four

Accepted as law (opinio juris)

Conclusion 9

Requirement of acceptance as law (opinio juris)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (opinio juris) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (opinio juris) is to be distinguished from mere usage or habit.

Conclusion 10

Forms of evidence of acceptance as law (opinio juris)

1. Evidence of acceptance as law (opinio juris) may take a wide range of forms.

2. Forms of evidence of acceptance as law (opinio juris) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction.

Part Five

Significance of certain materials for the identification of customary international law

Conclusion 11

Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (opinio juris), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12

Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13

Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14

Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six

Persistent objector

Conclusion 15

Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

Part Seven
Particular customary international law

Conclusion 16

Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

Document: R (on the application of Hamed) and Others v Secretary of S...

OverviewR (on the application of the Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs

Overview | **[2016] EWHC 2010 (Admin)**, 166 NLJ 7711, 166 NLJ 7712, | [2016] All ER (D) 32 (Aug)

R (on the application of Hamed) and Others v Secretary of State For Foreign and Commonwealth Affairs and Others (2016) [2016] EWHC 2010 (Admin)

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CO/6384/2015

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05/08/2016

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Case No: CO/6384/2015

IN THE HIGH COURT OF JUSTICE

DIVISIONAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 05/08/2016

Before:

LORD JUSTICE LLOYD JONES

MR JUSTICE JAY

- -

Between:

THE QUEEN
on the application of
(1) THE FREEDOM AND JUSTICE PARTY

(2) YEHIA HAMED
(3) MOHAMMED SOUDAN
(4) HH **Claimants**

- and -

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) THE DIRECTOR OF PUBLIC PROSECUTIONS
Defendants

- and -

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

-and- **Interested Party**

(1) AMNESTY INTERNATIONAL
(2) REDRESS

Interveners

- -

- -

Sudhanshu Swaroop QC and Tom Hickman (instructed by **ITN Solicitors**) for the **Claimants**

Tim Eicke QC, Guglielmo Verdirame and Jessica Wells (instructed by **Government Legal Department**) for the **First Defendant**

Paul Rogers and Katarina Sydow (instructed by the **Crown Prosecution Service**) for the **Second Defendant**

Jeremy Johnson QC (instructed by **MPS, Directorate of Legal Services**) for the **Interested Party**

Shaheed Fatima QC and Rachel Barnes (instructed by **Hickman and Rose**) for the **Interveners** (by written submissions only)

Hearing dates: 28th and 29th June 2016

- -

Approved Judgment

LORD JUSTICE LLOYD JONES:

I. Introduction 1. This is the judgment of the court to which both members have contributed.

2. The ub tantive i ue rai ed by the Claimant in thi application for judicial review i whether members of special missions visiting the United Kingdom with the approval of the First Defendant ("the FCO") enjoy per onal inviolability and/or immunity from criminal proce pur uant to a rule of cu tomary international law to which effect is given by the common law.

3. The Claimant deny the exi tence of uch a rule, and in any event contend that the common law should not give effect to it. They submit that these judicial review proceedings are the appropriate vehicle for enabling thi important point of principle to be determined. The FCO and the Second Defendant ("the DPP") adopt common cause in averring the existence of such a rule of customary international law which, to the extent it ha not already been recogni ed by the common law, hould now be recognised. The FCO further contends that the court in its discretion should not entertain this application on a number of related ground . The DPP hare ome of the FCO' concern in relation to the standing of these Claimants but (as more fully explained below) wishes to be informed by this court if it under tanding of the law i incorrect.

4. The Interested Party ("the MPS") adopts a neutral position in relation to what it describes as the "important legal i ue that ari e a between the Claimant and the Defendant ".

5. Amnesty International and Redress have filed helpful written submissions on the substantive issue but have taken no po ition on the particular fact of thi ca e or the court' exerci e of it di cretion.

II. Factual background

6. The law relating to permanent missions has been codified in the form of the Vienna Convention on Diplomatic Relations, 1961 ("VCDR") (as a matter of international treaty law binding on the United Kingdom and 189 other States in their mutual relations) and the Diplomatic Privileges Act 1964 (as a matter of domestic law within the United Kingdom). Special or *ad hoc* missions fall outside these regimes. The UN Convention on Special Missions, adopted in 1969 and which came into force in 1985, has been signed but not ratified by the United Kingdom and no domestic legislation in this jurisdiction reflects or enacts its provisions.

7. Following the decision of this court in *Khurts Bat v Federal Republic of Germany* [2013] QB 349, on 4th March 2013 the FCO (acting by the then Secretary of State, the Rt. Hon. Mr. William Hague MP) gave a written Ministerial Statement on "special mission immunity" announcing a "new pilot process by which the Government will be informed of inward visits which may qualify for special mission immunity status". It is the Government's view that members of special missions "enjoy immunities, including immunity from criminal proceedings and inviolability of the person" to which the common law gives effect. By an accompanying *note verbale*, foreign governments are advised that the Protocol Directorate of the FCO should be given at least 15 days' notice of the arrival of the mission, providing details, amongst other matters, of the visitor's full name and title, and role or function. It is the policy of the FCO to grant the application for consent to the visit only in respect of "official business". Both the *note verbale* and the Ministerial Statement make clear that consequential issues of legal effect and status "would ultimately be a matter for the courts", because the FCO's function is limited to the issue of consent to a given visit as a special mission. The *note verbale* reaffirms Her Majesty's Government's "firm policy of ending impunity for the most serious international crimes and a commitment to the protection of human rights".

8. Between June 2012 and July 2013 the First Claimant formed the elected Government of the Arab Republic of Egypt. The Second Claimant was appointed Minister of Investment in the Government of Egypt in May 2013 but ceased to hold office in July 2013. The Third Claimant describes himself as "the Foreign Relations Secretary of the Freedom and Justice Party of Alexandria" from June 2012 to July 2013. He is currently seeking asylum in the United Kingdom.

9. In July 2013 the First Claimant lost power in what it characterises as a "violent *coup d'état* orchestrated by the current military regime". It says that in August 2013 there was a "widespread, systematic and violent clampdown" on supporters of the previous regime, and that atrocities took place, including killings and acts of torture, during the course of a demonstration in Rab'a Square in support of ex-President Morsi, and its aftermath.

10. According to the evidence of Mr Tayab Ali, the First Claimant's solicitor:

"Since the coup, the First, Second and Third Claimants have been acting as representatives for thousands of individual victims of the coup. Individuals went to the First Claimant, as they were able to instruct lawyers and pursue a number of cases to seek redress and accountability for the coup. The First Claimant consequently instructed us to pursue a number of avenues for complaint … In that capacity, I have received instructions via the First Claimant for inter alia:

(1) Victims of the numerous atrocities at Rab'a Square

(2) Field doctors from Rab'a Square, who were attacked by security forces while they attempted to treat victims…

(3) Individuals who have been subjected to torture in Egyptian custody."

11. The Fourth Claimant, whose name has been anonymised by the order of Sweeney J. dated 16th February 2016, is a British citizen and surgeon who went to Egypt in July and August 2013 to assist in emergency field hospitals. He is not a member of the First Claimant. His witness statement graphically describes the immediate aftermath of a number of violent events, in particular what he characterises as an attack on a peaceful protest carried out by the Egyptian police, army and security services on 27th July 2013. He states that the field hospital at which he was working was overwhelmed by patients with life-threatening injuries. He informs the court that "over ten hours, we received over 3,000 patients, 200 of whom died". The Fourth Claimant states that he was deeply disturbed by what he witnessed, and seeks justice for what happened to the victims from those responsible.

12. The First Claimant, through in particular Mr Ali, has since February 2014 been pressing the War Crimes Unit of the Metropolitan Police Counter-Terrorism Command (SO15) to arrest in the United Kingdom individuals responsible for torture in Egypt, pursuant to the universal jurisdiction conferred by section 134 of the Criminal Justice Act 1988. The precise detail of the endeavours made by the First Claimant and its advisers need not be addressed, but - for example - on 28th February 2014 a meeting took place involving Mr Ali, four Queen's Counsel and members of the MPS. At around that time, Mr Ali's firm submitted a file to SO15 containing evidence of the alleged involvement of a number of individuals in significant international crimes. Mr Ali does not give the precise date, but according to paragraph 24 of his witness statement "we have provided the Police and the Crown Prosecution Service with a list of 43 named suspects that have been identified as responsible for the relevant crimes". SO15 then began a scoping exercise in accordance with internal guidelines.

13. According to the evidence of Deborah Walsh, who is Head of Counter Terrorism and Deputy Head of the Special Crime and Counter Terrorism Division of the CPS, on 6th June 2015 Mr Ali was informed both orally and in writing that there was insufficient evidence at that stage for a realistic prospect of conviction, and that the DPP's counsel was preparing a written advice to that effect. The evidential deficiencies were discussed at a meeting which took place on 17th June, and it was explained that the scoping exercise would continue its work. Ms Walsh also informs the court:

"We also discussed that some of those being investigated may have Special Mission immunity during any visit to the UK. ITN solicitors said that they may challenge this concept …"

14. Lt. General Mahmoud Hegazy was the director of the Egyptian Military Intelligence Service in July and August 2013, and is regarded by the First Claimant as "having key responsibility for the Rab'a atrocities". The MPS has confirmed that he is one of the 43 individuals named within the material submitted by ITN Solicitors, and that he remains part of the scoping exercise. His precise status as at September 2015 is not agreed by the parties, but Mr Ali describes him as "currently [i.e. as at the date of his witness statement, 14th December 2015] the Egyptian Chief of Staff", and the FCO's certificate (see below) confirms that. There is an issue between the parties as to whether he occupies other positions in the Egyptian regime, but in our view it is unnecessary for us to resolve it.

15. According to the evidence of Mr Barry Nicholas, Head of Diplomatic Missions and International Organisations Unit of the Protocol Directorate of the FCO, on 21st August 2015 his directorate received a

request (pursuant to the March 2011 Protocol) for special status to be accorded to General Hegazy, in relation to a visit to the United Kingdom he was due to undertake between 15th and 19th September 2015. It is clear from the letter from the Government Legal Department ("GLD") dated 23rd October 2015 that Lt. General Hegazy's programme included meetings with the Secretary of State for

Defence, the Chief of Defence Staff and the National Security Adviser, and that he was also seeking a meeting with the FCO. On 14th September 2015 Mr Nicholas issued the following certificate:

"Under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs conferred on me, I … hereby confirm that [the FCO] has consented to the visit to the United Kingdom of Egyptian Chief of Defence Staff, Lt. General Mahmoud Hegazy [REDACTED] from 15-19 September as a special mission, and they will be received as such."

16. On 16th September 2015 ITN Solicitors notified DI Mason, a detective inspector within SO15, of Lt. General Hegazy's likely presence in the United Kingdom and requested that immediate steps be taken to arrest him "for his involvement in the crime of torture contrary to the Criminal Justice Act 1988". DI Mason was asked to give his response within 24 hours as well as detailed reasons for his decision.

17. Within about 90 minutes of the despatch of ITN Solicitors' email, attaching its letter, DI Mason acknowledged it and stated, "we will continue to consider any opportunities for arrest or interview in accordance with our scoping exercise" and that "I will advise you accordingly of any action taken". Later that evening, Mr Ali sent another email expressing his extreme concern about the brevity of the information in DI Mason's reply. Then, by email timed at 11:18 on 17th September, DI Mason stated as follows:

"In relation to your request for the arrest of Mr Hegazy - we have been advised by the [FCO] that the individual has Special Mission Immunity in relation to his visit to the UK. We will not be seeking his arrest at this time but will continue with the Scoping Exercise."

18. The Claimants say that we should take this email at face value and conclude that the FCO did indeed give direct advice to SO15 that Lt General Hegazy has special mission immunity. Apart from the terms of the email itself, some further support for this conclusion may be derived from an email timed at 09:39 and dated 17th September 2015 which stated as follows:

"All - I [the Deputy Head of the Egypt team, North Africa Department of the FCO] have spoken to [DS] Gary Titherly at the Met and informed him that Hegazy has Special Mission Status. There are other avenues that could be pursued … the Met are reviewing further information before confirming a course of action, but undertook to be in contact with me before acting. Currently there is no possibility of arrest."

19. It is probable that DS Titherly then spoke to DI Mason, because at paragraph 16 of her witness statement Ms. Walsh helpfully informs the court that at 10:27 on 17th September she received an email from DI Mason saying that he had "just had it confirmed that he has Special Mission Immunity". There is no evidence that this confirmation had, at least by that stage, come from the DPP or that the MPS was taking its own advice. On the other hand, the Deputy Head of the Egypt team did not say in terms that Lt. General Hegazy had special mission immunity, although it may not be difficult to infer that this is how he was understood.

20. According to paragraph 17 of Ms. Walsh's witness statement:

"I replied at 10:31 "he is immune from criminal proceedings which means for arrest and prosecution. I think they will challenge FCO decision to grant special mission immunity."

21. The MPS has not filed evidence dealing with these emails and the sources and content of any advice given. Instead, it has filed a document, signed by leading counsel, entitled "Commissioner's Statement of Facts in Response to Claim". Fortunately, what actually happened, as opposed to the legal construction to be placed on what occurred, is not really in dispute, so we have taken into account this document, the material portions of which are as follows:

"10. … the MPS takes legal advice from the CPS, not the FCO. So, although the advice of the CPS coincides with the clear position of the FCO, it is the CPS advice as to the law (not the contentions of the FCO) that is material to MPS decision making.

…

18. … SO15 sought information from the Defendant as to the basis on which Lt. Gen Hegazy was in the United Kingdom. The Defendant provided SO15 with a certificate which confirmed that the Defendant had consented to the visit …

19. The combination of (a) the recognition by the FCO of Lt Gen Hegazy as part of a special mission and (b) the advice from the CPS that a person who is part of a special mission recognised by the Government is immune from arrest, meant that there was no question of Lt. Gen Hegazy being arrested.

20. Accordingly, SO 15 informed the Claimant's solicitors by an email dated 17th September 2015 that Lt

Gen Hegazy had Special Mission Immunity …

No mention i made of the email from the FCO (ee [18] above), of the conver ation the ender of that email had with DS Titherly, or of any communication between DS Titherly and DI Mason.

22. On 18th September 2015 Mr Ali ent an email to the FCO addre ed to "protocol enquirie ". Mr Ali sought, by return email, "disclosure of the circumstances of the purported granting of Special Mission Immunity to Mr Hegazy", including di clo ure of the Egyptian government' reque t and the letter of grant.

23. On 30th September 2015 the Legal Directorate of the FCO wrote to ITN Solicitor explaining that it email was not seen until 21st September (by which date, although the point is not made explicitly in the letter, Lt. General Hegazy had left the UK). The FCO tated that the vi it met the criteria for pecial mission status, and provided a copy of the certificate.

24. On 9th October 2015 ITN Solicitor ent to the GLD a pre action protocol letter, identifying the defendant as the FCO and the decision under challenge as being "to grant special mission immunity". The letter took the point, among t other , that pecial mi ion immunity i not part of cu tomary international law.

25. On 23rd October 2015 the GLD replied to the pre action protocol letter. The e ence of the FCO' opposition to the proposed claim was as follows:

" the [FCO] denie that [the Fir t Claimant] ha capacity or tanding to initiate the propo ed judicial review proceedings. The decision to consent to Lt. Gen. Hegazy's visit as a special mission is purely a matter for the Government and i therefore not ubject to review by the court . In any event, [the FCO] denies that his decision was unlawful, as alleged by [the First Claimant] or at all."

The point wa not taken that the FCO had made no relevant deci ion.

26. On 4th November 2015 ITN Solicitors addressed a number of the contentions made on behalf of the FCO, pointed out that the GLD had failed to provide relevant di clo ure, and required the FCO to tate, by return, whether Lt. General Hegazy was travelling to the United Kingdom as part of President el-Sisi's party, due to arrive the following day. On 4 November the Government Legal Department tated that, a far as the FCO was aware, this was not the case and that "we will endeavour to provide a substantive re pon e to the remaining point by the end of next week".

27. No substantive response was forthcoming, and these proceedings for judicial review were filed on 14th December 2015.

28. There is no evidence that Lt. General Hegazy has returned to the United Kingdom since September, and there i no evidence that he ha any plan to do o. Paragraph 38 of Mr Ali' witne tatement asserts that "any future visits" are "reasonably expected in the near future", but no material is provided to upport thi .

III. <u>The course of the litigation</u>

29. The focus of the claim form, and accompanying grounds, is the "decision of the FCO that Lt. General Hegazy … benefitted from immunity from prosecution as a member of a "special mission" of the Egyptian Government during a visit to the United Kingdom in September 2015".

30. On 8th February 2016 the Claimants applied to join the DPP as Second Defendant, on the ground that it had been made clear in paragraph 10 of the MPS's statement that the CPS and not the FCO had advised SO15 that a member of a special mission benefits from immunity. The point is made that "[t]his position had not been clear previously and this clarification is welcome". The DPP did not oppose that application.

