Neutral Citation Number: [2016] EWHC 2010 (Admin)

Case No: CO/6384/2015

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2016

Before:

LORD JUSTICE LLOYD JONES
MR JUSTICE JAY

- -

Between:

THE QUEEN
on the application of
(1) THE FREEDOM AND JUSTICE PARTY
(2) YEHIA HAMED
(3) MOHAMMED SOUDAN
(4) HH **Claimants**

- and –

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

- and –

THE COMMISSIONER OF POLICE FOR THE METROPOLIS **Interested Party**

-and-

(1) AMNESTY INTERNATIONAL
(2) REDRESS **Interveners**

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Sudhanshu Swaroop QC and Tom Hickman (instructed by **ITN Solicitors**) for the **Claimants**
Tim Eicke QC, Guglielmo Verdirame and Jessica Wells (instructed by **Government Legal Department**) for the **First Defendant**
Paul Rogers and Katarina Sydow (instructed by the **Crown Prosecution Service**) for the **Second Defendant**
Jeremy Johnson QC (instructed by **MPS, Directorate of Legal Services**) for the **Interested Party**
Shaheed Fatima QC and Rachel Barnes (instructed by **Hickman and Rose**) for the **Interveners** (by written submissions only)

Hearing dates: 28th and 29th June 2016

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Approved Judgment

Judgment Approved by the court for handing down.

LORD JUSTICE LLOYD JONES:

I. Introduction

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

2. The substantive issue raised by the Claimants in this application for judicial review is whether members of special missions visiting the United Kingdom with the approval of the First Defendant ("the FCO") enjoy personal inviolability and/or immunity from criminal process pursuant to a rule of customary international law to which effect is given by the common law.

3. The Claimants deny the existence of such a rule, and in any event contend that the common law should not give effect to it. They submit that these judicial review proceedings are the appropriate vehicle for enabling this important point of principle to be determined. The FCO and the Second Defendant ("the DPP") adopt common cause in averring the existence of such a rule of customary international law which, to the extent it has not already been recognised by the common law, should now be recognised. The FCO further contends that the court in its discretion should not entertain this application on a number of related grounds. The DPP shares some of the FCO's concerns in relation to the standing of these Claimants but (as more fully explained below) wishes to be informed by this court if its understanding of the law is incorrect.

4. The Interested Party ("the MPS") adopts a neutral position in relation to what it describes as the "important legal issue that arises as between the Claimants and the Defendants".

5. Amnesty International and Redress have filed helpful written submissions on the substantive issue but have taken no position on the particular facts of this case or the court's exercise of its discretion.

II. Factual background

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

7. Following the decision of this court in *Khurts Bat v Federal Republic of Germany* [2013] QB 349, on 4th March 2013 the FCO (acting by the then Secretary of State, the Rt. Hon. Mr. William Hague MP) gave a written Ministerial Statement on "special mission immunity" announcing a "new pilot process by which the Government will be informed of inward visits which may qualify for special mission immunity status". It is the Government's view that members of special missions "enjoy immunities, including immunity from criminal proceedings and inviolability of the person" to which the common law gives effect. By an accompanying *note verbale*, foreign governments are advised that the Protocol Directorate of the FCO should be given at least 15 days' notice of the arrival of the mission, providing details, amongst other matters, of the visitor's full name and title, and role or function. It is

the policy of the FCO to grant the application for consent to the visit only in respect of "official business". Both the *note verbale* and the Ministerial Statement make clear that consequential issues of legal effect and status "would ultimately be a matter for the courts", because the FCO's function is limited to the issue of consent to a given visit as a special mission. The *note verbale* reaffirms Her Majesty's Government's "firm policy of ending impunity for the most serious international crimes and a commitment to the protection of human rights".

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

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

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

> "Since the coup, the First, Second and Third Claimants have been acting as representatives for thousands of individual victims of the coup. Individuals went to the First Claimant, as they were able to instruct lawyers and pursue a number of cases to seek redress and accountability for the coup. The First Claimant consequently instructed us to pursue a number of avenues for complaint … In that capacity, I have received instructions via the First Claimant for inter alia:
>
> (1) Victims of the numerous atrocities at Rab'a Square
>
> (2) Field doctors from Rab'a Square, who were attacked by security forces while they attempted to treat victims…
>
> (3) Individuals who have been subjected to torture in Egyptian custody."

