IN THE COURT OF APPEAL **App. No. A4/2016/3648**
ON APPEAL FROM
THE ADMINISTRATIVE COURT (DIVISIONAL COURT)
Lloyd Jones LJ and Jay J

BETWEEN:

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

Appellants/Claimants

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) DIRECTOR OF PUBLIC PROSECUTIONS

Respondents/Defendants

-and-

THE COMMISSIONER OF POLICE OF THE METROPOLIS

Interested Party

-and-

(1) AMNESTY INTERNATIONAL
(2) REDRESS

Interveners

SUBMISSIONS ON BEHALF OF
AMNESTY INTERNATIONAL AND REDRESS

I. Introduction

1. Amnesty International and REDRESS (the **"Interveners"**)[1] were granted permission to intervene in writing[2] by the order of Lady Justice Arden dated 15 May 2017 (the **"Order"**). These submissions consider only certain legal issues arising in this appeal, namely the **"CIL point"** and the **"common law point"**. They are a summary of the Interveners' fuller

[1] See Annex 1 for summary description of Amnesty International (AI) and REDRESS.
[2] Limited to 10 pages. The Interveners' Application was to intervene on points of law only.

submissions before the Divisional Court[3], amended in light of that Court's Judgment and the Parties' Skeleton Arguments[4]. The Interveners submit, in summary, as follows.

2. The **CIL (customary international law) point**:

2.1. The Divisional Court correctly held that the Respondents had not established that, prior to 1969[5], there was a rule of CIL obliging States to give visiting foreign officials absolute personal inviolability and complete immunity from criminal jurisdiction (Judgment §§101-102).[6]

2.2. The Divisional Court erred in finding that a rule of CIL now exists, obliging States to grant to non-Ministerial officials on special mission absolute personal inviolability and complete immunity from prosecution (Judgment §180(a)). The evidence of state practice relied upon as support for this contended rule of CIL is neither sufficiently widespread amongst States, nor is it consistent as to the extent of the immunity on the key points (to whom it applies and to what conduct). In a number of instances, the state practice relied upon is not accompanied by the necessary *opinio juris.*

2.2.1. The Respondents have failed to discharge the burden upon them to prove that the contended for rule of CIL exists.[7] They have not adduced evidence to demonstrate (i) sufficiently widespread and consistent state practice of granting absolute personal inviolability and complete immunity from criminal jurisdiction to non-Ministerial level officials on special mission received as such and (ii) that is, in each case, accompanied by evidence that the grant of immunity by the receiving state is due to a sense of legal obligation, rather than comity, political expediency or convenience.

2.2.2. Consistency of state practice is required in two respects. First, as to <u>whom</u> the immunity should apply, i.e. it must extend to non-Ministerial high ranking officials on special mission. Secondly, as to the <u>nature of the conduct</u> covered by the

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[3] The Interveners' submissions below are at Appeal Bundle J164-J200.

[4] The Appellants' Appeal Skeleton Argument dated 11 May 2017 ("**Apps' SA**") and the Skeleton Argument of the Secretary of State for Foreign and Commonwealth Affairs dated 30 June 2017 ("**First Resp's SA**").

[5] 1969 was the year that the Convention on Special Missions ("**the Convention**") was opened for signature.

[6] The Respondents have not cross-appealed this finding and so the Interveners make no further submissions in respect of it. The Interveners' position is detailed in their written submissions before the Divisional Court §§11-28 [Appeal Bundle J164 – J200].

[7] See, e.g., <u>JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry</u> [1990] 2 AC 418, 513C (Lord Oliver): *'[a] rule of international law becomes a rule—whether accepted into domestic law or not—only when it is certain and is accepted generally by the body of civilised nations; <u>and it is for those who assert the rule to demonstrate it</u>'* (emphasis added).

immunities, i.e. it must extend beyond official acts connected with the special mission to include conduct amounting to torture (a serious international crime). The absence of evidence of consensus on these key points is fatal to the Respondents' case.