31. In their skeleton argument filed for the purposes of these proceedings on 15th June 2016, the Claimants identified as their targets of the claim:

(1) the FCO's advice given on or about 17th September 2015;

(2) the DPP's advice given at about the same time (according to paragraph 10 of the Claimants' skeleton argument, what is described as "the candid evidence" of the MPS made clear that no reliance was placed on advice received from the FCO); and

(3) the FCO's standing advice and guidance given in March 2013 and elsewhere that members of special missions are entitled to immunity.

32. Paragraph 19 of the Claimants' skeleton argument also invited the court to grant a declaration to clarify the law, "if it is necessary to do so".

33. It appeared to us that the Defendants and the Interested Party were being confronted by an evolving

case, at least as regards the decision or decisions under challenge and the nature of the relief sought, and we invited Mr Tom Hickman, who was leading for the Claimants on this issue, to produce a short document which encapsulated these matters. He did so on the second morning of the hearing. In short, the Claimants seek declaratory relief (and, if necessary, quashing orders) on the following four bases.

(1) They seek a declaration, whether pursuant to the court's supervisory or original jurisdiction, to clarify a point of law.

(2) They seek a declaration and/or a quashing order in relation to the FCO's 2013 advice and guidance.

(3) They seek a declaration and/or a quashing order in relation to the FCO's advice to the MPS given on or about 17th September 2015.

(4) They seek a declaration and/or a quashing order in relation to the DPP's similar advice.

34. It is to be noted that the Claimants' case is not formulated on the straightforward footing that the relevant decision not to arrest Lt. General Hegazy was made by the MPS on 17th September 2015, principally or primarily because he was considered to have special mission immunity. On such a formulation, the MPS was acting on advice, but it does not matter who gave it, and why. We also note that points (1) and (2) above were not made the subject of any formal application to amend the Claim Form and Grounds.

IV. Procedural issues

35. In a detailed and robust skeleton argument Mr Tim Eicke QC for the FCO advanced a number of submissions, some of which were interrelated, in support of an over-arching contention that this court should in its discretion not countenance this application for judicial review in any of its iterations. The submissions were directed not merely to the refusal of relief but also to the logically prior question of whether a judgment should be given on the customary international law issue. Given the breadth and depth of these submissions, they must be addressed before we go any further.

36. His key submissions are these:

(1) The FCO has made no relevant decision. The only decision it has given is contained in its certificate of status dated 14th September 2015, which is not justiciable. It has not made any decision to confer special mission immunity, because this must fall within the exclusive province of the courts, and is not for the executive.

(2) The Claimants have named the wrong defendant: the operative decision was the decision made by the MPS on 17th September 2015 not to arrest Lt General Hegazy.

(3) The Claimants have not acted promptly.

(4) This claim is now academic because there is no evidence that Lt. General Hegazy will return to this jurisdiction (whether as a member of a special mission or at all), and the MPS have made it clear that police officers probably would not have arrested him in September 2015 in any event, for reasons of insufficiency of evidence.

(5) The Claimants lack standing to bring this claim.

37. These matters were developed by Mr Eicke in oral argument. Insofar as the FCO's position is not already apparent from the foregoing, the following points were made. First, the role and function of the FCO is not to grant immunity but to confer status. Equally, it is no part of the role and function of the FCO to advise the MPS, which acts independently of the Crown; and the latter has in any event confirmed that it only acts on advice from the DPP given under section 3(2)(e) of the Prosecution of Offences Act 1985. If and to the extent that DS Titherly and/or DI Mason may have interpreted the Deputy Head of the Egypt Team as advising as to an immunity, as opposed merely as to status, this (at its highest) was informal advice which is not justiciable. Secondly, the Claimants are guilty of delay, both in relation to any decision made on 17th September 2015 (the claim form was not filed until 14th December) and, *a fortiori*, in relation to the guidance/advice promulgated in 2013. Further, in relation to this guidance the first point above may be repeated: it is confined to outlining a procedure for making decisions on status, and does not extend into the domain of giving legal advice or expressing legal opinion. Thirdly, this is an inappropriate case for the giving of an advisory opinion, because

(1) the First to Third Claimants are members of a foreign political movement;

(2) the Fourth Claimant's connection with relevant events in Egypt is tenuous; and/or

(3) the Claimants have no specific right to have the law clarified or the impugned decisions declared unlawful, not being the victims of any torture in Egypt.

38. Mr Hickman's response to these submissions will be reflected in our analysis below, but we should specifically record the position of the DPP, as explained to us by Mr Paul Rogers. Although the Director is

concerned about the standing of these claimants, given in particular their lack of victimhood, and the possibility of a plethora of similar claims, "if the law is not correct she would like to know". Mr Rogers, as does his client, realistically recognises that this point will not go away.

39. Our starting point must be to identify the proper focus of this challenge. We cannot accept an approach which suggests that imprecision may be condoned or that the court is simply allowing itself to become side-tracked.

40. We accept Mr Eicke's submission that the FCO made no justiciable decision in September 2015. On 14th September the FCO consented to Lt. General Hegazy's visit as a special mission, and stated that he "will be received as such". The position is as explained by Moses L.J. in his judgment in *Khurts Bat* at [40]:

"It seems to me that that controversy underlines the need for the courts not to question that which the Government chooses to recognise and that which it does not. Recognition is a matter, as it seems to me, of foreign policy which is unsuitable for discussion or a view in the courts. Whether or not the purpose of the defendant's visit and that which the Government of Mongolia hoped to achieve by that visit, was or was not capable of constituting a special mission, is beside the point. It was for the FCO to decide whether it would choose to recognise that visit as a special mission or not."

41. Although it is clear from all the material available to us that it is the view of the FCO that recognition of a special mission means that members of that mission enjoy an immunity, it would be incorrect to hold that the FCO has made a decision to that effect. This is simply the FCO's opinion as to what the common law provides, as to which it defers to the judicial arm of government. The March 2013 Ministerial Statement accepts this in terms.

42. In any event, the relevant or legally operative decisions in this domain were made not by the FCO, or by any Government department, but by the MPS acting, where appropriate, on advice from the DPP given under section 3(2)(e) of the 1985 Act. Strictly speaking, the Deputy Head of the Egypt team did not explicitly state that Lt. General Hegazy enjoyed an immunity, but even if he did (and we entirely accept that one or more police officers reasonably interpreted his email in that way, either directly or at second-hand), this would amount to no more than an informal expression of opinion not properly the subject-matter of judicial review.

43. The DPP accepts that she advised the MPS. Ms Walsh gave that advice on the morning of 17th September. If any informal advice had already been given by the FCO, the message received by police officers from all sources would have been exactly the same. In our judgement, the relevant or operative advice for present purposes was that given by the DPP. It was provided under statutory powers and was intended to be acted on. Below, we give separate consideration to the question whether advice of this nature and communicated in this manner may properly be the subject-matter of judicial review.

44. We cannot overlook the constitutional position based on the principle of the separation of powers as famously explained by Lord Denning MR in *R v Commissioner of Police for the Metropolis, ex parte Blackburn* [1968] 2 QB 118:

"I have no hesitation in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State … He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must or must not prosecute this man or that one …"

45. It is also clear from the available evidence that, although the DPP may well take her own counsel from time to time from experts such as Mr Rogers, the practical reality of this case is that Ms Walsh was guided by the FCO view. We draw that inference from paragraphs 12 and 17 of Ms Walsh's witness statement, in particular from the fact that she did not contradict DI Mason's email to the effect that it had just been confirmed to him that Lt. General Hegazy had special mission immunity. She may have been unaware of any direct communication between the FCO and DS Titherly, but her email timed at 10:31 on 17th September specifically mentions the position of the FCO. At the very least, it is reasonable to conclude that she was aware in general terms of the FCO view as evinced in *Khurts Bat* and elsewhere, and that the FCO also believed that its certificate would result (by court ruling, if needs be) in a corresponding immunity.

46. Thus, what may be described as "the FCO view" is the probable source and driver of the series of steps which led to the operative decision or decisions in this case, and that view is clearly set out in the March 2013 Ministerial Statement and other materials (e.g. Sir Michael Wood, The Immunity of Official Visitors, Max Planck UNYB 16 (2012)) and the United Kingdom's responses to the CAHDI Questionnaire on "Immunities of Special Missions", 2016, considered in detail later in the judgment). The Ministerial Statement is entitled "Special Missions Immunity", and it expressly refers to the *Khurts Bat* case and the relationship of customary international law and the common law. Regardless of the narrow point that the FCO can only confer status and not immunities, decision makers within the CPS would naturally treat "the FCO view" as both authoritative and likely to be correct. In theory they could ignore it - in

constitutional terms, they should decide for themselves - but in practice they would probably take account of it.

47. In any event, even if the DPP was not influenced by the FCO at all, this would make no difference to our ultimate conclusion that a point of law has arisen which needs to be clarified.

48. Thus far, we have reached the view that item (3) in paragraph 33 above cannot be regarded as the proper target for judicial review, but the 2013 Ministerial Statement and the DPP's advice given on 17th September, at least potentially, can. Accordingly, we must now proceed to address Mr Eicke's submission that the Ministerial Statement is not reviewable because it does not create substantive legal consequences and merely indicates his client's view of the law. On our understanding of his oral argument, Mr Rogers did not submit that his client's advice was not, at least in principle, amenable to judicial review - he told us that "it was a decision made in good faith, based on *Khurts Bat*". However, Mr Hickman did address the separate position of the DPP, and our approach to this issue will not presuppose that a concession has been made by Mr Rogers.

49. In *Royal College of Nursing v DHSS* [1981] AC 800, the object of the challenge, brought by ordinary action and not the then governing procedure for judicial review, RSC Order 53, was advice given by the defendant in a circular to nursing officers as to certain aspects of the Abortion Act 1967. The Royal College of Nursing sought a declaration that the circular was wrong in law, and the House of Lords ruled by a majority that it was not. The Crown did not put up any procedural impediments to the issue being determined. Lord Diplock observed (at 824D):

"… this appeal arises out of a difference of opinion between the Royal College of Nursing of the United Kingdom and the Department of Health and Social Security about the true construction of the Abortion Act 1967 …"

Mr Hickman drew support from the apparent breadth of this statement. However, and aside from the Crown's position in that litigation, it must be seen in the context of a case where a government department with public responsibilities in a given area was giving advice which it intended to be acted on.

50. In *Gillick v DHSS and another* [1986] 1 AC 112, the issue was the lawfulness of guidance given by the defendant to area health authorities on the provision of family planning services to children under 16. The plaintiff was the mother of five girls under that age, and sought declaratory relief, again by ordinary action brought by writ, that the guidance was unlawful. The House of Lords ruled that it was not. On this occasion, it did address the issue of jurisdiction.

51. In the view of Lord Scarman (at 177D-E):

"The judge saw no reason why he should be inhibited on this ground from dealing with the issues in the action; and I agree with him. It was not contended that the issue of the guidance was itself a crime: the case against the department was simply that the guidance, if followed, would result in unlawful acts and that the department by issuing it was exercising a statutory discretion in a wholly unreasonable way."

52. Lord Bridge's view was somewhat narrower (at 193G-194A):

"We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration. Such an extended jurisdiction is no doubt a salutary and indeed a necessary one in certain circumstances, as the *Royal College of Nursing* case [1981] AC 800 itself well illustrates. But the occasions of a departmental non-statutory publication raising, as in that case, a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare."

53. Lord Templeman, who was in the minority, expressed the principle even more narrowly, emphasising the fact that the guidance in question, if unlawful, interfered with the rights of parents. On the other hand, he recognised that it was irrelevant that the guidance was "an order", "advice" or "a mere expression of views" (see 206D-F).

54. Plainly, the *Gillick* case assists the FCO on the issue of standing, but in other respects it is less helpful. In our view, the instant case does raise a clearly defined issue of law untrammelled by political or social questions. Further, the Ministerial Statement could be characterised, in Lord Templeman's words, as a mere expression of view. On the other hand, the real question for us is whether the Ministerial Statement should properly be construed as giving advice to decision makers in an area which properly falls within their province as distinct from that of the Crown.

55. Mr Eicke also relied in his skeleton argument on the decision of the Court of Appeal in *Shrewsbury and Atcham BC v SSCLG* [2008] 3 All E R 548 where the challenge was to the process adopted by the

defendant in contrast to Parliament or legislation. Plainly, FCO could not be more different. At paragraph 32 of his judgment, Carnwath LJ observed:

"Judicial review, generally, is concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new rights and powers, or by restricting existing legal rights or interests."

Mr Eicke recruited these general (and we would add, uncontroversial) statements of principle in support of his submission that the FCO was not giving, or purporting to give, advice or guidance of any sort to those responsible for making arrest decisions under section 134 of the Criminal Justice Act 1988, or advising in connection with such decisions.

56. In *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] 1 WLR 2930, the issue was the correctness of legal advice that unsupervised swimming in the mixed pond on Hampstead Heath would expose the defendant to the risk of prosecution under the Health and Safety at Work etc. Act 1974. Paragraphs [21]-[24] of the judgment of Stanley Burnton J. are relevant to the broader question of whether the court should grant declaratory relief to clarify the law (the Claimants' first, and preferred formulation), but it was also relied on by Mr Hickman in support of a submission that even "private", internal advice (on the facts of that case, given by leading counsel) could be the proper subject matter of judicial review. As we understood his submission, the internal advice given orally by Ms Walsh to DI Mason should fall into the same category. In our judgement, this submission cannot receive any support from Stanley Burnton J's reasoning, and has the danger of detracting from the stronger, and better, submission that in appropriate cases the court may grant declaratory relief of an advisory nature, provided that a genuine issue arises in civil litigation. Nowhere in his judgment did Stanley Burnton J hold that leading counsel's advice was reviewable.

57. Drawing these strands together, we arrive at the following conclusions on this issue. In our judgement, Mr Eicke was technically correct in submitting that the Ministerial Statement cannot be regarded as akin to the advice or guidance given by government departments with specific responsibilities in given areas, such as obtained in the *RCN* case and in *Gillick*. It was, and is, no part of the FCO's role or function to advise the MPS or the DPP as to the meaning and content of customary international law. We acknowledge that the FCO is the expert in the area, and that for the purposes of expounding or advocating the position in an international context it is the FCO which will be setting forth the view of Her Majesty's Government. The demarcation line is a narrow one, and in one sense artificial, but both Defendants and the Interested Party are entitled to point to constitutional principle, the separation of powers, and the effect of section 3(2)(e) of the 1985 Act. Viewed strictly, the FCO's role and function is confined to the according of recognition and does not extend to the conferring of an immunity.

58. In any event, the Claimants face the obvious difficulty that they are substantially out-of-time to challenge a Ministerial Statement promulgated in 2013. Overall, their submissions are more forcefully and conveniently addressed under the rubric of their first formulation.

59. The analysis in relation to the DPP's advice to the MPS given on 17th September 2015 is not entirely straightforward. In our judgement, the Claimants have not failed to act promptly in relation to this decision, assuming that it is reviewable. Our examination of the procedural history shows that the Claimants acted with reasonable expedition in pursuing their case against the FCO through the pre-action protocol; that there was delay (by the FCO) after 4th November 2015, in not giving a substantive reply to matters raised in ITN Solicitors' letter; and that, in view of the terms of DI Mason's email of 17th September 2015, it was not unreasonable for the Claimants to focus their fire on the FCO. Once it became clear that it was the DPP and not the FCO which had advised the MPS, the Claimants should have abandoned the original formulation of their case against the FCO, but it is right to record that they applied to join the DPP reasonably promptly, and that the DPP consented.

60. The issue therefore arises as to whether Ms. Walsh's advice to DI Mason is reviewable. In our judgement, it would be incorrect to characterise this advice as private or internal (c.f. the *Hampstead Heath Winter Swimming Club* case), notwithstanding that it was proffered both orally and informally. The parties agree that Ms Walsh's advice was given under statutory powers. It was no doubt intended to guide the police officers and the evidence clearly demonstrates that it did so. Overall, if it really were necessary to identify the DPP's advice as being the only avenue into the important substantive issue which lies at the heart of this case, we would conclude that Ms Walsh's email to DI Mason is amenable to judicial review. Having said that, we do not overlook the remaining obstacles which exist, namely the Claimants' standing and the potentially academic nature of the claim. We are merely putting these to one side for the time being.

61. We do so because there is a more satisfactory procedural pathway into the substantive issue, and it involves an examination of the Claimants' first, and preferred, formulation. It is more satisfactory because there is obvious artificiality in maintaining a focus on the DPP's advice in circumstances where that Defendant has merely been loyal to *Khurts Bat*. The artificiality stems from the application of demarcation lines drawn in the legal sand by applications for recognition of the strict legal and constitutional

demarcation lines drawn by the legislature by allocating the constitutional responsibilities, but we really need to grapple with the broader point that the FCO is the expert in this area, more than anyone else.