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

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

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

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

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

15. According to the evidence of Mr Barry Nicholas, Head of Diplomatic Missions and International Organisations Unit of the Protocol Directorate of the FCO, on 21st August 2015 his directorate received a request (pursuant to the March 2013 protocol) for special mission status to be accorded to Lt. General Hegazy, in relation to a visit to the United Kingdom he was due to undertake between 15th and 19th September 2015. It is clear from the letter from the Government Legal Department ("GLD") dated 23rd October 2015 that Lt. General Hegazy's programme included meetings with the Secretary of State for Defence, the Chief of Defence Staff and the National Security Adviser, and that he was also seeking a meeting with the FCO. On 14th September 2015 Mr Nicholas issued the following certificate:

> "Under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs conferred on me, I … hereby confirm that [the FCO] has consented to the visit to

> the United Kingdom of Egyptian Chief of Defence Staff, Lt. General Mahmoud Hegazy [REDACTED] from 15-19 September as a special mission, and they will be received as such."

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

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

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

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

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

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

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

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

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

> "10. … the MPS takes legal advice from the CPS, not the FCO. So, although the advice of the CPS coincides with the clear position of the FCO, it is the CPS advice as to the law (not the contentions of the FCO) that is material to MPS decision making.
>
> …
>
> 18. … SO15 sought information from the Defendant as to the basis on which Lt. Gen Hegazy was in the United Kingdom. The Defendant provided SO15 with a certificate which confirmed that the Defendant had consented to the visit …
>
> 19. The combination of (a) the recognition by the FCO of Lt Gen Hegazy as part of a special mission and (b) the advice from the CPS that a person who is part of a special mission recognised by the Government is immune from arrest, meant that there was no question of Lt. Gen Hegazy being arrested.
>
> 20. Accordingly, SO 15 informed the Claimant's solicitor by an email dated 17th September 2015 that Lt. Gen Hegazy had Special Mission Immunity …"

No mention is made of the email from the FCO (see [18] above), of the conversation the sender of that email had with DS Titherly, or of any communication between DS Titherly and DI Mason.

22. On 18th September 2015 Mr Ali sent an email to the FCO addressed to "protocol enquiries". Mr Ali sought, by return email, "disclosure of the circumstances of the purported granting of Special Mission Immunity to Mr Hegazy", including disclosure of the Egyptian government's request and the letter of grant.

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

24. On 9th October 2015 ITN Solicitors sent to the GLD a pre-action protocol letter, identifying the defendant as the FCO and the decision under challenge as being "to grant special mission immunity". The letter took the point, amongst others, that special mission immunity is not part of customary international law.

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

> "… the [FCO] denies that [the First Claimant] has capacity or standing to initiate the proposed judicial review proceedings. The decision to consent to Lt. Gen. Hegazy's visit as a special mission is purely a matter for the Government and is therefore not subject to review by the courts. In any event, [the FCO] denies that his decision was unlawful, as alleged by [the First Claimant] or at all."

The point was not taken that the FCO had made no relevant decision.

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

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

28. There is no evidence that Lt. General Hegazy has returned to the United Kingdom since September, and there is no evidence that he has any plans to do so. Paragraph 38 of Mr Ali's witness statement asserts that "any future visits" are "reasonably expected in the near future", but no material is provided to support this.

III. The course of the litigation

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Procedural issues

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

36. His key submissions are these:

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

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

(3) The Claimants have not acted promptly.

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

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

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

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

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

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

38. Mr Hickman's response to these submissions will be reflected in our analysis below, but we should specifically record the position of the DPP, as explained to us by Mr Paul Rogers. Although the Director is concerned about the standing of these Claimants, given in particular their lack of victimhood, and the possibility of a plethora of similar claims, "if the law is not correct she would like to know". Mr Rogers, as does his client, realistically recognises that this point will not go away.

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

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

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

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

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

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

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

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

45. It is also clear from the available evidence that, although the DPP may well take her own counsel from time to time from experts such as Mr Rogers, the practical reality of this case is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. Mr Eicke also relied in his skeleton argument on the decision of the Court of Appeal in *Shrewsbury and Atcham BC v SSCLG* [2008] 3 All E R 548 where the challenge was to the process adopted by the defendant in promoting Parliamentary legislation. Plainly, the context could not be more different. At paragraph 32 of his judgment, Carnwath LJ observed:

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

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

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

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

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

59. The analysis in relation to the DPP's advice to the MPS given on 17th September 2015 is not entirely straightforward. In our judgement, the Claimants have not failed to act promptly in relation to this decision, assuming that it is reviewable. Our examination of the procedural

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

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

61. We do so because there is a more satisfactory procedural pathway into the substantive issue, and it involves an examination of the Claimants' first, and preferred, formulation. It is more satisfactory because there is obvious artificiality in maintaining a focus on the DPP's advice in circumstances where that Defendant has merely been loyal to *Khurts Bat*. The artificiality stems from the application of demarcation lines drawn in the legal sand by an accurate recognition of the strict legal and constitutional responsibilities, but we really need to grapple with the broader point that the FCO is the expert in this area, more than anyone else.