3. The **common law issue**: the Divisional Court erred in holding that the CIL rule that it identified "is given effect by the common law" (Judgment §§ 180(b)). Even if such a rule exists: it should not be received into the common law because (a) the recognition of an international law immunity, which bears directly on the UK's diplomatic/foreign relations, and results in an immunity from arrest and prosecution for an offence under domestic law, is a matter for Parliament, and (b) it is difficult to reconcile with the UK's obligations under the UN Convention Against Torture (**"UNCAT"**) (see §§20ff below).

II. The CIL point

A. ILC's Draft conclusions and Commentary

4. The Judgment and the parties in their submissions to this Court refer to the ILC's draft conclusions on identification of customary international law and commentaries (**"ILC Draft conclusions"** and **"ILC Commentary/ies"**).[8] We address, in turn below, the two constituent elements necessary to evidence a rule of CIL: (1) general practice (2) accepted as law (*opinio juris*).[9]

B. State practice

5. 'Sufficiently widespread and representative, as well as consistent' (Draft conclusion 8) is the test adopted by the Divisional Court (Judgment §78).[10]

6. **Sufficiently widespread and representative:** The ILC Commentary starts by incorporating the standard applied by the ICJ in the North Sea Continental Shelf cases, namely that 'the

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[8] ILC, *Report on the work of the sixty-eighth session* (2016) UN Doc A/71/10, Chapter V, pp 79-117 ("**ILC Report 2016"**). Referred to in the Judgment §§77-78, Apps' SA §§11-15, and the First Resp's SA §§10-11, 16-17, fn 45. Comments and observations from Governments on the ILC Draft conclusions were due to be submitted to the Secretary-General by 1 January 2018 (ILC Report 2016 (n 8) §60 p 75). The Interveners understand that Governments' comments and observations will be published on the ILC's website some time before the start of its 70th session on 30th April 2018.

[9] Article 38(1), Statute of the International Court of Justice ("**ICJ**"); ILC Draft conclusion 2. See, Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands ("North Sea Continental Shelf cases") [1969] ICJ Rep. 3 §§74, 77.

[10] See also Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] 3 WLR 957, 976C §31 per Lord Sumption. The Appellants refer to this phrase used in Draft conclusion 8 in its entirety (Apps' SA §11); the First Respondent focuses on its first part (First Resp's SA §11(b)).

practice in question must be both "extensive and virtually uniform"[11]. It then notes the relevance of context in that assessment.

7. When considering how '**extensive**' or '**widespread**' an alleged practice must be to qualify as a 'general practice' for the purposes of establishing evidence of a norm of CIL, it is relevant whether the subject matter is one in which many or, conversely, only a few, states participate (e.g. diplomatic relations as opposed to international canals[12]). As to how '**representative**' those states adopting the practice must be: the ILC Commentary states that they should be representative of the various geographic regions and/or the various interests at stake.[13]

8. In Serdar Mohammed, 'extensive' was measured by reference to the number of states engaged in internationalised non-international armed conflicts, i.e. those states participating and interested in the subject matter. By analogy, in this case, since the subject matter is diplomatic relations, in which all States participate and all are interested,[14] 'sufficiently widespread and representative' should mean extensive amongst all States (currently 193 states are members of the UN[15]) and representative of the geographic regions within the international community.

9. Those criteria are not satisfied in this case. The relevant evidence concerns 25 States.[16] The Divisional Court found that the CAHDI Survey responses of 9 of these States provided no relevant evidence for or against the existence of the contended rule of CIL.[17] In the context of diplomatic relations and international law immunities, the practice relied upon by the

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[11] ILC Report 2016 (n 8) 94 §(2). This is the test adopted in Serdar Mohammed v Ministry of Defence by the Court of Appeal: [2016] 2 WLR 247 §220 and in the Supreme Court: Mohammed (No 2) [2017] 2 WLR 327, 338E §14 per Lord Sumption.