62. The jurisdiction to grant declaratory relief to clarify an issue of law is not controversial. Wade and Forsyth on Administrative Law, 11th edition, observe (at p. 484):

"The declaration is a discretionary remedy. This important characteristic probably derives not from the fact that the power to grant it was first conferred on the Court of Chancery, but from the discretionary power conferred by the rule of court. There is thus ample jurisdiction to prevent its abuse; and the court always has inherent powers to refuse relief to speculators and busybodies, those who ask hypothetical questions or those who have no sufficient interest. As was said by Lord Dunedin [in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448]:

'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.'

In other words, there must be a genuine legal issue between the parties."

As we point out below, the judicial approach to "hypothetical questions", and the meaning of that term, has not been wholly consistent.

63. A similarly broad and flexible approach may be discerned in the extensive analysis given to this topic by the current authors of Zamir, The Declaratory Judgment (Woolf and Woolf), 4th edition, paragraphs 3-19 to 3-30. These authors explain that the approach to declaratory relief has expanded since *Gouriet v Union of Post Office Workers* [1978] AC 435, particularly in the context of the exercise of its supervisory jurisdiction. Relevant judicial landmarks, apart from the decisions we have already reviewed, include *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam. 1, *Rolls Royce Plc v Unite* [2010] 1 WLR 318 and *Oxfordshire CC v Oxford City Council* [2006] 2 AC 674. We limit ourselves to two citations from these authorities:

"It [the speech of Lord Diplock in *Gouriet*] is to be regarded as a reminder that the jurisdiction is limited to the resolution of justiciable issues; that the only kind of rights with which the court is concerned are legal rights; and that accordingly there must be a real and present dispute between the parties as to the existence and extent of a legal right. Provided that the legal right in question is contested by the parties, however, and that each of them would be affected by the determination of the issue, I do not consider that the court should be astute to impose the further requirement that the legal right in question should be claimed by either of the parties to be a right which is vested in itself." (per Millett LJ in *Re S*, at 21)

and:

"On one view, the better course would have been for the registration authority to take a decision, following whichever advice seemed best to them. Whichever party was aggrieved … would be left to apply for judicial review. Leave would have been required and the issues would have been confined to those raised by the authority's decision. But the authority clearly did not have an immediate interest in knowing what their powers were. There was nothing hypothetical or academic about the issues. There were opposing parties who also took different views in these matters, so that they could be properly argued. This could therefore be seen as a proper case for seeking an advisory opinion from the court, tied specifically to the issues relating to the powers of the registration authority in the circumstances which had arisen." (per Baroness Hale in *Oxfordshire CC* at [133])

64. In the *Hampstead Heath Winter Swimming Club* case, Stanley Burnton J. expressly recognised that the litigation was hypothetical in the sense that there were no concrete facts before him, or the HSE (which was not even a party), which might give rise to a criminal prosecution. Further, the Claimants in that litigation could not be prosecuted at all, but they were indirectly affected by the Corporation's concern that it might be. Although condign caution had to be exercised, in particular the need to avoid the possibility of collusive litigation, judicial review could be an appropriate remedy where the issue was "a genuine issue arising in civil litigation", especially in circumstances where "there is no other means of testing the correctness or otherwise of the legal advice on the basis of which the Corporation made its decision".

65. These observations resonate quite closely with the circumstances which obtain in the instant case, although there are some points of distinction. In particular, the standing of the swimming club as appropriate claimant was clear, as was the possibility that facts might present themselves at some later date which could trigger the HSE's obligations under the 1974 Act. Here, the standing of these Claimants is not free from controversy, and it is far from clear that any of the 43 suspects will come to the United Kingdom as members of a special mission.

66. As regards the issue of *locus*, Mr Eicke naturally placed heavy reliance on the decision of this court in *Al-Haq v FCO* [2009] EWHC 1910 (Admin). In that case, an NGO based in Ramallah in the Palestinian

territories sought an order that the UK Government must change its policy in relation to the State of Israel on account of events occurring in Gaza and the West Bank. This court held that the issue was simply not justiciable, and that moreover the claimants did not have standing to raise it. (See the judgment of Pill LJ at [48] and that of Cranston J at [62].) However, it is clear from the analysis of Pill LJ in particular

that the issue of standing could not be divorced from the context of the right being claimed. It was not the foreign character of the NGO which was critical but the fact that it was seeking to intrude in an area which the courts regard as close to *terra incognita*.

67. It would be artificial, and somewhat strained, to hold that the Claimants are the victims of the torture being alleged or that they really represent the victims. They may have been instrumental in introducing a number of victims to ITN Solicitors, but they have no right to represent them. Unless the Fourth Claimant has suffered recognised psychiatric harm as a result of his experiences in Egypt in the summer of 2013, and we do not understand his evidence to go that far, he would not qualify as a victim either.

68. However, in the circumstances of the present case, which appear to us to be exceptional, it is possible to take a broader perspective. The following considerations, taken cumulatively, are salient. The Claimants have raised a genuine issue of domestic law and are far from being busybodies or strangers to the issue. ITN Solicitors have been involved in high-level dialogue with the MPS since 2014. They raised the matter, entirely properly, in September 2015 and, subject to the point that Lt. General Hegazy has come and gone, we have found that the advice given by the DPP is amenable to judicial review, and that a timeous application in relation to it has been made. Further, and adopting the helpful analysis of Hickinbottom J. at paragraph 55(i) of his judgment in *R (Williams) v SSHD* [2015] EWHC 1268 (Admin), the present case falls in the realm of a hypothetical rather than an academic question, being "one which may need to be answered for real practical purposes at some stage, although the answer may not have immediate practical consequences for the particular parties in respect of the extant matter before the court". Both the FCO and the DPP have advanced full submissions on the substantive issue. Both, if pressed, would have to accept that it is more convenient to deal with the issue now rather than in the context of a rushed judicial review heard when a special mission happens to be in the UK for, no doubt, a brief period. Finally, and perhaps most compellingly, the DPP - subject to her concerns about *locus* and floodgates - positively invites the court to clarify the law.

69. Our preferred analysis is that the claim for declaratory relief on this basis must involve the DPP as well as the FCO. Insofar as the document submitted by Mr Hickman at the start of the second day of this hearing might be interpreted as limiting this first formulation to a claim for relief against the FCO alone, its scope needs to be expanded.

70. The position would be different if the Claimants, entirely out of the blue, were coming to this court seeking an advisory declaration as to the law. In our view, they have been able to establish a sufficient metaphorical toe-hold into this case, and consequent standing to bring this claim, by virtue of the actions they took on a number of occasions, culminating in the events of September 2015.

71. We have not overlooked paragraphs 21-25 of the MPS's statement drafted by Mr Jeremy Johnson QC asserting that, even if no question of an immunity arose, his clients probably would not have arrested Lt. General Hegazy in September 2015. This may well be a reasonable inference to draw from what we know, but strictly speaking we have no direct evidence to that effect, and Mr Johnson's statement cannot provide it. This objection would carry greater potential weight if the Claimants' access to this court depended on directly assailing the DPP's advice to the MPS given on 17th September 2015.

72. Ultimately, we consider that there are particular reasons which exist in this case to permit us to address the substantive issue in the exercise of our broad discretion under CPR Part 54. The law would be deficient, and unnecessarily technical, if an important issue of this sort could not be addressed in these circumstances.

73. Accordingly, we accede to Mr Hickman's submission that the Claimants may advance a claim for a declaration, pursuant to the court's supervisory jurisdiction, to clarify the point of law which has arisen between them, the FCO and the DPP. We grant permission to amend the Claim Form to include it.

V. **Customary international law**

Introduction

74. Diplomatic relations are normally conducted by permanent missions accredited to the receiving State. In modern international law detailed provision is made for the privileges and immunities of members of such permanent missions by the Vienna Convention on Diplomatic Relations 1961 ("the VCDR") to which 190 States, including the United Kingdom, are currently parties. Diplomacy, however, is not invariably conducted through permanent missions. States sometimes have occasion to send and receive special or *ad hoc* missions of temporary duration, sometimes in connection with a specific event or intended to achieve a limited purpose. Temporary missions were the earliest form of diplomatic missions but they fell into relative disuse in the seventeenth and eighteenth centuries as the practice of exchanging permanent envoys and embassies grew. Special missions then became associated with representation of the sending state or its ruling family on ceremonial occasions. However, following the

Second World War, no doubt as a result of increased international co-operation and the development of air transport, special missions came to be used to an ever-increasing extent in many different fields of official business. (Hardy, Modern Diplomatic Law, (1968), pp. 89-90; Kalb, Immunities: Special Missions, Max Planck Encyclopedia of Public International Law (2011).) In 1969 the United Nations General Assembly adopted the Convention on Special Missions to which 38 States are currently parties. The United Kingdom has signed but has not ratified the Convention on Special Missions.

75. As in the case of state immunity and the privileges and immunities of members of permanent diplomatic missions, the question whether and if so to what extent a member of a special mission is entitled to inviolability or immunity is a matter of law as opposed to a mere matter of international comity or courtesy. Such a legal entitlement may be derived from a treaty or from customary international law. In the present case there is no treaty between the United Kingdom and Egypt which makes provision for the privileges and immunities of members of special missions. Accordingly, it is necessary to consider, whether there exists "international custom, as evidence of a general practice accepted as law" conferring privileges or immunities on members of special missions and, if so, their nature and extent. The burden lies on the party seeking to establish a rule of customary international law to demonstrate both a settled practice and *opinio juris* (i.e. that the conduct of states reflects their sense of binding legal obligation). This will require an examination of state practice in its various manifestations. (See generally *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, paras. 53-55.) Treaties, in particular multilateral conventions, will often be relevant to this process, notwithstanding that they may not be directly applicable between the parties, because they may record or define rules deriving from custom or may develop them (*Continental Shelf (Libya Arab Jamahiriya / Malta)*, Judgment, ICJ Reports 1985, para. 27).

76. The specific question for consideration here is whether a member of a special mission is entitled as a matter of customary international law to inviolability of his person and immunity from criminal proceedings by virtue of a rule of customary international law to that effect. During the hearing Mr. Eicke QC for the Secretary of State described these as "core immunities" which are essential if a special mission is to be able to function and submitted that, whatever might be the position in relation to other privileges and immunities under the Convention on Special Missions, these had achieved the status of rules of customary international law. Mr. Swaroop QC for the Claimants submitted that the Defendants had simply failed to discharge the burden of demonstrating that these were accepted by States as required under customary international law.

The test for the existence of a rule of customary international law.

77. In order to establish a rule of customary international law it is necessary to demonstrate a settled practice and *opinio juris*. What will be required in order to demonstrate these elements will vary according to the circumstances. Thus the current work of the International Law Commission ("ILC") on the identification of customary international law (Text of the draft conclusions provisionally adopted by the Drafting Committee, 30 May 2016, A/CN.4/L.872, Draft conclusion 3) states that regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.

78. In the *North Sea Continental Shelf cases (Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands)*, Judgment, ICJ Reports 1969, p. 3) it was contended, unsuccessfully, that Article 6, Geneva Convention on the Continental Shelf 1958 had, in a very short period of time, become a rule of customary international law, partly because of its impact and partly because of subsequent state practice. The ICJ's discussion of what was required in order to demonstrate a settled practice was closely linked to those particular circumstances. It observed (at [73]) that it might be that, even without the passage of a considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. It was also in this context that it made its much quoted statement (at [74]):

"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are special affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

It is clear however that general practice need not be universal and total consistency is not required. Thus the ILC current draft states that the requirement that the practice must be general means that it must be sufficiently widespread and representative, as well as consistent (Draft conclusion 8).

79. The question as to what evidence may demonstrate the emergence of a new rule of customary international law was addressed by the ICJ in the *Jurisdictional Immunities* case. The court was there concerned with state immunity but it provides a close analogy for the purposes of the task which this court has to undertake.

"In the present context, State practice of particular significance is to be found in the judgments of

national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and their Property, 2 December 2004]. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgement, by States granting immunity, that international law imposes upon them an obligation to do so; and conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court."

80. Evidence of *opinio juris* may sometimes be elusive. It is important to note, however, as Judge Crawford points out, that the ICJ will often infer the existence of *opinio juris* from a general practice, from scholarly consensus or from its own or other tribunals' previous determinations. (See Brownlie's Principles of Public International Law, 8th Ed., at p. 26 and the cases there cited at footnote 33.)

81. Before turning to examine state practice in relation to the privileges and immunities of members of special missions, it is necessary to sound a cautionary note. Whereas national judges may enjoy a measure of freedom to develop principles of law within their own legal systems, they have no such freedom to develop customary international law. International law is based on the common consent of states and there is, accordingly, a need for a national judge to guard against adopting a rule which might appear a desirable development as opposed to identifying rules which are sufficiently supported by state practice and *opinio juris*. As Lord Bingham observed in *Jones v. Saudi Arabia* ([2006] UKHL 26; [2007] 1 AC 270 at [22]), one swallow does not make a rule of international law. The same point was made by Lord Hoffmann in *Jones* (at [63]):

"It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states".

Thus in *Serdar Mohammed v. Secretary of State for Defence* [2015] EWCA Civ 843; [2016] 2 WLR 247 (at [220]-[244]) the Court of Appeal felt unable to conclude that, in a non-international armed conflict, customary international humanitarian law authorised or conferred a legal basis for detention, desirable as such a rule might be, because the little in the way of unequivocal state practice which supported such a rule did not meet the requirement that the practice be extensive.

State practice in relation to treaties.

82. Multilateral treaties may bear on the emergence of rules of customary international law in a number of different ways. A provision in a multilateral convention may be declaratory of existing customary international law from the outset. Alternatively, a provision in a multilateral convention may subsequently achieve the status of the rule of customary international law by virtue of the scale of State participation in the convention, or because of the impetus which the provision has given to the development of State practice.

The Havana Convention regarding Diplomatic Officers, 1928

83. An early attempt to regulate diplomatic relations was the Convention regarding Diplomatic Officers, Havana, 20 February 1928. This multilateral convention classified diplomatic officers as ordinary and extraordinary. Those who permanently represented the government of a State before that of another State were ordinary. Those entrusted with a special mission or those who were accredited to represent the government in international conferences and congresses or other international bodies were extraordinary (Article 2). The convention provided that, except as concerns precedence and etiquette, diplomatic officers, whatever their category, had the same rights, prerogatives and immunities (Article 3). The convention provided that diplomatic officers should be inviolate as to their persons, their residence, private or official, and their properties. It expressly provided that this inviolability covered all classes of diplomatic officers (Article 14). It further provided that diplomatic officers were exempt from all civil or criminal jurisdiction of the State to which they were accredited (Article 19). The preamble to the Havana Convention recorded that diplomatic officers should not claim immunities which were not essential to the discharge of their official duties and recited that the convention was intended to apply "until a more complete regulation of the rights and duties of diplomatic officers can be formulated".

84. The Havana Convention attracted a relatively modest degree of support, with only 15 States becoming parties and 6 further States signing but not ratifying it. All of the States concerned are American States, the convention being concluded under the auspices of the Sixth International Conference of American States.

The Vienna Convention on Diplomatic Relations, 1961

85. The Vienna Convention on Diplomatic Relations, 16 April 1961 ("VCDR") is a multilateral convention to which 190 States are currently contracting parties. It was based on preparatory work by the ILC. The United Kingdom has signed and ratified the convention and its principal provisions relating to privileges

and immunities are given effect in domestic law within the United Kingdom by the Diplomatic Privileges Act 1964. The VCDR entered into force for the States parties to it on 24 April 1964. In addition, in the light of almost universal participation in the convention, many of its provisions may be taken to be declaratory of customary international law.

86. The VCDR is concerned only with permanent missions and does not apply to special missions. It provides that the person of a diplomatic agent shall be inviolable and that he shall not be liable to any form of arrest or detention (Article 29). It provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State and goes on to specify the more limited circumstances in which he enjoys immunity from its civil and administrative jurisdiction (Article 31).

The Convention on Special Missions, 1969

87. The Convention on Special Missions was adopted by the General Assembly of the United Nations on 8 December 1969 and it entered into force for the contracting States on 21 June 1985. Like the VCDR, the Convention on Special Missions was based on draft articles prepared by the ILC. There are currently 38 States parties to the convention. Twelve further States (including the United Kingdom) have signed but not ratified the convention. Accordingly, the United Kingdom is not a party to the Convention on Special Missions.

88. The preamble to the convention recalls that the purpose of privileges and immunities relating to special missions is not to benefit individuals but to ensure the efficient performance of the functions of special missions as missions representing the State. Significantly, it goes on to affirm that the rules of customary international law continue to govern questions not regulated by the provisions of the convention. A "special mission" is defined for the purposes of the convention as follows:

"A temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task" (Article 1)

It provides that a State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel (Article 2). The functions of a special mission are to be determined by the mutual consent of the sending and the receiving State (Article 3). The scheme of the convention is very similar to that of the VCDR. The general approach of the convention is to extend to special missions privileges and immunities similar to those accorded to permanent missions, subject to appropriate modifications. In particular, the convention provides that the persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable and shall not be liable to any form of arrest or detention (Article 29) and shall enjoy immunity from the criminal jurisdiction of the receiving State (Article 31(1)). The convention also makes provision for a more restricted immunity from the civil and administrative jurisdiction of the receiving State (Article 31(2)).

