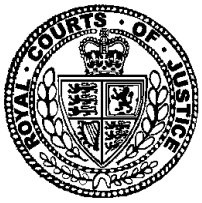

Neutral Citation Number: [2018] EWCA Civ 1719

Case No: C1/2016/3648

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
IN THE HIGH COURT OF JUSTICE DIVISIONAL COURT
LORD JUSTICE LLOYD JONES & MR JUSTICE JAY
[2016] EWHC 2010 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE SALES
and
LORD JUSTICE IRWIN

- -

Between :

The Queen on the Application of **(1) The Freedom and Justice Party and Ors** **(2) Yehia Hamed**	**Appellants**
- and -	
(1) The Secretary of State for Foreign and Commonwealth Affairs **(2) The Director of Prosecutions**	**Respondents**
- and – **The Commissioner of Police for the Metropolis**	**Interested Party**
- and – **(1) Amnesty International** **(2) Redress**	**Interveners**

- -
- -

Sudhanshu Swaroop Q.C., Tom Hickman & Philippa Webb (instructed by **ITN Solicitors**) for the **Appellants**

Karen Steyn QC, Jessica Wells, Guglielmo Verdirame, (instructed by **Government Legal Department**) for the **First Respondent**

Paul Rogers and Katarina Sydow (instructed by the Director of Public Prosecutions) for the **Second Respondent The interveners did not appear but made written representations**

Hearing dates : 21-22 March 2018

- -

APPROVED JUDGMENT

LADY JUSTICE ARDEN :

Overview and summary of conclusions

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:

> 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 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 (Lloyd Jones LJ and Jay J) dated 5 August 2016 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.

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, 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 Articles 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 395-6).

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 thirty-nine 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*), International Court of Justice ("ICJ") Reports, Judgment of 3 February 2012, [77]), but this will not always be the case (see *SS Lotus (France v Turkey)* (1927) PCIJ Ser 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 Secretary of State for the Foreign and Commonwealth Office* [2017] UKSC 62, [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). 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 ed (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 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 186:
>
> "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."
>
> 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: see *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 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 (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969, p. 3).

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 sixteen 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 Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270, at [63], quoted by the Divisional Court at paragraph [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 US*, ICJ Reports 1986, pp108-9).

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, (*United Kingdom v Iceland)*, ICJ Reports 1974, p.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*:

> … 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. [32]

2. JUDGMENT OF THE DIVISIONAL COURT

22. The judgment of the Divisional Court 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, MPUNYB 16 (2012) 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 Sandstrőm, 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 the *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium),* ICJ Reports 2002, p. 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 Assistance in Criminal Matters* (*Djibouti v France),* ICJ Reports (2008), 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 *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2013] QB 349 ("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 [2013] QB 349, [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* 1995 F. Supp. 1469 (1997), 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 the (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 in the form of the statement by the ICJ in the *Arrest Warrant* case (*Democratic Republic of the Congo v Belgium),* ICJ Reports 2004 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, the *Tabatabai* case and the *Vietnamese National* case.

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 twenty-four 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 ed. (2015); in Halsbury's Laws of England, Vol. 61 (2010), paragraph 264; and C. Wickremasinge, *Immunity enjoyed by Officials of States and International Organisations* in Evans (ed), *International Law*, 4th ed., (2014) at 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 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.

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 paragraph. 74, cited by the Divisional Court in [78] of its judgment, and draft ILC conclusion 8, in appendix 2 below). In *Serdar Mohammed v Ministry of Defence* [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*, i.e. the immunity in respect of "official acts" (see *Brownlie*, 6th ed (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, [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 (pages 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, paragraph [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 Ed., at 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 (o/a Osman) v Pentonville Prison (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, paragraph 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), page 37, paragraph 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* ILR 80 (1989) 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 (15 June 2006) OVG 8 S 39.06. 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 paragraph 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 o*pinio 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 fifteen 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 *Phillipines v Marcos* (United States District Court, ND California 665 F Supp 793 (ND Cal 1987) 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* 258 F Supp 3d 168 (2017), 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, *Dogan v Barak* (CD Cal 2016), 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* 2443 F Supp 3d 21 (DDC 2017). 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 paragraphs 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 10 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 thirty-six 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 (5 states) considered that customary international law may so require. Andorra, Georgia, Hungary, Israel, Latvia, Moldova, Sweden and the US (8 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 paragraph [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

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

107. 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 paragraph [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 UN 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.

108. 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.

109. Accordingly, we too would reject this submission.

110. 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.

111. 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.

5. THE COMMON LAW

112. 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.

113. 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 e.g. *Triquet v Bath* (1764) 3 Burr. 1478, 1481 and *Trendtex Trading Corp. v Central Bank of Nigeria* [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 (Margaret)* [2006] UKHL 16 [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 *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 [2016] AC 1355, [144]-[146] and [150] per Lord Mance JSC.

114. 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.

115. 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 of PSC and [151] per Lord Mance JSC.

116. 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 *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499-500 (Lord Oliver) and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [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.

117. 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, 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.

118. 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 (Margaret)*, 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.

119. 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.

120. Secondly, the context for Wilcox J's discussion, much as in *R v Jones (Margaret)*, 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.

121. 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 (Margaret)*); (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 (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC5, [2017] 2 WLR 583 and Article 1 of the Bill of Rights 1689, which forbids the suspension of laws or dispensation against the execution of law "by regall authority" (i.e. by the executive).

122. 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.

123. As to point (i), Mr Hickman's attempt to argue that the position is the same as in *R v Jones (Margaret)* 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 (Margaret)* 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.

124. 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 section 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] 1 WLR 1573, 1585-1586 per Lord Millett, Parliament has never purported to create an exclusive code on immunity.

125. 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 e.g. The London Summit (Immunities and Privileges) Order 2009, made in exercise of the power conferred by section 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 section 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.

126. 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.

127. 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.

128. 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, i.e. 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.

129. 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 e.g. 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.

130. 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 Article 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.

131. 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.

132. 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.

133. 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 paragraph [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.

134. For these reasons, we dismiss the second ground of appeal.

6. OVERALL CONCLUSION

135. 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 (i.e. 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.

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 paragraphs 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*).