[12] Draft conclusion 8, Commentary (3): ILC Report 2016 (n 8) 94 §(3). In its analysis of this Commentary, the First Respondent focuses on the limited instances in which evidence of a practice by only a small number of states can be sufficient (First Resp's SA §§16-17). The Court is however, invited to consider the entirety of the ILC's Commentary on this point (ILC Report 2016 (n 8) 94-95 §§(2)-(4).

[13] Ibid: ILC Report 2016 (n 8).

[14] UNGA Resolution 2530 (XXIV) Convention on Special Missions and Optional Protocol concerning the Compulsory Settlement of Disputes, 8th December 1969, sixth recital: 'the object and purpose of which are of interest to the international community as a whole'. See also, Judgment §74.

[15] UN 'Growth in United Nations membership, 1945 – present', <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> accessed 19 September 2017.

[16] The 24 States that responded to the Council of Europe's Committee of Legal Advisors (CAHDI) questionnaire (the "**CAHDI Survey**") and Belgium.

[17] Andorra, Denmark, Estonia, Norway, USA, Georgia, Ireland, Latvia and Mexico (see Annex to Judgment). The Divisional Court did not classify the responses of Belarus or Sweden under any of its four heads of (i) consistent with the contended for CIL rule, (ii) providing general support for the existence of the rule, (iii) unequivocal support for the existence of the rule, and (iv) no relevant evidence for or against the existence of the rule. The Divisional Court erred in finding that since Finland's practice largely reflected the contended for rule of CIL, this supported its existence notwithstanding that Finland declined to answer whether it considered that 'certain obligations and/or definitions regarding immunity of special missions derive from [CIL]'.

Divisional Court is 'hardly a sufficient basis on which to identify a widespread, representative and consistent practice of states, let alone to establish that such a practice is accepted on the footing that it is an international obligation': Benkharbouche, p 993G §66 per Lord Sumption.

10. Even if the relevant practice of the 25 States was virtually uniform and consistent, and accompanied by the requisite *opinio juris* (which it is not), it could not satisfy the requirement of being sufficiently widespread i.e. extensive amongst the relevant community of 193 States. Neither can it said to be representative of the geographic regions of the international community. All the 25 States bar two are European. The other two, the USA and Mexico, cannot be said to be representative of the states of the Americas.[18] There is no evidence of representative practice in other geographic regions.

11. **Consistency:** the practice must be consistent across States. While 'complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform; some inconsistencies and contradictions are thus not necessarily fatal to a finding of "a general practice".'[19] It must be possible to 'discern a constant and uniform usage'.[20] As applied to the present case, the Respondents must demonstrate that there is a consistent practice of receiving states granting (1) high ranking State officials - other than Heads of State, Heads of Government or Ministers of Foreign Affairs, or other government ministers - on (2) special mission (and received as such), (3) absolute personal inviolability from arrest and complete immunity from prosecution i.e. including for serious international crimes. Evidence of a consensus in principle but without clear evidence of a consensus on these key issues is not sufficient.[21]

12. There is no clear evidence of consensus, i.e. settled state practice, on either key issue that is both widespread and representative. Nor is there even clear evidence of consensus among the limited number of States about which there is some evidence. This is apparent from States' responses to the CAHDI Survey.

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[18] The Organization of American States ("**OAS**") has 35 members (states parties to the OAS Charter), < http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp> accessed 19 September 2017.
[19] Para (7) of the Commentary to draft conclusion 8: ILC Report 2016 (n 8) 96 §(7).
[20] Para (3) of the Commentary to draft conclusion 8 (n 12).
[21] Mohammed v MOD (No 2) (n 11) §16 per Lord Sumption (differences amongst states as to appropriate limits to a right of detention under customary international humanitarian law, conditions of its exercise and whether special provision should be made for non-state armed groups would be fatal to the contended rule of CIL pursuant to which the UK could detain persons in a non-international armed conflict). Lord Sumption (with whom Lady Hale agreed) and Lord Mance (§148) inclined to this view but found it unnecessary to decide the issue. Lord Reed made a positive finding to that effect that although emerging, there was insufficient evidence that such a rule had crystalised (§275).