The work of the International Law Commission 1960-1967.

89. During the hearing of the present case, a great deal of time was devoted to an examination of the preparatory work of the ILC which led to the Convention on Special Missions. In particular, attention focused on whether and, if so, the extent to which, the reports of the ILC might provide evidence of customary law in relation to special missions.

90. Following the completion of its work on the draft articles which eventually became the VCDR, the ILC included the issue of *ad hoc* diplomacy in the agenda of its twelfth session (1960). A report was prepared by Special Rapporteur Mr. A. E. F. SandstrÖm who observed:

"[T]urning now to the applicability of the provisions of Section II of the 1958 draft, dealing with diplomatic privileges and immunities, it has been suggested above …that this part of the draft would, in the main, be applicable to special missions. The activities of a special mission are part of what are usually functions of a permanent mission, and since privileges and immunities are granted in the interest of these functions and for promoting good relations between the States, it is natural that these advantages be granted also to special missions, unless they are based on circumstances which apply only to permanent missions." (A/CN.4/129, Yearbook of the ILC 1960, II, para 23.)

He also noted:

"[P]ublicists seem to agree that diplomatic immunities apply also to special missions, although they do not discuss the matter in detail. The Havana Convention of 1928 sanctions the same rules."

91. The 1960 draft articles on special missions, which proceeded by analogy with permanent missions, were transmitted to the Vienna Conference on Diplomatic Intercourse and Immunities which met in

were transmitted to the Vienna Conference on Diplomatic Intercourse and Immunities which met in 1961. The Vienna Conference sent the question of special missions to a sub-committee which found that the draft articles were unsuitable for inclusion in the final convention without long and detailed study

which could take place only after a set of rules on permanent missions had been finally adopted. The Vienna Conference adopted this recommendation.

92. In 1961 the General Assembly requested the ILC to study *ad hoc* diplomacy and to report to the Assembly. Mr. Milan Bartoš was appointed Special Rapporteur. He produced four reports on the subject (A/CN.4/166, Report on Special Missions, YILC 1964, Vol II; A/CN. 4/177 and A/CN.4/179, Second Report on Special Missions, YILC 1965, Vol II; A/CN.4/189 Third Report on Special Missions, YILC 1966, Vol II; A/CN.4/194, Fourth Report on Special Missions, YILC 1967, Vol II). Although we have been referred to passages in all four reports, it is convenient to proceed by reference to the fourth report in which the Special Rapporteur summarised all his previous reports and submitted them as a whole.

93. At paragraph 113-144 of his Fourth Report, Mr Bartoš considered whether there are any rules of positive public international law concerning special missions.

"113. All the research carried out by the Special Rapporteur to establish the existence of universally applicable rules of positive law in this matter has produced very little result. Despite abundant examples of the use of special missions, the Special Rapporteur has failed to establish the existence of any great number of sources of law of more recent origin which might serve as a reliable basis for the formulation of rules concerning special missions..."

114. Although the dispatch of special missions and itinerant envoys has been common practice in recent times and, as the Special Rapporteur would agree, represents the use of the most practical institutions for the settlement of questions outside the ordinary run of affairs arising in international relations, whether multi-lateral or bi-lateral, they have no firm foundation in law. Whereas ordinary matters remain within the exclusive competence of permanent missions and there are many sources of positive international law which relate to these organs of international relations ... the rules of law relative to ad hoc diplomacy and the sources from which they are drawn are scanty and unreliable.

…

116. One question has exercised jurists, both as a matter of practice and of doctrine: what is the scope of facilities, privileges and immunities to which such missions are entitled and which the receiving States are obliged to guarantee? In the absence of other rules, attempts have been made to find rules in the comity of nations and to discover analogies with the rules of diplomatic law.

…

120. With no well-established juridical customs and no clearly defined practice, with changes occurring in general criteria, even in those relating to resident diplomacy, with no well-grounded positions in the literature and with no institutions which can be described as accepted by the civilised nations … it is interesting to find that those who have sought to create international law *de lege ferenda* have failed to make any advance.

…

121. This general paucity of rules of positive law on the subject eliminated all possibility of codification by the method of collecting and redrafting existing rules of international law and integrating them into a system.

…

122. The International Law Commission was faced with this situation when it had to make a decision on the establishment of the rules of law relating to special missions. It was clear to all the members of the Commission that there were no definite rules or positive law which could serve as a basis for the preparation of the rules of law of ad hoc diplomacy. The Secretariat reached the following conclusion:

"Whilst the various instruments and studies referred to above do not purport to reflect the actual practice of States in every particular, it is probable that they represent the position adopted by the majority of States in respect of special missions. Four broad principles at least appear to be generally recognized: (i) That, subject to consent, special missions may be sent; (ii) That such missions, being composed of State representatives, are entitled to diplomatic privileges and immunities; (iii) That they receive no precedence *ex proprio vigore* over permanent missions; and (iv) That the mission is terminated when the object is achieved."

123. But these four principles extracted from the abundant sources on special missions were not sufficient to guide the Commission in the task of preparing the new positive law concerning special missions."

94. It appears therefore that the ILC accepted, in very general terms, that there was general recognition that special missions were entitled to at least some diplomatic privileges and immunities. However, no explanation is provided of the nature or scope of such privileges and immunities or of the circumstances in which they should be granted. On the contrary, the Special Rapporteur referred to a general paucity of rules of positive law on the subject which eliminated any possibility of codification by the ILC. The Special Rapporteur, noting that the positive sources of public international law relating to *ad hoc* diplomacy were in a condition "which is worse than critical" (at 135) concluded:

"136. The present situation demands that a solid foundation for a positive system of law in this field be laid without delay and that the rules of such a system be formulated in detail. The old has been found wanting. The new does not exist, and every day brings new concrete situations which require a solution. Reality demands it."

95. The Fourth Report records debate within the Commission as to whether the rules relating to special missions should be based on law or on international comity or courtesy. It was the unanimous view of the ILC that the rules it was drafting on special missions should be rules of law and that they were not based on *comitas gentium.* (See the Fourth Report at [138]-[141].)

96. The Fourth Report then returned to the question of the relationship between the rules relating to special missions and customary international law. It acknowledged that "certain rules applicable to the legal status of special missions may be found in customary international law" and, accordingly, "in drawing up specific rules of legal institutions, the Commission applied the idea that legal rules relating to special missions, are influenced by customary international law and relied on the practice of customary law in cases where it was satisfied that a universally recognized custom existed" (at [142]). However it also noted (at [144]) that no member of the Commission insisted that it should confine itself strictly to codification in drawing up the rules.

97. It appears therefore that there may be some element of codification in the work of the ILC in producing draft articles. The passage at [142] is, however, as the Claimants submit, difficult to reconcile with the earlier passages in the Fourth Report set out above where Mr Bartoš refers to the paucity of state practice in this area.

98. The Special Rapporteur stated, later in his Fourth Report:

"326. There still remains the fundamental question - what is the general legal custom (since codified rules are as yet lacking) with regard to the legal status of *ad hoc* diplomacy as regards the enjoyment of facilities, privileges and immunities? On this point theory, practice and the authors of the draft of the future regulation of this question agree. The International Law Commission took as its starting point the assumption that *ad hoc* missions being composed of State representatives, are entitled to diplomatic privileges and immunities. This however does not answer the question; for it has not yet been determined, either by the Commission or in practice, precisely to what extent *ad hoc* diplomacy enjoys these diplomatic facilities. The Commission itself wavered between the application of the *mutatis mutandis* principle and the direct (or analogous) application of the rules relating to permanent diplomatic missions. In any event, before a decision can be reached further studies will be needed, in order either to codify the undetermined and imprecise cases of application in practice (e.g. topics which are not yet ripe for codification) or to apply, by means of rational solutions, the method of the progressive development of international law."

This passage seems to us to be a reasonably clear statement that the precise extent of the privileges and immunities in customary law of members of a special mission had yet to be established.

99. In its 1967 report to the General Assembly (A/6709/REV.1) the ILC submitted draft articles on special missions. These provided, inter alia, that the persons of the representatives of the sending State in the special mission and the members of the diplomatic staff shall be inviolable and shall not be liable to any form of arrest or detention (Article 29) and that the representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State (Article 31). The ILC observed:

"23. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law."

In its commentary on the draft articles the ILC stated (at p. 358):

"Before the Second World War, the question whether the facilities, privileges and immunities of special missions have a basis in law or whether they are accorded merely as a matter of courtesy was discussed in the literature and raised in practice. Since the War, the view that there is a legal basis has prevailed. It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members. Such is also the opinion expressed by the Commission on several occasions between 1958 and 1965 and confirmed by it in 1967."

This passage must be read against the background of the decision to place before the commission as to whether the grant of facilities, privileges and immunities to special missions was a matter of law at all, or whether it was merely a matter of comity or courtesy. It was the unanimous view of the ILC that it was a requirement of law. This passage reflects that conclusion. It also reflects a general acceptance that

States are under an obligation to accord facilities, privileges and immunities to special missions and their members.

100. However, the Report to the General Assembly goes on to explain that in 1958 and in 1960 there was a division of the view within the Commission. At that time several members held that every special mission was entitled to the facilities, privileges and immunities accorded to permanent diplomatic missions and, in addition, to any further facilities, privileges and immunities necessary for the performance of the particular task entrusted to it. Other members of the ILC and some governments maintained that, on the contrary, the facilities, privileges and immunities of special missions should be less extensive than those accorded to permanent diplomatic missions and that they must be limited to what is strictly necessary for the performance of a special mission's task. Those who held that opinion were opposed to the Commission's taking the VCDR as the basis for its draft on special missions. The Report then goes on to state that in 1967 the Commission decided that every special mission should be granted everything that is essential for the regular performance of its functions, having regard to its nature and task. It concluded that under those conditions, there were grounds for granting special missions, subject to some restrictions, privileges and immunities similar to those accorded to permanent diplomatic missions. Accordingly it had taken the VCDR as the basis for the provisions of its draft and had departed from that Convention only on particular points for which a different solution was required.

101. These passages from the ILC's 1967 Report indicate, therefore, that although it considered that to some extent the draft articles codified the modern rules of international law concerning special missions, in substantial part it was proposing solutions based on the analogy of the law relating to permanent diplomatic missions as reflected in the VCDR. What is unclear is the extent to which the ILC considered that its proposals in relation to special missions reflected existing rules of customary law. In this regard we note the repeated references in the Fourth Report of the Special Rapporteur to the fact that there was a dearth of custom or positive law which could be codified. In these circumstances we consider that only limited weight can be given to the work of the ILC as supporting the existence of rules of customary law on this subject as at 1967. In our view, the most that can be said on the basis of this evidence is that:

(1) There was some customary law on the subject which operated by way of legal obligation as opposed to comity or courtesy.

(2) The solution proposed by the ILC in its draft articles was, in general, based on the rules in the VCDR concerning permanent missions, as opposed to an approach based on the grant of facilities, privileges and immunities to special missions limited to what was strictly necessary for the performance of the mission's task.

(3) It is apparent from the work of the ILC that the purpose of according privileges and immunities to special missions and their members is, as in the case of permanent diplomatic missions and their members, to enable the mission to perform its functions. Diplomatic immunity is essentially a functional immunity. In this regard, it seems to us that the matters with which we are concerned - the inviolability and immunity from criminal proceedings of a member of a mission during its currency - are essential if a mission is to be able to perform its functions and that, accordingly, if there exists any customary law on the subject, it could be expected to include rules to that effect.

102. Sir Michael Wood, writing in 2012, sums the matter up in this way:

"The elaboration of the Convention had a major impact on the development of rules of customary international law; it was a focus for State practice. As already noted, the Commission was of the opinion that its draft reflected, at least in some measure, the rules of customary international law and this does not seem to have been contested by States. While it cannot be said that all - or even most - of the provisions of the Convention reflected customary international law at the time of its adoption, it is widely accepted that certain basic principles, including in particular the requirement of consent, and the inviolability and immunity from criminal jurisdiction of persons on special missions, do now reflect customary law.

At the time of its adoption, the United Kingdom's view was that the Convention was not declaratory of international law in the same way as the Vienna Convention on Diplomatic Relations, since there was not enough evidence of State practice for it to be said that existing international law was clear and settled in the matter. But the Convention was thought to be generally declaratory of what an International Tribunal would probably have held international law to be, or what international law would have come to be in practice had the Convention not been concluded."

(Wood, The Immunity of Official Visitors, Max Planck UNYB 16 (2012) at pp. 59-60.)

103. Before leaving the work of the ILC we should draw attention to two further matters. First we note that, in 2008 when the ILC considered the immunity of State officials from criminal jurisdiction, a

memorandum by the Secretariat of the ILC (UN Doc A/CN.4/596, p58, para 90) identified three cases in which "lower officials" enjoy immunity which had already been the subject of codification. One of those was "that of representatives of the sending State in a special mission and members of its diplomatic staff who also enjoy immunity from criminal jurisdiction in the receiving State under Article 31, paragraph 1, of the Convention on Special Missions, 1969." Secondly, however, the ILC in its current work on immunities has taken a cautious approach to this question observing that "further study is required to determine whether there exist customary rules of international law governing the status of members of special missions." (Preliminary report on immunity of State officials from foreign criminal jurisdiction by Mr. Kolodkin, Special Rapporteur, 28 May 2008, UN Doc A/CN.4/601, footnote 189.)

Decisions of international courts and tribunals.

104. Neither the ICJ nor any other international court or tribunal has had cause to give a considered ruling on whether the immunity of members of a special mission is established in customary international law. The Claimants draw attention, however, to two brief references in judgments of the ICJ.

(1) In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* ICJ Reports 2002, p. 3 the ICJ was concerned with the immunity from jurisdiction of a Minister of Foreign Affairs. In the course of its judgment the ICJ mentioned the VCDR, the Vienna Convention on Consular Relations 1963 and the Convention on Special Missions. The court expressly noted that certain provisions of the first two conventions "reflect…customary international law" (at [52]). The court then observed that the DRC and Belgium were not parties to the Convention on Special Missions. The Claimants invite the court to attach weight to the fact that it did not add that the Convention on Special Missions or any part of it reflected customary international law.

(2) In the case of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France),* ICJ Reports 2008, at an early stage in the proceedings Djibouti had claimed immunity for two of its officials on the ground that they were members of a special mission. However, it later amended its claim so as not to claim immunity *ratione personae* for officials other than the head of State. (See Wood p. 62, footnote 89.) The court noted "that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case" (at [194]). The Special Missions Convention was not applicable because Djibouti and France were not parties to it. The claimants submit that if the rules on the immunity of special missions had the status of customary international law, the ICJ could not have expressed itself in this way.

105. We are unable to attach any weight to these oblique references. These remarks do not cast any light on the issues with which we are concerned, which were not directly in point before the ICJ and were not the subject of any considered expression of opinion. In the *Arrest Warrant* case the court was not directly concerned with special missions. We also note that the ICJ stated (at [52]) that the Convention on Special Missions provided "useful guidance on certain aspects of the question of immunities". In *Djibouti v. France* there is nothing to support the view that the ICJ considered and rejected any rules of customary law relating to special missions. (See Wood, p. 62.)

State practice: the United Kingdom.

106. The privileges and immunities of a special mission have arisen for consideration in a number of cases in this jurisdiction.

107. In *Service v Castaneda* (1845) 1 Holt Eq 158 the defendant applied for the discharge of an injunction against him on the ground that he was an agent of the Spanish government. During the argument Knight Bruce V-C observed that the Diplomatic Privileges Act 1708 was only explanatory of the law of nations (at p. 163) and was only declaratory of the common law (at p. 169). Discharging the injunction, the Vice Chancellor observed that if the defendant did not strictly bring himself within the language of section 3 of the 1708 Act, a matter on which he expressed no opinion, on the language of his affidavit he had brought himself "within that common law which exists equally with the statute to protect him from that particular process, which he now seeks to have dissolved" (at p. 170). On one reading the decision may, therefore, be taken to be a decision upholding the immunity of a member of a special mission on the basis of international law which in turn formed the part of the common law. However, it is stated elsewhere in the report that the defendant was attached to the Spanish Embassy and bound to observe the directions of the Spanish Ambassador. Accordingly, it may not be a decision relating to the immunity of a special mission at all. In any event, we do not consider that it casts any light on the present state of customary international law or the common law on the subject.

108. *Fenton Textile Association Limited v Krassin* (1921) 38 TLR 259 concerned the Trade Agreement of 16 March 1921 between His Majesty's Government and the Russian Socialistic Federative Soviet Republic. When sued in relation to a commercial transaction Mr. Krassin applied for service of the writ to be set aside on the ground that he was the authorised representative of a foreign State and entitled to immunity. The Court of Appeal considered that, in the light of letters received from the Foreign Office, Mr. Krassin did not appear to be an ambassador or public minister authorised and received by the sovereign

and, as a special diplomatic representative for a temporary purpose, he was present in this country on the terms of a special agreement which did not confer on him the immunity he sought. Our attention has been drawn to the statement by Scrutton L.J. (at p. 262) that "so long as our Government negotiates with a person as representing a recognized foreign State about matters of concern as between nation and nation, without further definition of his position, I am inclined to think that such representative may be entitled to immunity though not accredited to or received by the King". However, as in the case of *Service v Castaneda*, we do not consider that this *obiter dictum* provides any assistance in relation to the current state of customary international law or the common law in this jurisdiction.

109. In *R v Governor of Pentonville Prison*, *ex parte Teja* [1971] 2 QB 274 India sought the return of Mr. Teja as a fugitive offender. He was arrested on a brief visit to the United Kingdom whilst carrying a document issued by the Republic of Costa Rica which stated that he was a member of a "special mission". Mr. Teja submitted that he was entitled to immunity as a diplomat and head of mission under the VCDR 1961 and the Diplomatic Relations Act 1964. Lord Parker CJ, with whom the other members of the court agreed, rejected that submission (at p. 28) on a number of grounds. First, Mr. Teja had not been accepted or received by the United Kingdom as a diplomatic agent. Secondly, Costa Rica intended Mr. Teja to go on a special mission within the Convention on Special Missions and not within the VCDR. The Convention on Special Missions had not been implemented into domestic law. Thirdly, in any event, Mr. Teja was in the United Kingdom merely as a commercial agent of the government for the purpose of concluding a commercial contract. It was almost impossible to say that a man who is employed by a government to go to foreign countries to conclude purely commercial agreements, and not to negotiate in any way or have contact with the other government, can be said to be engaged on a diplomatic mission at all. He was there merely as a commercial agent of the government for the purposes of concluding a commercial contract. He was not there representing his state to deal with other states. Accordingly, he could not claim diplomatic privileges and immunities under Article 39 VCDR.

110. On behalf of the Claimants in the present case it is said that there was no suggestion that the members of special missions enjoyed immunity in customary international law or at common law. However, Mr. Teja does not appear to have claimed immunity on this basis. Moreover, he would not have been entitled to immunity as a member of a special mission because he had not been accepted as such by the United Kingdom.

111. In *R v Governor of Pentonville Prison, ex parte Osman (No.2)* (1988) 88 ILR 378 the Government of Hong Kong sought the return of the applicant to stand trial on charges of dishonesty. The applicant claimed immunity on the ground that he had been appointed as ambassador-at-large by the government of Liberia to represent Liberian interests in the European Community. The FCO submitted to the court a certificate from the Secretary of State that the applicant had not been notified or accepted as a member of the Embassy of Liberia. The Divisional Court held that the applicant was not a member of the diplomatic staff of the Liberian Embassy in London.

112. The interest of the case for present purposes lies in the fact that the certificate was accompanied by an affidavit sworn by the Vice Marshal of the Diplomatic Corps in which it was stated that the United Kingdom was not a party to the Convention on Special Missions and did not regard that convention as declaratory of customary law. In his judgment Mustill L.J. observed that the possibility that the applicant was head of a special mission had been rightly disclaimed. In his view there was nothing special about the tasks entrusted to the applicant. No notification of such a mission was ever given to Her Majesty's Government or to any other government. He went on to observe (at p. 393) that, if it had been, the applicant's status would not have been recognised under English law, since the United Kingdom had not enacted legislation pursuant to the Convention on Special Missions.

113. On behalf of the Claimants in the present proceedings, it is submitted that at no point was it contemplated by the court in *Osman* that, outside the VCDR, special mission immunity had become a rule of customary international law that took effect in domestic law. That point is fairly made. Furthermore, they are able to point to the statement on behalf of the executive that it did not regard the Convention on Special Missions as declaratory of customary international law. However, some care is needed here. If the statement was intended to mean that the convention in its entirety does not reflect customary international law that would be unexceptional and would accord with the currently stated view of the executive. If, on the other hand, it was intended to mean that the provisions of the convention governing the inviolability and immunity of a member of a special mission from criminal proceedings do not reflect international law, it is inconsistent with the more recent stance of the executive. In the light of what was in issue in *Osman*, the latter reading seems the more likely to have been intended.

114. We have been referred to a number of more recent first instance decisions of District Judges concerning the status of members of a special mission.

(1) In *Re Bo Xilai* (2005) 128 ILR 713 the applicant applied for an arrest warrant in respect of Mr. Bo, the Minister for Commerce and International Trade of the People's Republic of China, whom he accused of offences of torture contrary to section 134, Criminal Justice Act 1988. Senior District Judge Workman dismissed the application holding that Mr. Bo was entitled to immunity *ratione personae* as a matter of customary international law. Adopting the reasoning of the ICJ in the *Arrest Warrant* case, the judge concluded that under customary international law Mr. Bo had immunity from prosecution as he

concluded that under customary international law he was entitled to immunity from prosecution as he would not be able to perform his functions unless he was able to travel freely. In addition, he was satisfied that Mr. Bo was a member of a special mission and as such had immunity under customary international law which the judge considered had been embodied in the Convention on Special Missions.

(2) In *Court of Appeal Paris, France v Durbar* (16 June 2008, unreported; Wood, p. 90) France sought the extradition of the defendant. In rejecting a plea of immunity, District Judge Evans accepted the existence in principle of special mission immunity under customary international law. However, he rejected the submission that the defendant had been on a special mission sent by the Central African Republic.

(3) In *Re Ehud Barak* (29 September 2009, unreported) District Judge Wickham concluded that Mr. Barak, the Israeli Defence Minister, was entitled to immunity *ratione personae* by virtue of his office and, in addition, was entitled to special mission immunity under customary international law.

(4) In *Re Mikhael Gorbachev* (30 March 2011, unreported; Wood, p. 91) District Judge Wickham was satisfied, on the basis of information provided by the FCO that the former head of State of the USSR was entitled to immunity under customary international law as a member of a special mission.

115. In each of these cases it was accepted that at common law a member of a special mission enjoys immunity from criminal jurisdiction. None of these decisions was appealed.

116. In *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2011] EWHC 2029 (Admin); [2013] QB 349 the defendant, the Head of the Office of National Security of Mongolia, was arrested in the United Kingdom pursuant to a European Arrest Warrant issued in Germany with the intention that he be prosecuted in Germany for offences of kidnapping and false imprisonment. The defendant claimed that he was on a special mission to the United Kingdom on behalf of the Mongolian Government. There was no treaty in force between the United Kingdom and Mongolia on the subject of special missions. The Secretary of State for Foreign and Commonwealth Affairs wrote to the District Judge expressing the view that the defendant had not been on a special mission to the United Kingdom on behalf of the Mongolian Government at the time of his arrest and stating that the FCO had not consented to his visiting the United Kingdom on a special mission. The District Judge ordered the Defendant's extradition to Germany. The defendant appealed, inter alia on the ground that at the relevant time he had been on a special mission on behalf of the Mongolian Government. On the hearing of the appeal, the two central issues in the present proceedings were the subject of agreement.

"It was agreed that under rules of customary international law the defendant was entitled to inviolability of the person and immunity from suit if he was travelling on a special mission sent by Mongolia to the UK with the prior consent of the UK. It was agreed that whilst not all the rules of customary international law are what might loosely be described as part of the law of England, English courts should apply the rules of customary law relating to immunities and recognise that those rules are a part of or one of the sources of English law." (per Moses LJ at p361)

The appeal, insofar as it concerned special missions, then concentrated on the questions whether the certificate was conclusive and, if not, whether the United Kingdom had given its consent to a special mission of which the defendant was a member. The court accepted the principle of special mission immunity but found that there was no special mission which had been received with the assent of the United Kingdom.

117. The Claimants in the present proceedings point to the agreement between counsel for the Government of Mongolia (Sir Elihu Lauterpacht QC) and counsel for the Foreign and Commonwealth Office (Sir Michael Wood) that the court should proceed on the basis that such immunity exists in customary law and should be given effect at common law. They submit that it is unsurprising in the light of its position in these proceedings that the FCO or the Government of Mongolia, which was seeking to prevent the prosecution of its official, should have taken this position. The Divisional Court simply proceeded on this premise and, accordingly, the judgment is not authority for the proposition that members of special missions benefit from immunity. All of this is correct. The issue was not argued nor does it form part of the *ratio decidendi* of the case. Nevertheless, the proceedings are of significance to the present debate because of the position taken by the executive branch of government that the United Kingdom is bound in customary international law to secure inviolability and immunity from criminal proceedings to a person accepted by the FCO as a member of a special mission.

118. In the present case we have been referred to the skeleton argument in *Khurts Bat* on behalf of the Secretary of State. It provides a detailed statement of the position of the executive on the issue supported by extensive reference to State practice. In particular it submitted that:

(1) Not all provisions of the Convention on Special Missions are generally regarded as reflecting customary international law.

(2) At the time of its adoption the view of the United Kingdom was that the convention was not declaratory of international law in the way the VCDR was, since there was not enough evidence of state practice for it to be said that existing international law was clear and settled.

(3) Nevertheless, customary international law requires the grant of inviolability and immunity from criminal proceeding to member of pecial mi ion and effect hould be given to thi by the court of England and Wales.

119. Reference ha been made earlier in thi judgment to the fact that, following the deci ion of thi court in *Khurts Bat*, on 4th March 2013 the FCO (acting by the then Secretary of State, the Rt. Hon. Mr. William Hague MP) made a written Mini terial Statement on " pecial mi ion immunity" announcing a "new pilot process by which the Government will be informed of inward visits which may qualify for pecial mi ion immunity tatu ". It expre ed the Government' view that member of pecial mi ion "enjoy immunities, including immunity from criminal proceedings and inviolability of the person" to which the common law give effect.

120. In our view, there is only limited support in judicial decisions in the United Kingdom for the exi tence of rule of cu tomary international law requiring the inviolability and immunity from criminal jurisdiction of members of special missions. Although they are not authoritative, the decisions of District Judge in criminal proceeding ummari ed at paragraph [114] above, how that in practice it ha been accepted that members of special missions are entitled to immunity from criminal jurisdiction. Similarly, the deci ion of thi court in *Khurt Bat* cannot be con idered an authoritative deci ion on the point because the immunity of a member of a special mission was accepted by the parties. However, there is unequivocal evidence of the current po ition of the executive, in particular in it ubmi ion in *Khurt Bat*. It seems clear that, while the executive does not accept that all of the provisions of the Convention on Special Mi ion reflect cu tomary international law, it doe con ider that the current tate of customary law does require the inviolability and immunity from criminal proceedings of members of pecial mi ion who are accepted a uch by the receiving State.

State practice: the United States

121. Judicial decisions and executive statements in the United States on the privileges and immunities of members of special missions have developed in a way which corresponds closely to the developments in the United Kingdom.

122. In *United States of America v Sissoko* 995 F. Supp. 1469 (1997) the defendant pleaded guilty before the US District Court for the Southern District of Florida to a charge of bribery. Some weeks later The Gambia filed a motion to dismiss the case on the grounds of diplomatic immunity. The Magistrate Judge found that The Gambia designated the defendant as a "special advisor to a special mission to the United States" which designation the United States appeared to accept by the grant of a diplomatic visa. However he found that the defendant's status as "special advisor" did not entitle him to diplomatic immunity because it had not been submitted to the US State Department for certification. The Magistrate Judge produced a report and recommendation that The Gambia's motion be denied.

123. In its objection to the Magistrate Judge's report and recommendation, The Gambia submitted to the US District Court Southern District of Florida (995 F. Supp. 1469 (1997)) that procedures concerning accreditation set out in a diplomatic circular note were inapplicable because they applied only to diplomats assigned to permanent missions and that in the absence of governing US law the court must look to customary international law and the Convention on Special Missions. The court rejected the submission that a special advisor to a special mission in the United States should be accorded full diplomatic immunity in circumstances where there had not been proper accreditation. It also observed:

"The Court does not find that the UN Convention on Special Missions is "customary international law" that binds this court. Neither the United States nor The Gambia are signatories to the convention. None of the members of the UN Security Council have signed the convention. These facts indicate to this court that there is, in the least, some resistance to the tenets of the convention such that it is not yet "customary international law". *See Third Restatement on Foreign Relations Law,* Reporter's note 14 (Conventions "*may* emerge as customary international law") (emphasis added).

124. While this decision supports the Claimants' submission that there was, at that date, no customary international law which required a receiving State to secure inviolability and immunity from criminal proceedings for members of a special mission, it needs to be treated with caution. First, the usual process of accreditation had not been followed. Secondly there was no recognition by the Department of State that a special mission existed and no executive suggestion that immunity should apply. Thirdly, other judicial decisions and State practice by the United States, notably in relation to *Kilroy v Windsor* and *Re Bo Xilai*, are inconsistent with the reasoning and conclusions in this case. The more recent evidence of US practice is strongly supportive of the rule of customary international law for which the defendants contend.

125. In *Kilroy v Windsor (Prince Charles, Prince of Wales)* (Civil Action No. C-78-291, United States District Court, Northern District of Ohio, Eastern Division, 1978) the complainant brought an action against the Prince of Wales alleging that his rights under the US Constitution had been violated in that, during a ceremony in which an honorary degree was being conferred on the Prince, the complainant put a question regarding the treatment of prisoners in Northern Ireland and was removed from the premises. The Legal Advisor to the US State Department wrote to the Attorney General requesting that the

Department of Justice filed a suggestion of immunity in respect of the Prince on the ground that his visit was a special diplomatic mission. The Department of Justice filed a suggestion of immunity which stated, inter alia, that under customary rules of international law recognised and applied in the United States senior officials on special diplomatic missions are immune from the jurisdiction of the United States. The suggestion of immunity was upheld by District Judge Lambros. It should be noted that this case was concerned with immunity from civil jurisdiction and therefore goes rather further than the rule for which the Defendants contend in the present proceedings.

126. In *Li Weixum v Bo Xilai* 568 F. Supp. 2d 35 (DDC 2008) following service of process in an action under the Alien Tort Claims Act and the Tort Victims Protection Act on Mr. Bo, a minister of the People's Republic of China, while he was visiting the United States, the United States filed a suggestion of immunity and statement of interest. This document stated:

"…upon an Executive branch determination, senior foreign officials on special diplomatic missions are immune from personal jurisdiction where jurisdiction is based solely on their presence in the United States during their mission.

…

Other states have recognised special mission immunity and its foundation in international law. The full extent of that immunity may remain unsettled, but need not be decided here in any event. Minister Bo's case falls well within the widespread consensus that, at a minimum, States are constrained in their ability to exercise jurisdiction, as here, over ministerial-level officials invited on a special diplomatic mission."

The court acted on the suggestion and held that the defendant was immune from service of process. This, again, is an example of immunity from civil proceedings which goes further than the immunity contended for by the Defendants in the present proceedings.

127. In 2008 John B. Bellinger III, who was then Legal Advisor to the US State Department, expressed the State Department's view of the requirements of customary international law in relation to members of special missions as follows:

"Another immunity that may be accorded to foreign officials is special mission immunity, which is also grounded in customary international law and federal common law. (Like most countries, the United States has not joined the Special Missions Convention.) The doctrine of special mission immunity, like diplomatic immunity, is necessary to facilitate high level contact between governments through invitational visits. The Executive Branch has made suggestions for special mission immunity in cases such as one filed against Prince Charles in 1978 while he was here on an official visit. (*Kilroy v Charles Windsor, Prince of Wales,* Civ. No. C-78-291/N.D. Ohio, 1978). This past summer, in response to a request for views by the Federal District Court for the D.C. Circuit, the Executive Branch submitted a suggestion of special mission immunity on behalf of a Chinese Minister of Commerce who was served while attending bi-lateral trade talks hosted by the United States, in *Li Weixum v Bo Xilai, D.C.C.* Civ. No. 04-0649 (RJL)" (John Bellinger, 2008 Opinio Juris "Blog Archive", Immunities.)

128. This accords with the view of Sir Michael Wood:

"In summary, it is clear from United States practice and case-law that the US Government considers that official visitors, accepted as such by the Executive, are entitled to immunity for the duration of their visit. US practice supports the existence of customary rules regarding the immunity of official visitors. It also demonstrates that the applicability of this immunity is dependent on the consent and recognition, accorded by the receiving State's Executive, of the official visit as such." (Wood, Max Planck UNYB 16 (2012) at p. 97)

State practice: other States

129. We have been referred by the parties to evidence of the judicial decisions and State practice of a number of other States and to the survey of State practice annexed by Sir Michael Wood to The Immunity of Official Visitors (Max Planck UNYB 16 (2012) at pp. 74-98).

Austria

130. The *Syrian National Immunity case* (Case 12 Os3/98, 12 February 1998, 127 ILR 88) is not directly in point because it is concerned with the issue of consent. Although Austria is a party to the Convention on Special Missions, Syria is not and accordingly the convention had no application. Nevertheless, this decision applies the convention rules by analogy in a wider context.