12.1. As to the **type of foreign visitor** that may be afforded privileges and immunities: the responses reveal a range of practices and – as addressed in paragraph 18 below - a number of States' responses are opaque or decline to comment on the existence or content of CIL on special missions or whether their practice was a requirement of CIL.[22] Belarus, Sweden and possibly Finland,[23] consider that CIL requires only that full immunities are extended to Heads of State or Government and Foreign Ministers (the so-called '*troika*'). As to practice (whether or not considered a requirement of CIL), the response of the USA identifies that immunity is afforded to visiting cabinet level Ministers in certain circumstances;[24] Albania and Belarus also afford immunities to some high ranking state officials below ministerial level (although Albania excludes such immunity in respect of international crimes);[25] while some other States afford immunity to all those received on a special mission, irrespective of status.[26] Denmark, Georgia and Ireland declined to identify to whom they would afford inviolability and immunity when on special mission.[27]

12.2. As to what **type of conduct** is covered, the following States in the CAHDI Survey expressly adopt a restrictive 'official acts only' approach to immunity from criminal proceedings for visiting foreign officials on special missions: Albania (excluding international crimes)[28]; Austria[29]; Belarus[30]; France;[31] and possibly Andorra.[32] The Czech

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[22] On this latter point, see the responses of Sweden (answer to Q5, p 77); Finland (answer to Q5 p 40); and Denmark (answer to Q5, p 34; declined to answer Q6).
[23] Belarus (answer to Q5 p 83); Sweden (answer to Q2 p 76); Finland (answer to Q6b p 41).
[24] Answer to Q5 p 89.
[25] Albania (answer to 6b p 10: the *troika* plus 'diplomats and high officials holding a diplomatic passport'); Belarus (answer to Q5 p83).
[26] Armenia (except where arrest is necessary to execute a criminal judgment: art. 446(1), Criminal Procedural Code, see Annex 1); Finland (answer to Q6b p 41); Germany (answer to Q5 p 49); Italy (answer to Q6b p 55); the Netherlands (answer to Q6b p 60); Romania (answer to Q6b p 65); Serbia (answer to Q6b p 71; Switzerland (answer to Q6b p 74); and the UK (answer to Q6b p 79).
[27] Denmark (answer to Q6 p 35); Georgia (answer to Q6 p 46) and Ireland (answers to Q5 and 6 p 53).
[28] Annex to the Judgment p BB054.
[29] But see comment in the Judgment rejecting this statement as reflective of Austrian practice. Ibid p BB056.
[30] Ibid p BB056.
[31] The Divisional Court interpreted this as supportive of the proposed CIL rule since it found that France granted 'personal inviolability which would be inconsistent with any exercise of criminal jurisdiction' (BB058). It is questionable whether this is correct and whether the Divisional Court ought to have given greater consideration to the distinction between personal inviolability and immunity. Immunity from jurisdiction relates to amenability to judicial process, while inviolability pertains to subjection to measures of physical constraint or other interference. See O'Keefe *International Criminal Law* (2015) §10.11 and, for an illustration of the distinction, Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) ICJ Rep. 2008 which concerned not only a witness summons served upon the President of Djibouti during a visit to France but also the *in absentia* prosecution of the Djiboutian *Procureur de la Republique* and Head of National Security. In France, given that a prosecution can occur *in absentia*: a foreign official may be subject to criminal jurisdiction (after he has left the territory of the receiving state) notwithstanding that he would be afforded personal inviolability if he visited on a special mission received as such.