131. A Syrian national carrying a diplomatic passport was arrested in Austria pending extradition to Germany. The Oberlandesgericht held that he was entitled to immunity as a representative of a member State to the United Nations Industrial Development Organisation (UNIDO) and because he was on an *ad hoc* mission to UNIDO. The Supreme Court reversed the decision on both grounds. It observed:

"An "ad hoc" mission means a legation, limited in duration, which represents a State and is sent by that State to another State, with the latter's consent, for the purpose of dealing with specific issues with the State and to fulfil a specific task in relation to it … The position of such *ad hoc* State representatives - also those sent to an international organisation - is determined primarily by the relevant agreement on the official headquarters of that organisation, secondarily by customary international law, for the determination of which (limited) reference may be made to the Vienna Convention of 14 March 1975 on the representation of States in their relations with International Organisations of a universal character, and by analogy also the UN Convention on Special Missions … None of those legal sources can support the assumption that an *ad hoc* mission to UNIDO may come into being without the consent of that organisation."

Consequently, although not directly relevant to the issue before us, this decision did refer to the provisions of the Convention on Special Missions as relevant by analogy when seeking to determine the applicable customary international law.

Belgium.

132. In *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) ICJ Reports 2002 p. 3 Belgium stated that "… representatives of foreign States who visit Belgium on the basis of an official invitation… would be immune from enforcement of an arrest warrant in Belgium."

133. In 2003 the Belgium Code of Criminal Procedure was amended. Paragraph 2 now provides:

"In accordance with international law, no act of constraint relating to the exercise of a prosecution may be imposed during their stay, against any person who has been officially invited to stay in the territory of the Kingdom by the Belgium authorities or by an international organization established in Belgium and with which Belgium has concluded a headquarters agreement."

Finland.

134. Finland is not a party to the Convention on Special Missions, having signed it but not having ratified it. It has, however, enacted legislation based in part on the Convention. It provides that the person of a member of a special mission shall be inviolable and that a member of a special mission shall enjoy the same immunity from criminal, civil and administrative jurisdiction and executive power as the members of diplomatic missions in Finland.

France.

135. In 1961-62 three members of the French Property Commission in Cairo were arrested and tried on charges of espionage, plotting against the State and planning the assassination of President Nasser. The defence contended that as a matter of customary international law the members of the French Property Commission were in the United Arab Republic on an official mission on behalf of the French government and were accordingly entitled to immunity from the jurisdiction of local courts. In this regard the defence relied heavily on the views expressed by the ILC in its draft articles on special missions. The trial was eventually suspended "for high reasons of State" and the defendants released. (See Watts, Jurisdiction on Immunities of Special Missions: French Property Commission in Egypt (1963) 12 ICLQ 1383; Wood, Max Planck UNYB 16 (2012) at pp. 76-77.) During the proceedings the French Government issued a press release which stated:

"The French Foreign Ministry officials who were arrested were members of an official mission accredited by the French Government, in accord with the Egyptian Government, for the purpose of implementing an international agreement; they were entitled to certain privileges and immunities, in accordance with the general principles of international law, under which special missions enjoy a status similar to that of regular diplomatic missions..."

The press release went on to state that this status is no different from that of the permanent diplomatic missions, in particular as concerns judicial immunity.

136. We note, however, that Watts, writing in 1963, expressed the view that

"There is not yet any settled answer to the question whether, and if so to what extent, any jurisdictional immunity is enjoyed by Government officials who are not members of an Embassy or a Consulate but who are sent on an official mission to a Foreign State." (Jurisdictional Immunities of Specialist Missions: The French Property Commission in Egypt, (1963) 12 ICLQ 1383.)

137. A pleading by France in proceedings before the ICJ, *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*, ICJ Reports 2008, 177 is also in point. It stated:

"Lorsque des personnes ont, comme en l'espèce, des fonctions essentiellement internes, il n'est pas nécessaire qu'elles soient protégées par des immunités en tout temps et en toutes circonstances; il suffit qu'elles puissent bénéficier d'immunités lorsqu'elles se rendent à l'étranger, pour le compte de leur Etat, dans le cadre d'une mission officielle. Tel est l'objet des immunités reconnues aux membres des missions

spéciales, qui constituent une garantie suffisante pour des personnes exerçant une fonction, telle que celle de procureur de la République ou de chef de la sécurité nationale, qui n'implique pas de fréquents déplacements à l'étranger." (referred to by Wood, Max Planck UNYB 16 (2012) at p.77)"

138. Sir Michael Wood also refers (at pp. 77-78) to the case of Jean-Francois H, Director-General of Police of the Republic of The Congo who in 2004 was arrested in France in connection with allegations of crimes against humanity and torture. The French Ministry of Foreign Affairs confirmed to the court that he was on an official mission in France and that in that capacity and by virtue of customary international law he benefited from immunities from jurisdiction and execution. The proceedings were stopped. In a judgment of 20 June 2007 the Court of Appeal of Versailles considered that the defendant benefited from immunity from jurisdiction and execution, which applied whatever the nature of the crimes, notwithstanding the non-ratification by France of the Convention on Special Missions. However, Wood records that the Cour de Cassation, which dismissed the appeal on other grounds, seems to have concluded that the Court of Appeal had not been competent to deal with immunity and was in error since the Director-General of Police was only entitled to official act immunity. (Wood p, 98, footnote 132.)

139. Against this background Wood concludes that "French practice, particularly as evidenced by statements of the executive, tends to support the view that under customary international law official visitors to France enjoy immunity from criminal jurisdiction." (at p. 79)

Germany.

140. The German Law on the Constitution of the Courts (Gerichtsverfassungsgesetz - GVG) provides:

"20. German jurisdiction also shall not apply to representatives of other states and persons accompanying them who are staying in territory of application of this Act at the official invitation of the Federal Republic of Germany.

Moreover, German jurisdiction also shall not apply to persons other than those designated in subsection (1) and in section 18 [diplomatic missions] and 19 [consular missions] insofar as they are exempt therefrom pursuant to the general rules of international law or on the basis of international agreements or other legislation."

141. The *Tabatabai* litigation in the Federal Republic of Germany between 1983 and 1986 arose from the arrest of Dr. Tabatabai, a member of the political leadership of the Islamic Republic of Iran, at Düsseldorf airport following the discovery of opium in his luggage. The Government of Iran claimed that he was immune from criminal proceedings as a member of a special mission. The protracted litigation which followed was essentially concerned with whether the Federal Republic of Germany and Iran had agreed upon a sufficiently specific mission to be performed. Wood in his account of the litigation (Max Planck UNYB 16 (2012) at p. 80) states that the courts were essentially in agreement as to the customary international law status of the law on special missions and its main outline. The Federal Supreme Court, in its judgment of 27 February 1984 expressed the matter in this way:

"[286] …It is contentious amongst scholars of international law whether its provisions are already now the basis of State practice as customary international law. Professor Doehring, whom the Provincial Court heard as an expert, has indicated that no court decisions on that issue are known. He is of the opinion that the content of the Convention has not up to now created ascertainable pre-effects in the sense of the coming into being of customary international law supported by a general *opinio juris* (for the same view see also Wolf, *Europäische Grundrechtezeitschrift* 1983, pp. 401, 403; also doubtful is Bothe, *Zeitschrift für Ausländisches und Öffentliches Recht und Völkerrecht* 1971, pp. 246, 265). Lagoni (in Menzel & Ipsen, *Völkerrecht,* 2nd ed., 1979, p. 282), on whom Doehring relies, sees in the Convention merely a possibility of "indications for recognition by customary international law of the Special Mission as an institution of international law and of the diplomatic status of its members". On the other hand, Bockslaff & Koch in their comprehensive article on the case at hand (*German Yearbook of International Law,* vol.25 pp. 539-584) are of the opinion that it follows from numerous statements of States and from State practice that the Convention reflects valid customary international law, at a minimum with respect to Articles 1a, 2 and 3, which lay down the requirements for a special mission (p. 551).

[287] The experts presented by the defence, Professors Bothe, Delbrück and Wolfrum, also proceed on the assumption that the Convention "could be seen as an expression of valid customary law in its basic or minimum requirements", but not in its entirety (Delbrück; Wolfrum speaks of a "minimum consensus" with reference to a memorandum of the UN Secretariat).

However, the question of the customary validity of the Convention, which after all that has been said above is dubious, is not the decisive issue, so that recourse to the Federal Constitutional Court in accordance with Article 100(2) of the Basic Law is not necessary. It is in any case established that, irrespective of the draft Convention, there is a customary rule of international law based on State practice and *opinio juris* which makes it possible for an *ad hoc* envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys to be placed on a par with the members of the permanent missions of States protected by international treaty law."

142. More recently the Higher Administrative Court of Berlin-Brandenburg in the *Vietnamese National case* (15 June 2006) OVG 8 S 39.06, referred to by Wood, (Max Planck UNYB 16 (2012) at pp. 81-2) has reaffirmed this view. The proceedings concerned whether a procedure pursuant to a bilateral agreement between Germany and Vietnam was an action of the German authorities or not. The Higher Administrative Court explained that its conclusion that the procedure was not governed by German administrative law was

"confirmed by the status in international law of the Vietnamese officials who carried out this procedure in Germany. That presence was considered by the Federal Government as a consented-to special mission (see Article 1(a) of the UN Convention on Special Missions of 8 December 1969). This Convention, which Germany thus far had not signed, is in its greater part recognized and applied by the Federal Government as customary international law. As such it is part of Federal law and has a higher rank than ordinary laws. The Vietnamese officials taking part in the special mission enjoy at least immunity for their official acts and personal inviolability (Articles 29, 31 and 41 of the Convention)."

The Netherlands.

143. Wood (at pp. 83-4) draws attention to a response by the Government of the Netherlands dated 19 October 2011 to a report published by the Dutch Advisory Committee on Issues of Public International Law (CAVV). The CAVV reports stated:

"If a representative of a State pays an official visit to another State, this person should, in the opinion of the CAVV, be able to claim full immunity, even in cases concerning international crime."

In response the Government stated:

"In the CAVV's opinion, all members of official missions may be entitled to full immunity under customary international law. The Government endorses this. Members of official missions can be seen as "temporary diplomats". They, like diplomats, require the immunity so they can carry out their mission for the sending State without interference. However, unlike diplomats, members of official missions only require this immunity for a limited period, namely the duration of the mission to the receiving State."

The Committee of Legal Advisors on Public International Law (CAHDI)

144. In September 2013, at the request of the delegation of the United Kingdom, the topic of immunities of special missions was included in the agenda of the meeting of the Committee of Legal Advisors on Public International Law ("CAHDI"), a committee of government legal advisers under the auspices of the Council of Europe. Subsequently it prepared a questionnaire, the responses to which were published in February 2016. The questions addressed different aspects of State practice in relation to immunities of special missions including a question relating to specific national legislation on the subject. Of particular relevance for present purposes is Question 5:

"Does your State consider that certain obligations and/or definitions regarding immunity of special missions derive from customary international law? If so, please provide a brief description of the main requirements of customary international law in this respect."

145. The responses of the participating States are summarised in the Annex to this judgment. They are sometimes insufficiently specific to indicate the position of the State concerned on the existence of the rule of customary international law contended for in these proceedings i.e. whether customary international law requires a receiving State to accord to members of a special mission inviolability and immunity from criminal proceedings during the currency of the mission. The survey was, of course, not specifically directed at this question. Moreover, the responses, are on occasion difficult to interpret or internally inconsistent.

146. While the responses do not indicate an entirely uniform approach among the responding States, we consider that, with very limited exceptions, they fall into two broad categories. In the first the responses do not provide any evidence for or against the proposed rule either because the issue is not addressed or because the State concerned takes a neutral position. The responses of Andorra, Belarus, Denmark, Estonia, Georgia, Ireland, Latvia, Mexico, Norway and the United States fall into this category. In the second the responses are, at the least, consistent with the proposed rule and in many instances they provide unequivocal support for the proposed rule. The responses of Armenia, Austria, the Czech Republic, Finland, Germany, Italy, The Netherlands, Romania, Serbia, Switzerland and the United Kingdom fall into this category. The responses of Albania and France require special mention because they state that immunity is limited to official acts of a member of the mission and would not therefore extend to immunity in the case of international crimes. However, they also appear to accept that the member of the mission would, nevertheless, be inviolable. Sweden considered that it was uncertain whether the Convention on Special Missions reflects customary international law. As we have seen, a number of other States, including the United Kingdom, have expressed the view that the Convention in its entirety does not reflect customary international law.

147. However, the CAHDI [illegible]

147. However, the ILC's survey does not cause us to doubt the great weight of State practice summarised earlier in this judgment demonstrates the existence of the proposed rule of customary international law. On the contrary we consider that it is broadly consistent with or supportive of that conclusion.

The views of jurists.

148. In parallel with the growth of State practice on the subject of the immunities of special missions and their members, the views on this topic expressed by jurists have shown a marked shift in recent years with the result that there is now a considerable body of support among scholars for the view that, at the very least, the inviolability and immunity from criminal jurisdiction of the members of special missions are required by customary international law.

149. Watts, writing in 1963 on the subject of the French Property Commission in Egypt clearly considered the matter to be unresolved. (See above at [136].)

150. Similarly, Hardy, writing in 1968, observed:

"Although States have used the device of sending a special mission increasingly, no definite rules have emerged to prescribe the conditions under which such missions may be sent and received. If we were prepared to wait long enough presumably rules might be created by custom - but that would be a long process and, having regard to the varied character of these missions, it is in any case doubtful how effective a solution this would be." (Michael Hardy, Modern Diplomatic Law (1968) p. 91.)

151. The American Law Institute, Third Restatement of the Foreign Relations Law of the United States (1986) states (at p. 470):

"The Special Missions Convention follows generally the Convention on Diplomatic Relations and would provide essentially similar privileges and immunities. Although the law as to "itinerant envoys", special representatives, representatives to international conferences, and other participants in diplomacy remains uncertain, the Convention on Special Missions reflects what is increasingly practiced and in many respects may emerge as customary international law."

152. R van Alebeek in The Immunity of States and their Officials in International Criminal Law and International Human Rights Law (1987) stated (at p168):

"Scholars generally agree that "clear and comprehensive rules of customary international law" on the immunity of temporary diplomatic missions are lacking. In 1969 the General Assembly adopted the Special Missions Convention - modelled on the 1961 Vienna Convention. The Convention failed to secure widespread support and the provisions granting the same immunity to temporary missions as to permanent missions are not accepted as representing customary international law. The principal problem with the Special Missions Convention is that it treats all technical, administrative, and political missions alike. Early codifications of the law of diplomatic immunity commonly included both permanent and temporary diplomatic agents and it cannot be denied that a form of diplomatic immunity *does* in fact apply to ad hoc political missions accredited to the receiving state. In particular, it is generally agreed that diplomatic immunity applies to all official missions abroad of the head of state, the head of government, and members of the cabinet - with the minister of foreign affairs as conspicuous example." (original emphasis)

In connection with her statement that a form of diplomatic immunity does apply to *ad hoc* political missions accredited to the receiving State, van Alebeek drew attention to the view of the ILC that the Draft Articles on immunity and privileges reflected an already existing obligation, not mere courtesy (YBILC 1967, Vol. II, 347, 358).

153. In Oppenheim's International Law, 9th Ed. (1991) Sir Robert Jennings and Sir Arthur Watts stated (at [533]):

"The general recognition of the public and official character of these [special missions] has not been accompanied by the development of clear and comprehensive rule of customary international law concerning their privileges and immunities."

However they too drew attention to the fact that the ILC in preparing its Draft Articles on special missions recognised that it was both codifying the existing rules of international law and also engaging in its progressive development (YBILC (1967) ii 346) and drew attention to the view of the ILC that so far as concerns facilities, privileges and immunities "it is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question" and that this was no longer a mere matter of courtesy (YBILC (1967) Vol. II, p. 358).

154. Satow's Diplomatic Practice, 6th Ed. (2009) states:

"The Convention [on Special Missions], unlike the Vienna Convention on Diplomatic Relations, has not acquired the status of customary international law."

We would agree that the Convention on Special Missions in its entirety has not achieved the status of customary international law. However, it seems to us that the weight of authority and State practice now clearly supports the view that customary international law requires inviolability and immunity as required by Articles 29 and 31(1) of the Convention on Special Missions.

155. Nadia Kalb, writing in the Max Planck Encyclopaedia of Public International Law in 2011, takes a more positive view of the emergence of rules of customary international law in this field. In her review of judicial decisions and State practice she states:

"9. It is generally agreed that clear and comprehensive rules of customary international law on the immunity of temporary missions are lacking. But, since such missions consist of agents of States received with the consent of the host State, they benefit from the privileges based on State immunity and the express or implied conditions of their invitation. Therefore, States have accepted that special missions enjoy functional immunities, such as immunity for official acts and inviolability for official documents … While the extent of privileges and immunities of special missions under customary international law remains unclear, State practice suggests that it does not currently reach the level accorded to diplomatic agents."

In her assessment she draws the following conclusions.