Republic, Ireland, and Norway reserve discretion to decide the extent of conduct covered by any immunity on a case-by-case basis.[33]

13. The First Respondent relies on a lack of contrary practice as support for its purported rule of CIL.[34] Contrary practice would include, for example, the arrest of and/or institution of criminal proceedings against high-ranking non-Ministerial officials on special missions, including for private (i.e. not 'official') acts. In response, the Interveners make three submissions.

14. **First**, a lack of such practice does not support a finding that the contended for immunity is a rule of CIL because it

> *would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom*.[35]

15. **Secondly**, it is unrealistic to expect that there would be a body of evidence (let alone an externally/publicly accessible body of evidence) of contrary practice in this area.[36] The contended rule of CIL relates to members of a special mission received as such, and it is most unlikely that a receiving state would consent to a visit by an official if it anticipated (a) that there was a reasonable prospect that the individual would then be prosecuted for previous acts or (b) that the individual's conduct whilst in the territory of the receiving state would be such as to give rise to prosecution for other acts. Furthermore, the official in question is unlikely to visit a jurisdiction where there may be a significant risk of criminal proceedings without having secured a political assurance from the receiving state that immunity will be afforded. In either situation, a criminal prosecution is most unlikely.

16. **Thirdly**, there is some evidence of contrary practice in the form of those states in which immunity is afforded only for official acts related to the mission (Albania, Austria, Belarus, France and possible Andorra: see §12.2 above) and Albania, for its exception to immunity in respect of international crimes. In relation to the former, see e.g. the criminal proceedings against Jean-Francois N'Dengue, the Congolese Director-General of National Police. Sir

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Complexities such as these – which complicate the picture of state practice - do not appear to have been considered by the Divisional Court.

[32] Annex to the Judgment p BB055.

[33] Czech Republic (answer to Q5 p 32); Ireland (answer to Q5 p 53); Norway (answer to Q5 p 62).

[34] First Resp's SA §49.

[35] SS Lotus case (France v Turkey) (1927) PCIJ Reports, Series A, No 10, p 28.

[36] In contrast to the situation identified in Benkharbouche at pp 993H-994C.

Michael Wood describes the Cour de Cassation's judgment in N'Dengue as follows: '*The Cour de Cassation … seems to have concluded that the Cour d'Appel had not been competent to deal with immunity and was moreover wrong, since the Director-General of Police was only entitled to official act immunity*.'[37]

C. Opinio juris

17. This second element means that 'the practice in question must be undertaken with a sense of legal right or obligation' 'distinguished from mere usage or habit' (Draft conclusion 9). Thus, it is 'crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law'.[38] In circumstances where it is difficult to discern whether the immunity that is afforded by a receiving state is due to their perception of 'a duty incumbent on them and not merely for reasons of political expediency'[39], those circumstances cannot, without more, be treated as an example of *opinio juris* for the purpose of evidencing a rule of CIL.[40]

18. The responses of the States in the CAHDI Survey demonstrate the lack of consensus as to whether a practice of granting immunities is an obligation under CIL or an exercise of discretion. 11 States declined to express any, or any final, opinion on whether, or to what extent, 'certain obligations and / or definitions regarding immunity of special missions derive from [CIL]'.[41] As noted above, a number of States asserted their discretion to assess on a 'case by case' basis what privileges and immunities they will extend and to whom[42] rather than acknowledging any legal obligation to grant certain immunities.[43] This is telling. If it was extensively and virtually uniformly accepted that CIL **obliges** States to afford complete

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[37] M. Wood *The Immunity of Official Visitors* (2012) Max Planck Yearbook of United Nations Law fn.132 (emphasis added). (The appeal was refused on other grounds). The case of Hubert X does not assist with the analysis of what immunities must be afforded to members of special missions since the court's analysis stops with the factual finding that the defendant was not on a special mission.

[38] Draft conclusion 9, commentary §(2): ILC Report 2016 (n 8) 97 (emphasis added); Benkharbouche p 976C §31. See also, ILC commentary to draft conclusion 3, ILC Report 2016 (n 8) 87, §(7): '*No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature"*' quoting North Sea Continental Shelf cases (n 9) §76.

[39] Colombian-Peruvian asylum case (Judgment Nov 20th) [1950] ICJ Reports p 266, 277.

[40] Draft conclusion 9, commentary §(3): ILC Report 2016 (n 8) 97, distinguishing *opinio juris* from 'comity, political expediency or convenience'.

[41] Andorra (pp 13-14), Armenia (p 18), Denmark (pp 34-35), Finland (p 40), Georgia (p 46), Ireland (p 53), Latvia (p 57), Mexico (pp 85-86), Norway (p 62), Sweden (p 77) and the United States of America (p 89).

[42] Austria, Czech Republic, Ireland, Norway (see paragraph 12 above).

[43] The only States to so respond to the CAHDI questionnaire are Italy, the UK, Serbia and the Netherlands. The US response is equivocal: it does not refer to an obligation under international law but that 'it is generally inappropriate for States to exercise jurisdiction over ministerial-level officials'. See CAHDI survey p89 and Annex to Judgment p BB064 (emphasis added).

personal inviolability and full criminal immunity to members of special missions then one would expect no reticence amongst States in expressing that position.

19. The First Respondent relies on the ILC's Draft conclusion 10(3), which provides that '[f]ailure 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' (emphasis added).[44] However, the circumstances in which a visiting official of State A, the sending state, is granted immunity by State B, the receiving state, are not generally of the type that would call for some reaction by other States. **First**, a sending state is (i) unlikely to react negatively when a receiving state grants immunity to one of its officials; and (ii) if it did disagree with a decision to grant immunity to its official, it could simply waive the official's immunity irrespective of whether it had been granted by the receiving state as a matter of courtesy or from a sense of obligation.[45] **Secondly**, since immunities may be granted as a matter of comity or courtesy rather than from a sense of legal obligation and often the exact basis upon which they have been granted is unclear, a lack of reaction from other States is not necessarily evidence of the acceptance of the practice as a matter of law.

III. The Common Law point

20. The Divisional Court correctly identified that courts must grapple with issues of policy when considering in what circumstances the common law should receive a norm of CIL (Judgment §166[46]). It is constitutionally inappropriate for the common law to receive a norm of CIL that obliges States to provide to those foreign officials on special mission absolute personal inviolability and full immunity from criminal jurisdiction for two reasons.

21. **First,** this is an area of foreign and diplomatic relations in which the UK's general international law obligations, conventional and customary (and including in respect of serious international crimes) may also be engaged. Given the potential political and diplomatic sensitivities, it would be constitutionally appropriate for courts to defer to Parliament and for Parliament to consider the extent to which such a norm should be a part of English law. The principles identified by Lord Bingham in R v Jones [2007] 1 AC 136 at pp.159D-160G are applicable to situations in which victims of serious crimes will otherwise be denied redress and alleged perpetrators of such crimes will be granted impunity, thereby

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[44] First Resp's SA §50.
[45] Arrest Warrant of 11 April 2000 (Dem Rep. Congo v. Belg.), Judgment, 2002 ICJ Rep. 3, 25 §61 (Feb. 14).
[46] As to which, see Lord Mance in R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] 3 WLR 1665, 1703 §144ff.

undermining a fundamental objective of criminal prosecution and punishment which is to protect the substantive rights in question.[47] Such decisions are the preserve of Parliament.[48] They necessarily involve the balancing of important interests[49], which Parliament has not, in relation to special missions, had the opportunity to consider.[50]