"17. In view of the low level of acceptance of the Convention on Special Missions, the particular status of special missions is often determined on a case-by-case basis by agreement between the sending and receiving States. The better view seems to be that under customary international law persons on special missions accepted as such by the receiving State are at least entitled to immunity from suit and freedom from arrest for the duration of the mission."

156. This conclusion is very similar to that of Wood (Max Planck UNYB 16 (2012) at p. 60) referred to above at [102], that while it cannot be said that all or even most of the provisions of the Convention reflected customary international law at the time of its adoption, it is widely accepted that certain basic principles, including in particular the requirement of consent and the inviolability and immunity from criminal jurisdiction of persons on special missions do now reflect customary law. Wood concludes (at pp 72-3):

"As regards [the immunity of official visitors, including those on special missions] the rules of customary international law are both wider and narrower than the provisions of the Convention on Special Missions. They are wider in that the class of official visitors who may be entitled to immunity is broader than that foreseen in the Convention. They are narrower in that the range of privileges and immunities is more limited, being essentially confined to immunity from criminal jurisdiction and inviolability of the person."

This leads him to suggest that there now seems to be a settled answer to the question of the customary law of the immunity of official visitors.

157. Crawford (Brownlie's Principles of Public International Law, 8th Ed. (2012)) states:

"The Convention has influenced the customary rules concerning persons on official visits (special missions), which have developed largely through domestic case-law. The Convention confers a higher scale of privileges and immunities upon a narrower range of missions than the extant customary law, which focuses on the immunities necessary for the proper conduct of the mission, principally inviolability and immunity from criminal jurisdiction." (at p. 414)

This passage should be contrasted with the view of Sir Ian Brownlie in earlier editions of the work, e.g. the following extract from the 6th edition (2003) at p. 357:

"These occasional missions have no *special* status in customary law but it should be remembered that, since they are agents of States and are received by the consent of the host State, they benefit from the ordinary principles based upon sovereign immunity and the express or implied conditions of the invitation or licence received by the sending States."

In our view this statement no longer represents the modern position as there is now an abundance of State practice which demonstrates the existence of rules of customary international law relating to the privileges and immunities of special missions and their members.

158. Fox and Webb, The Law of State Immunity, 3rd Ed., (revised 2015) refer (at p. 567) to Wood's view that certain basic principles of the Convention, including the inviolability and immunity from criminal jurisdiction of members of special missions, do now reflect customary international law. They agree with Crawford that the Convention confers a higher scale of privileges and immunities upon a narrower range of missions than the extant customary law and they conclude (at p.568):

"In customary international law the immunities to which a person on special missions is entitled is determined by the principle of functional necessity, which would appear to be narrower than the immunities specified in the Convention and essentially confined to immunity from criminal jurisdiction and inviolability of the person."

159. Similarly, Joanne Foakes, The Position of Heads of State and Senior Officials in International Law (2014) states (at p. 134):

"While there is still some uncertainty as to the precise content of the privileges and immunities under customary international law to which persons on special mission are entitled, it is generally accepted that inviolability and immunity from criminal jurisdiction for the duration of the special mission are included."

160. The editors of Halsbury's Laws of England, Vol. 61, (2010), para 264 state:

"International law does not lay down any clear rules as to the precise extent of the privileges and immunities to which persons on a special mission are entitled. It is, however, acknowledged that such missions do have a public, official character and that the members of such missions should, therefore, be entitled to special treatment. The English courts have accordingly recognised that a representative of a foreign State on special mission may enjoy personal inviolability and immunity from jurisdiction comparable to that of a diplomatic agent."

We would suggest that this practice on the part of courts in this jurisdiction must now be taken as reflecting a requirement of customary international law.

161. C. Wickremasinghe, Immunity enjoyed by Officials of States and International Organisations in Evans, International Law, 4th Ed., (2014) at p. 390 considers that under the customary international law of special missions the members of a special mission will enjoy personal inviolability and unqualified immunity *ratione personae* from criminal jurisdiction, as well as such immunity from civil and administrative jurisdiction as is necessary for them to carry out the functions of their mission.

162. It appears therefore that the preponderance of the modern views of jurists strongly supports the existence of rules of customary international law on special missions which, at the least, require receiving States to secure the inviolability and immunity from criminal jurisdiction of members of the mission during its currency as essential to permit the effective functioning of the mission.

Conclusion on customary international law.

163. This survey of State practice, judicial decisions and the views of academic commentators leads us to the firm conclusion that there has emerged a clear rule of customary international law which requires a State which has agreed to receive a special mission to secure the inviolability and immunity from criminal jurisdiction of the members of the mission during its currency. There is, in our view, ample evidence in judicial decisions and executive practice of widespread and representative State practice sufficient to meet the criteria of general practice. Furthermore, the requirements of *opinio juris* are satisfied here by State claims to immunity and the acknowledgement of States granting immunity that they do so pursuant to obligations imposed by international law. Moreover, we note the absence of judicial authority, executive practice or legislative provision to the contrary effect.

164. In a further submission the Claimants maintain that, even if members of a special mission are entitled to immunity from criminal jurisdiction, this applies only in relation to official acts. They refer to the fact that the conduct alleged against Lt. General Hegazy constitutes torture contrary to section 134, Criminal Justice Act 1988 and submit that, accordingly, it cannot be considered an official act. In our view, this submission is unfounded for a number of reasons. First, although there are instances where such a limitation has been suggested (see, for example, the case of Jean-Francois H, referred to at paragraph [138] above), State practice in general does not support any such limitation on special mission immunity in customary international law. Thus, Kalb, writing in the Max Planck Encyclopaedia of Public International Law, refers to the current practice in the United Kingdom, where immunity has been upheld repeatedly at first instance notwithstanding that the intended proceedings allege conduct amounting to international crimes. She concludes that special mission immunity applies even in cases concerning international crimes. Secondly, any such limitation would be inconsistent with the rationale of the immunity which is a functional immunity intended to permit the mission to perform its functions without hindrance. Thirdly, any such limitation would be inconsistent with the personal inviolability of a member of a special mission which is now shown to be required by customary international law.

165. For these reasons we consider that customary international law obliges a receiving State to secure, during the currency of the mission, the inviolability and immunity from criminal jurisdiction of a member of a special mission whom it has accepted as such.

VI. The Common Law

166. If we are correct in our conclusion that customary international law requires a receiving State to secure the inviolability and immunity from criminal jurisdiction of an accepted member of a special mission, it becomes necessary to consider whether, and if so by what means, effect is to be given to such a rule in proceedings before courts in this jurisdiction. Blackstone's view that the law of nations is adopted to its full extent by the common law as part of the law of England (Blackstone, Commentaries on the Laws of England, Fourth Book, Fifth Chapter) has had many adherents both judicial (for example,

Lord Denning M.R. in *Trawler's Trading Corporation Ltd. v. Central Bank of Nigeria* [1977] QB 529) and academic (for example, H. Lauterpacht (1939) Transactions of the Grotius Society 51; Sir Robert Jennings and Sir Arthur Watts in Oppenheim's International Law, 9th Ed., (1992), pp. 56-7). However, it is not possible to make sweeping deductions from such broad statements of principle as the relationship

between customary international law and the common law in this jurisdiction is far more complex. It seems preferable to regard customary international law not as a part but as a source of the common law on which national judges may draw. (See *R v. Jones (Margaret)* [2007] 1 AC 136 per Lord Bingham at 155; Crawford, Brownlie's Principles of Public International Law, 8th Ed., pp. 67, 71.) As part of this process they will have to consider whether any impediments or bars to giving effect to customary international law may exist as a result of domestic constitutional principles. Moreover, as Lord Mance JSC pointed out in *R. (Keyu) v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2015] 3 WLR 1665 at [149], it appears that judges in this jurisdiction may face a policy issue as to whether to recognise and enforce a rule of customary international law. However, given the generally beneficent character of international law the presumption should be in favour of its application. As Lord Mance observed in *Keyu* (at [150]):

"Speaking generally, in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration."

The case for giving effect to customary international law will normally be the more compelling where, as here, the national court is concerned with a rule which requires the grant of immunity and where a failure to give effect to that rule would result in the United Kingdom being in breach of its international obligations.

167. In the present case Mr. Hickman on behalf of the Claimants has advanced a series of reasons why effect should not be given at common law to the rule of immunity which, we consider, exists in customary international law.

168. First he submits that it would be inappropriate for the courts to recognise such an immunity where Parliament, by the Diplomatic Relations Act 1964, intended to replace the existing statute law and common law on diplomatic immunity and provide a comprehensive restatement of the law based on the VCDR. In this regard he points to the fact that the Diplomatic Privileges Act 1708 was not the sole source of the relevant law, it being accepted by the judges that there remained a role for the common law (*Service v. Cataneda*; *Fenton Textile Association Limited v. Krassin* per Scrutton L.J.). He submits that the purpose of the 1964 Act was to sweep away this unsatisfactory amalgam of statute law and common law. He relies on *R v. Secretary of State for the Home Department, ex parte Thakrar* [1974] 1 QB 684 where Orr L.J. held that a rule of international law would not be given effect where it was inconsistent with a legislative provision or with an Act of Parliament considered as a whole, including by reference to its purpose and long title. In particular he points to the statement (at p. 708 D-E) that the Act was plainly intended to be a comprehensive code and, in those circumstances, if it had been intended to preserve any rule of international law not embraced in the code express reference would have been made to the rule in question.

169. We accept that the 1964 Act was intended to make comprehensive provision for its subject matter in substitution for the pre-existing statute and common law on that subject. It is, however, necessary to examine the statute to ascertain what precisely that subject matter was. Its long title is:

"An Act to amend the law on diplomatic privileges and immunities by giving effect to the Vienna Convention on Diplomatic Relations; and for purposes connected therewith."

Section 1 provides:

"The following provisions of this Act shall, with respect to the matters dealt with herein, have effect in substitution for any previous enactment or rule of law."

170. Section 2 then provides that the Articles set out in Schedule 1 shall have the force of law in the United Kingdom. Those Articles are certain Articles of the VCDR. Those Articles are concerned with permanent diplomatic missions, the matter of special missions having been deliberately excluded from the scope of the VCDR and the ILC having been asked to prepare separate draft Articles on that subject. The 1964 Act therefore has effect in substitution for the previous law with respect to permanent missions but does not purport to regulate special missions or to replace any pre-existing law in relation to special missions. The case is therefore distinguishable from *Ex parte Thakrar* where the claimed rule of international law would have operated in relation to the subject matter of the statute and would have been inconsistent with the statute. For the same reasons the present case is distinguishable from *Keyu* where Parliament had previously expressly provided for the very subject matter to which the claimed rule of international law was said to relate. (See *Keyu* per Lord Neuberger at [117].)

171. Secondly, Mr. Hickman submits that it would be inappropriate for the courts to recognise the

immunity of members of special missions from criminal proceedings because this would conflict with constitutional or common law values. He refers to the principle, accepted in *R v. Jones (Margaret)*, that it is Parliament alone which can recognise new crimes. He submits that the FCO invites the court in the present case to recognise an immunity from all criminal offences which would provide a general defence to criminal prosecution. While acknowledging that this is not precisely the same as recognition of a new criminal offence, he refers to the speech of Lord Diplock in *Knuller v. DPP* [1973] AC 435 at p. 473 E-G and submits that the amendment of the scope of application of the criminal law requires the democratic sanction of Parliament.

172. However, the court is not concerned here with the substance of the criminal law but with a procedural bar to criminal proceedings which, if we are correct in our conclusion, is required by customary international law. No offence is created here nor is any substantive defence created. Moreover, there is nothing inherently objectionable about procedural immunities from criminal proceedings being regulated by the common law. When Parliament enacted the State Immunity Act 1978 it expressly excluded from its scope immunity from criminal jurisdiction (State Immunity Act 1978, section 16(4)).

173. Mr. Hickman further submits in this regard that the recognition of special mission immunity by the courts would conflict with a second constitutional principle. He points to the fact that, on the authority of *Khurts Bat*, a decision by the Secretary of State for Foreign and Commonwealth Affairs to recognise a person as part of a special mission would be conclusive and not amenable to judicial review. He submits that, as a result, the effect of the recognition of this immunity would in substance amount to the discretionary suspension by the executive of the execution of laws against certain foreign officials and would violate the Bill of Rights. He submits, further, that recognition of such a power would represent an extension of the prerogatives of the Crown.

174. It is correct that it is for the Secretary of State to decide whether to accept a special mission and to decide whether to accept any given individual as a member of that mission. Furthermore, a certificate by the Secretary of State would be conclusive as to the status of the mission and its members. In precisely the same way, Foreign Office certificates have long been accepted by the courts in this jurisdiction as conclusive of certain facts of state in relation to the conduct of foreign relations which are peculiarly within the cognizance of the Crown. (See, generally Parry, 8 British Digest of International Law, (1965), pp. 214-6.) On such matters it is important that the executive and the judiciary should speak with one voice (*Al Atiyya v. Al Thani* [2016] EWHC 212 (QB) per Blake J. at [75]; *H v. W* [2016] EWCA Civ 176 per Lord Dyson MR at [33]). However, the Secretary of State does not confer or purport to confer immunity on a member of a special mission. The consequences which may flow from such a status are emphatically not a matter for the executive but for the courts to decide in accordance with the applicable law. If the courts were to decide to give effect to a rule of international law requiring the grant of immunity, that would in no sense involve the discretionary suspension of law by the executive or any extension of the prerogatives of the Crown.

175. Thirdly, Mr. Hickman submits that this is an area where Parliament can be expected to legislate. He submits that this subject matter is addressed by the Convention on Special Missions and that it is open to Parliament to incorporate all or part of that treaty if it wishes to do so. Furthermore, he submits, the context of international immunities is one in which there now exist extensive legislative provisions which make clear that this is an area that involves legislative and policy choices and is therefore unsuitable for judicial legislation.

176. It would, of course, be open to the United Kingdom to accede to the Convention on Special Missions and to Parliament to implement its provisions into domestic law. It appears that the FCO has concerns about some of its provisions which do not bear on the issue currently before the court so it may well be that it would choose not to accede. Moreover, it has made clear in its submissions to this court that it does not maintain that every provision of the Convention on Special Missions reflects customary international law. The existence of the convention and the possibility of its implementation by Parliament would not, however, be a reason for the court to decline to give effect to a rule of customary law relating to the same subject matter which, in the court's view, requires the grant of immunity. The subject matter is not one of such complexity that it could be said that it is unsuitable for regulation by the common law and requires legislation. In this regard it should be noted that Parliament has never purported to create an exclusive code on immunity. (See, for example, *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573, per Lord Millett at pp. 1585-6.) Moreover, this is not a matter requiring the consideration of complex policy issues. The rule with which we are concerned is limited to granting inviolability and immunity from criminal proceedings to members of special missions accepted as such by the Foreign and Commonwealth Office and, in our view, is in any event required by international law.

177. Fourthly, Mr. Hickman submits that the asserted rule of customary international law is vague in its scope and in its field of application. He asks whether it confers full immunity from suit in the United Kingdom, whether it applies only to acts done in furtherance of the special mission or only to acts done when a person is a member of a special mission and whether there are exceptions for torture or other grave international crimes.

178. The answer is that we have concluded that customary international law requires that a member of

178. The answer is that we have considered that customary international law requires that a member of the special mission is inviolable and immune from any criminal proceedings during the mission. These are functional privileges and immunities which are required in order to permit the special mission to function. As in the case of the corresponding inviolability and immunity *ratione personae* of permanent diplomatic agents there is no basis for limiting immunity from criminal jurisdiction in any of the ways suggested. Mr. Hickman asks whether the immunity would apply to administrative members of the mission or personal staff. We consider that the immunity would apply to any person accepted by the FCO as a member of a special mission, but the point does not arise on the present facts. Mr. Hickman asks whether such immunity would extend to administrative penalties, taxes, rates and civil proceedings. These questions do not arise on the present facts. Moreover, the rule of customary international law which we have identified is concerned only with inviolability of the person and immunity from criminal proceedings of a member of a special mission. We express no view on these wider issues, in particular on whether a member of a special mission enjoys immunity from civil suit. However, the fact that such issues may, at present, be unresolved, is not a reason for declining to give effect at common law to a rule which we consider has become clearly established in customary international law.