22. Relatedly, by the judicial reception of a CIL norm of immunity from criminal process into the common law, the Executive could circumvent the primacy of Parliament in the area of criminal law. To apply the words of Lord Hoffman in R v Jones to immunity from prosecution for serious international crimes: it 'should not creep into existence [in domestic law] as a result of an international consensus to which only the executive of this country is a party' (p171C-D [62]). This is particularly so where the CIL norm in question is, even on the executive's case, a relatively recent creation.[51]

23. **Secondly**, the alleged special mission immunity is difficult to reconcile with the UK's international law obligation under UNCAT to prosecute or extradite any person suspected of torture located in territory under its control, incorporated into domestic law by section 134 of the Criminal Justice Act 1988. Common law should be slow to incorporate a CIL norm the effect of which would be to enable the UK executive, by consenting to special mission status in a given instance, to clothe that person with immunity from criminal liability which that person would otherwise face pursuant to s.134. This would be contrary to *'one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven*

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[47] This was the very reason for the elaboration of UNCAT: to achieve *"a more effective implementation of the existing prohibition under international and national law of the practice of torture…"* General Assembly resolution 39/46 of 10 December 1984 (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), fifth recital. Criminal law and punishment is the "necessary institution to deter [culpable] wrongdoing": A. Ashworth, *Principles of Criminal Law* (5th ed. 2006) 17.

[48] An illustration of the appropriate role of Parliament (viz., to extend diplomatic immunities to officials of foreign States and Governments located in the UK who would not fall within the category of accredited envoys and members of permanent legations) is the (now repealed) Diplomatic Privileges (Extension) Act 1941.

[49] As recognised in the Arrest Warrant Case (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal §71 p 85): '*[I]mmunity . . . reflects … an interest which in certain circumstances prevails over an otherwise predominant interest. … It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.*'

[50] Since the Convention has not been ratified by the UK, Parliament has not had the opportunity to consider the provisions relating to immunities (arts. 29 and 31) as is now required under Part 2 of the Constitutional Reform and Governance Act 2010 and was formerly achieved by the Ponsonby Rule.

[51] See also, p160E-F per Lord Bingham (quoting Sir Franklin Berman):

> *Inasmuch as the reception of [CIL] into English law takes place under common law, and inasmuch as the development of new [CIL] remains very much the consequence of international behaviour by the executive, in which neither the legislature nor the courts, nor any other branch of the constitution, need have played any part, it would be odd if the executive could, by means of that kind, acting in concert with other states, amend or modify specifically the* criminal *law…*

for torturers'.[52] Given the strength of English public policy on torture,[53] whether this is appropriate is properly a matter for Parliament to consider.

IV. Conclusion

24. A summary of the Interveners' submissions on the two legal issues addressed above – the CIL issue and the common law issue - are at §§2-3.

SHAHEED FATIMA Q.C.
Blackstone Chambers

RACHEL BARNES
3 Raymond Buildings

DANIEL MACHOVER
Hickman and Rose

30th January 2018

[52] R v Bow Street Magistrate, ex parte Pinochet (No 3) [2000] 1 AC 205F per Lord Browne-Wilkinson; see also Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) [2012] ICJ Rep. 422, 460 §115.

[53] Recognised by Lord Sumption in Mohammed & Ors v Ministry of Defence [2017] UKSC 1, [2017] 2 WLR 287, 324D §96.

ANNEX 1

AMNESTY INTERNATIONAL AND REDRESS

Amnesty International (AI) is a movement of over seven million members, activists, and supporters in more than 150 countries and territories, working to promote respect for and protection of internationally recognised human rights principles. It monitors relevant laws and practices in countries throughout the world, in light of international law and standards. The organisation was awarded the Nobel Peace Prize in 1977. AI Ltd in the United Kingdom operates as the international secretariat (headquarters) of all national AI entities (Sections).

REDRESS is an international human rights non-governmental organisation and registered charity based in London with a mandate to assist torture survivors to seek justice and other forms of reparation. It pursues this mandate through a combination of individual casework, research and information at both national and international levels.