179. Fifthly, Mr. Hickman submits that the matter is controversial, requires democratic deliberation and raises difficult policy issues unsuitable for resolution by the courts. In particular he points to the fact that the immunity would be available where it was sought to bring a prosecution pursuant to section 134, Criminal Justice Act 1988 which creates a criminal offence of torture in domestic law in compliance with the requirements of the UN Convention against Torture ("UNCAT"). In this regard he draws attention, first, to the fact that the prohibition on torture in international law is a peremptory norm of *jus cogens* from which derogation is not permitted. This, however, does not assist the Claimants. It has now been demonstrated conclusively by the ICJ (*Jurisdictional Immunities* case), the European Court of Human Rights (*Al-Adsani v. United Kingdom* (2002) 34 EHRR 11) and the House of Lords (*Jones v. Saudi Arabia*) that the grant of immunity in circumstances required by international law does not derogate in any way from the substantive prohibition. The submission confuses substantive prohibitions on conduct in the area of criminal responsibility with the distinct procedural question as to whether there exists adjudicative jurisdiction in respect of that conduct. In this context, we note that in the present case the Claimants have, correctly in our view, abandoned their pleaded ground that the immunity of a member of a special mission does not apply where he is charged with torture. Secondly, in this regard, reference is made to *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147. However, that case was concerned with a restriction on the immunity *ratione materiae* of a former head of state arising from the UN Convention on Torture and the reasoning has no application to the immunity *ratione personae* of a member of a special mission. There is no inconsistency between the offence created by section 134 and the recognition of immunity *ratione personae* from criminal proceedings of a member of a special mission.

VII. Conclusion

180. For the reasons set out above, we consider it appropriate to grant declarations in the following terms:

(1) Customary international law requires a receiving State to secure, for the duration of a special mission, personal inviolability and immunity from criminal jurisdiction for the members of the mission accepted as such by the receiving State.

(2) This rule of customary international law is given effect by the common law.

R (FREEDOM AND JUSTICE PARTY AND OTHERS) v. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS AND OTHERS

ANNEX

Committee of Legal Advisors on Public International Law (CAHDI)

Replies by States to the questionnaire on immunities and special missions

Question 5 asks:

"Does your State consider that certain obligations and/or definitions regarding immunity of special missions derive from customary international law? If so, please provide a brief description of the main requirements of customary international law in this respect.

Question 6 asked States to provide information on the scope of the immunities of special missions.

Albania.

Albania has not signed or ratified the Convention on Special Missions.

Answer to Question 5.

"Albania considers that issues related to immunity of special missions derive from customary law. The

customary rules that are applied to a "high-level" mission are related with immunity from civil and criminal jurisdiction in respect of their official acts."

In answer to Question 6 Albania replied that a Special Mission and its staff to Albania enjoy full diplomatic immunity including the necessary facilities required for the performance of its functions, personal inviolability and immunity from jurisdiction for their official acts.

In answer to a question relating to the scope ratione materiae of immunities Albania replied

"The scope *ratione materiae* of immunities comprises immunity from civil and criminal jurisdiction in respect of official acts. Immunity is not granted to State officials who have committed international crimes while in office."

Comment

Subject to one point this response is in conformity with general international practice and consistent with the existence of a rule of international law requiring the grant of inviolability and immunity from criminal proceedings to members of a special mission.

The responses state that there is immunity from jurisdiction for official acts and that immunity is not granted to state officials who have committed international crimes while in office. However the response also states that a special mission and its staff are entitled to personal inviolability which would be inconsistent with any exercise of criminal jurisdiction.

Andorra.

Andorra has not signed or ratified the Convention on Special Missions.

In answer to Question 5 Andora simply refers to a constitutional provision which incorporates universally recognised principles of customary international law.

Comment

This response provides no relevant evidence of State practice either for or against the proposed rule.

Armenia.

Armenia has not signed or ratified the Convention on Special Missions.

Armenia's answer to Question 5 is that it is not applicable.

However, Armenia draws attention to its Criminal Procedural Code which provides that "members of the delegations of a foreign State who has arrived to participate in international negotiations, international assemblies and meetings" enjoy diplomatic immunity (Article 445). The Code provides that persons listed in Article 445 enjoy the right to personal immunity and may not be arrested or detained except for cases when it is necessary for the execution of a criminal judgment having entered into force against them (Article 446). However, it goes on to provide that persons listed in Article 445 shall enjoy immunity from criminal prosecution. (Article 447)

Comment

This is in conformity with general international practice and consistent with the proposed rule.

Austria.

Austria has acceded to the Convention on Special Missions.

Answer to Question 5:

"Although Austria is aware of the progressive elements in the Convention, it considers it as reflecting by and large customary international law. Austria thus applies the provisions of the Convention in relation to any State. If a state not party to the Convention contested the customary status of a provision in a particular situation, a detailed case-by-case analysis would be necessary."

Answer to Question 6:

"Every member of a special mission enjoys immunity from criminal jurisdiction for official acts. As to immunity in civil and administrative proceedings, Article 31(2) of the Convention applies."

Comment

Contrary to the submission of the Claimants, the fact that Austria is a party to the Convention does not

detract from the significance of the fact that it applies its provisions, which it considers as reflecting by and large customary international law, in relation to all States.

If the answer to Question 6 is intended to mean that there is no immunity from criminal jurisdiction for acts other than official acts, it is inconsistent with the provisions of the Convention which Austria says it applies to all States. Furthermore, any exercise of criminal jurisdiction would be an infringement of the inviolability of the member of the mission, which Austria appears to accept.

Accordingly we consider that Austrian practice is in conformity with general international practice and consistent with the proposed rule. It also provides positive support for the existence of the rule.

Belarus

Belarus has acceded to the Convention on Special Missions.

Answer to Question 5:

"Customary international law applied to the status of members of special missions stems from the principle of sovereign immunity and depends on the category of the mission in question. The Heads of States, the Heads of Governments and Foreign Ministers enjoy the full diplomatic immunity irrespective of the nature of the act performed. The same extent of immunity may be recognized with regard to the other senior State officials on a mission abroad when they are key actors of exercising some crucial aspects of the external policy of State.

The immunity of other members of special missions is based upon the explicit or implied consent of the receiving State to a special mission and encompasses, at least inviolability and immunity in respect of official acts."

Comment

The response indicates that the extent of immunity may depend on the seniority of the member of the mission. However, it accepts that in the case of all members of special missions inviolability and immunity in respect of official acts are the minimum required.

Czech Republic.

The Czech Republic is a party to the Convention on Special Missions by succession, Czechoslovakia having acceded to the Convention.

Answer to Question 5:

"The Czech Republic is of the view that the Convention, in particular the provisions concerning the scope of privileges and immunities, to large extent reflects customary international law. With regard to States which are not parties to the Convention, the customary nature of relevant rules will be assessed on a case-by-case basis."

In answer to Question 6 it states that as the Czech Republic is a party to the Convention it applies its relevant provisions and here refers, inter alia, to personal inviolability and immunity from jurisdiction.

Comment

The Czech Republic does not identify the provisions of the Convention which may not reflect customary international law. However, its statement that the Convention, in particular the provisions concerning the scope of privileges and immunities, to a large extent reflects customary international law provides general support for the proposed rule.

Denmark.

Denmark has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"No detailed analysis has been made hereof but a preliminary view would be that Denmark does not regard the Convention on Special Missions as such to reflect international custom although certain principles which mirror general principles under State immunity law are of customary nature."

Comment

This response provides no relevant evidence of State practice either for or against the proposed rule.

Estonia.

Estonia has acceded to the Convention on Special Missions.

In response to Question 5 Estonia simply stated that it was a party to the Convention.

Comment

This response provides no relevant evidence of State practice either for or against the proposed rule.

Finland.

Finland has signed but not ratified the Convention on Special Missions and accordingly is not a party.

Answer to Question 5:

"No official statements by Finland on the nature of obligations and/or definitions regarding immunity of Special Missions have been made."

However, in response to Question 6 it draws attention to the Act on the Privileges and Immunities of International Conferences and Special Missions (572/1973) which provides that the person of members of the delegation or the special mission shall be inviolable (section 9) and that members of the delegation or the special mission shall enjoy the same immunity from criminal jurisdiction as members of diplomatic missions in Finland (Section 10).

Comment

Finland's practice is consistent with the existence of the proposed rule and provides positive support for its existence.

France.

France has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"Concerning the privileges and immunities enjoyed by members of a special mission, it is clear that the scope of such privileges and immunities remains very uncertain in law. The New York Convention only partially reflects the state of customary international law. The New York Convention has only been ratified by a few States. One of the reasons for this limited number of ratifications (38 as of 1 March 2014) as well as the non-ratification of France, is the very wide range/extent of privileges and immunities recognised for members of special missions, who benefit from privileges and immunities enjoyed by members of diplomatic missions. In these circumstances, the rules imposed by the New York Convention do not appear to be considered, taken as a whole, as reflecting the state of customary international law on the topic. However, there is little doubt that a special envoy, who is not a national of the receiving State, should benefit from immunities necessary to the exercise of his/her functions, namely personal inviolability, which prohibits any coercive measure on the person of the special envoy such as arrest, and immunity from jurisdiction for official acts in the exercise of his/her functions under and within the framework of the Special Mission."

Comment

In common with a number of other States, including the United Kingdom, France does not accept that the Convention on Special Missions in its entirety reflects customary international law.

However, notwithstanding the reference to immunity from jurisdiction for official acts, France's response supports the existence of a rule requiring personal inviolability which would be inconsistent with any exercise of criminal jurisdiction.

Georgia.

Georgia has acceded to the Convention on Special Missions.

Answer to Question 5:

"There is no genuine approach in Georgia towards the certain obligations and/or definitions regarding immunity of special missions as the manifestation of customary international law. Georgian governmental bodies solely rely on those international instruments which were consented to be bound by the state and as long as there are hardly any completed or ongoing judicial cases in Georgian courts regarding the immunity of special missions it is difficult to assess authoritatively the possible affiliation of certain provisions from those instruments with customary international rules."

Comment

This response provides no relevant evidence of State practice either for or against the proposed rule

Germany.

Germany has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"The German Government takes the view that immunity of the members of special missions from judicial, in particular from criminal proceedings, is part of customary international law. Moreover, if there has been explicit consent on transit, customary law also stipulates the granting of privileges necessary for transit. Beyond these core privileges, States enjoy discretion concerning the exact scope of immunities and privileges of individual Special Missions. The basis for any regime of immunities has to be the mutually agreed function of the individual mission and the necessities arising out of this function."

Comment

The Claimants submit that this response is inconsistent with the view of the German Federal Supreme Court in *Tabatabai* that "it is contentious amongst scholars of international law whether [the provisions of the Convention on Special Missions] are already now the basis of state practice as customary international law…"

However, *Tabatabai* was heard between 1983 and 1986. There has been a great deal of developing state practice in this field since that date which, in our view, supports the emergence of the proposed rule.

Germany's response to the questionnaire provides unequivocal support for the existence of the proposed rule.

Ireland.

Ireland has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"Ireland accepts that members of special missions may be entitled to certain immunities but has not taken a position as to the precise scope of immunities applicable to special missions under customary international law. Any situation that was to arise would be considered on a case-by-case basis. If an issue of special mission immunity arose in the context of legal proceedings in Ireland, it would be for the relevant court to determine to what extent immunity applied with reference to customary international law."

Comment

This response provides no relevant evidence of State practice either for or against the proposed rule.

Italy

Italy has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"Italy considers that immunity of the members of special missions from judicial proceedings, and in particular from criminal proceedings, is part of customary international law. Beyond this, States enjoy discretion with regard to the exact scope of immunities granted to a special mission, depending on its function and the necessities it entails."

Comment

This response provides unequivocal support for the existence of the proposed rule.

Latvia

Latvia has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"Since Latvia has not had sent or received any Special Mission the customary law of diplomatic missions had never been applied."

It states that for the same reason there is no national regulation regarding immunities for Special Missions.

Comment

This response provides no relevant evidence of State practice either for or against the proposed rule.

Mexico

Mexico has acceded to the Convention on Special Missions

Answer to Question 5:

"Albeit Mexico acknowledges the existence of certain State practice to grant ratione personae immunity from jurisdiction to officials of special missions whenever they are performing public functions and prior the host State consent on such immunity, it has no defined position as to the existence of a customary rule in this respect, Rather, Mexico has voluntarily opted to be legally bound in this respect by the rules codified in the [United Nations Convention on Special Missions]."

Comment

Unlike Austria and the Czech Republic Mexico's response does not address what rules it applies vis à vis a State which is not a party to the Convention. This response provides no relevant evidence of State practice either for or against the proposed rule.

The Netherlands

The Netherlands has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"In the view of the Netherlands, there is sufficient basis to conclude an obligation exists under customary international law to accord full immunity to the members of official missions. The underlying reason for the immunity of the members of official missions is to facilitate the smooth conduct of international relations. Members of official missions may be seen as "temporary diplomats". They, like diplomats, require this immunity in order to carry out their mission for the sending state without interference. Unlike diplomats, members of special missions only require this immunity for a short period, namely the duration of the mission to the receiving State. Therefore, members of official missions enjoy immunity in The Netherlands based on the provisions of Dutch law…"

Comment

This response provides unequivocal support for the existence of the proposed rule.

Norway

Norway has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"Norway does see an emerging customary law developing on this topic, but has not taken a position as to the precise scope of immunities applicable to special missions. Any situation that was to arise would be considered on a case-by-case [basis]. We welcome a future discussion on the topic."

Comment

This response provides no relevant evidence of State practice either for or against the proposed rule.

Romania

Romania has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"Although not a party to the UN Convention on Special Missions, Romania considers that its provisions reflect the customary international law in this field and Romania applies the Convention as such."

Comment

This response provides unequivocal support for the existence of the proposed rule.

Serbia

Serbia is a party to the Convention on Special Missions by succession, Yugoslavia having signed and ratified the Convention.

Answer to Question 5:

"Yes, it does."

In response to Question 6, it states that the extent of the immunities granted to special missions is determined according the United Nations Convention on Special Missions.

Comment

Contrary to the submission of the Claimants, this is an unequivocal response. Furthermore, the fact that Serbia is a party to the Convention does not detract from its force. Customary international law will govern the immunity applied in Serbia to special missions from States which are not parties to the Convention.

This response provides unequivocal support for the existence of the proposed rule.

Switzerland

Switzerland has signed and ratified the Convention on Special Missions.

Switzerland answered Question 5 in the affirmative as follows:

"Oui. Nous pouvons mentionner les éléments suivants (liste non exhaustive qui ne préjuge pas de la position de la Suisse à l'égard d'autres domaines qui ne seraient pas évoqués ci-dessous):

· De manière générale, la Suisse considère que la Convention sur les missions spéciales constitue dans une large mesure une codification du droit international coutumier, s'agissant en particular de la portée des privilèges et immunités.

· Principe visant à accorder des privilèges et immunités à la mission spéciale et à ses membres dans une mesure comparable à ce qui est accordé aux missions diplomatiques et à leurs membres.

· Statut du chef d'Etat, chef de gouvernement et ministre des affaires étrangères, étant entendu que la définition prévue à l'art. 21 de la Convention sur les missions spéciales ne saurait limiter les immunités dont ces personnes peuvent jouir en vertu du droit international coutumier lorsqu'elles ne sont pas en mission spéciale au sens de la Convention."

Comment

The fact that Switzerland is a party to the Convention does not detract from the significance of its response.

This response provides unequivocal support for the existence of the proposed rule.

Sweden

Sweden has not signed or ratified the Convention on Special Missions.

Sweden answers Question 5 in the negative and states:

"In the preparatory work to the Swedish Act on Jurisdictional Immunity of States and their Property (prop. 2008-09:204) there is a reference to special missions stating that Sweden has not signed the Convention and that it is uncertain if the Convention reflects customary law. There is no position expressed in the matter."

Comment

Sweden considers it uncertain whether the Convention on Special Missions reflects customary international law.

United Kingdom

The United Kingdom has signed but not ratified the Convention on Special Missions and accordingly it is not a party.

The United Kingdom answers Question 5 in the affirmative. It also states:

"It is clear that persons on a special mission enjoy personal inviolability and immunity from criminal jurisdiction. It is likely that persons on a special mission would enjoy immunity from civil jurisdiction in so far as the assertion of civil jurisdiction would hinder them performing their official functions as members of a special mission. However there are no recent judicial precedents concerning the immunity of members of a special mission from civil jurisdiction.

…

As other persons enjoying immunity ratione personae, the members of a special mission enjoy personal inviolability and immunity from criminal jurisdiction without exception."

This response provides unequivocal support for the existence of the proposed rule.

United States of America

The USA has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

"The United States has noted that while the full extent of special missions immunity remains unsettled, there is a widespread consensus that, at a minimum, it is generally inappropriate for States to exercise jurisdiction over ministerial-level officials invited on a special diplomatic mission. The United States has noted that special missions immunity would not, however, encompass all foreign official travel or even all high-level visits of officials. For example, no personal immunity is extended to persons based on their mere assignment to temporary duty at a foreign mission for a brief period of time. We are continuing to review and evaluate our practice in this area and look forward to understanding the practices and policies of other States in this area."

Comment

The United States limits itself to expressing its view that there is a widespread consensus that, at a minimum, a certain level of immunity is required to be accorded to ministerial level members of special missions. Accordingly, this response, unlike the US practice referred to in the judgment, provides no relevant evidence of State practice either for or against the proposed rule.

Content Type: UK Cases

Terms: "of customary international law has been identified which now obliges a state to grant to the members of a special mission"

Narrow By: Sources: England & Wales

Date and Time: Jan 21, 2021 05:11:47 p.m. EST

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2021, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

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