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

> "The declaration is a discretionary remedy. This important characteristic probably derives not from the fact that the power to grant it was first conferred on the Court of Chancery, but from the discretionary power conferred by the rule of court. There is thus ample jurisdiction to prevent its abuse; and the court always has inherent powers to refuse relief to speculators and busybodies, those who ask hypothetical questions or those who have no sufficient interest. As was said by Lord Dunedin [in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448]:
>
> > 'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.'
>
> In other words, there must be a genuine legal issue between the parties."

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

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

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

and:

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

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

issue arising in civil litigation", especially in circumstances where "there is no other means of testing the correctness or otherwise of the legal advice on the basis of which the Corporation made its decision".

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

66. As regards the issue of *locus*, Mr Eicke naturally placed heavy reliance on the decision of this court in *Al-Haq v FCO* [2009] EWHC 1910 (Admin). In that case, an NGO based in Ramallah in the Palestinian territories sought an order that the UK Government must adapt its policy in relation to the State of Israel on account of events occurring in Gaza and the West Bank. This court held that the issue was simply not justiciable, and that moreover the claimants did not have standing to raise it. (See the judgment of Pill LJ at [48] and that of Cranston J at [62].) However, it is clear from the analysis of Pill LJ in particular that the issue of standing could not be divorced from the context of the right being claimed. It was not the foreign character of the NGO which was critical but the fact that it was seeking to intrude in an area which the courts regard as close to *terra incognita*.

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

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

69. Our preferred analysis is that the claim for declaratory relief on this basis must involve the DPP as well as the FCO. Insofar as the document submitted by Mr Hickman at the start of

the second day of this hearing might be interpreted as limiting this first formulation to a claim for relief against the FCO alone, its scope needs to be expanded.

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

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

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

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

V. Customary international law

Introduction

74. Diplomatic relations are normally conducted by permanent missions accredited to the receiving State. In modern international law detailed provision is made for the privileges and immunities of members of such permanent missions by the Vienna Convention on Diplomatic Relations 1961 ("the VCDR") to which 190 States, including the United Kingdom, are currently parties. Diplomacy, however, is not invariably conducted through permanent missions. States sometimes have occasion to send and receive special or *ad hoc* missions of temporary duration, sometimes in connection with a specific event or intended to achieve a limited purpose. Temporary missions were the earliest form of diplomatic missions but they fell into relative disuse in the seventeenth and eighteenth centuries as the practice of exchanging permanent envoys and embassies grew. Special missions then became associated with representation of the sending state or its ruling family on ceremonial occasions. However, following the Second World War, no doubt as a result of increased international co-operation and the development of air transport, special missions came to be used to an ever-increasing extent in many different fields of official business. (Hardy, Modern Diplomatic Law, (1968), pp. 89-90; Kalb, Immunities: Special Missions, Max Planck Encyclopedia of Public International Law (2011).) In 1969 the United Nations General Assembly adopted the Convention on Special Missions to which 38 States are currently parties. The United Kingdom has signed but has not ratified the Convention on Special Missions.

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

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

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

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

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

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

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

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

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

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

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

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

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

State practice in relation to treaties.

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

The Havana Convention regarding Diplomatic Officers, 1928

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

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

The Vienna Convention on Diplomatic Relations, 1961

85. The Vienna Convention on Diplomatic Relations, 16 April 1961 ("VCDR") is a multilateral convention to which 190 States are currently contracting parties. It was based on preparatory work by the ILC. The United Kingdom has signed and ratified the convention and its principal provisions relating to privileges and immunities are given effect in domestic law within the United Kingdom by the Diplomatic Privileges Act 1964. The VCDR entered into force for the States parties to it on 24 April 1964. In addition, in the light of almost universal participation in the convention, many of its provisions may be taken to be declaratory of customary international law.

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

The Convention on Special Missions, 1969

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

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

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

It provides that a State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel (Article 2). The functions of a special mission are to be determined by the mutual consent of the sending and the receiving State (Article 3). The scheme of the convention is very similar to that of the VCDR. The general approach of the convention is to extend to special missions privileges and immunities similar to those accorded to permanent missions, subject to appropriate modifications. In particular, the convention provides that the persons

of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable and shall not be liable to any form of arrest or detention (Article 29) and shall enjoy immunity from the criminal jurisdiction of the receiving State (Article 31(1)). The convention also makes provision for a more restricted immunity from the civil and administrative jurisdiction of the receiving State (Article 31(2)).

The work of the International Law Commission 1960-1967.

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

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

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

He also noted:

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

91. The 1960 draft articles on special missions, which proceeded by analogy with permanent missions, were transmitted to the Vienna Conference on Diplomatic Intercourse and Immunities which met in 1961. The Vienna Conference sent the question of special missions to a sub-committee which found that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted. The Vienna Conference adopted this recommendation.

92. In 1961 the General Assembly requested the ILC to study *ad hoc* diplomacy and to report to the Assembly. Mr. Milan Bartoš was appointed Special Rapporteur. He produced four reports on the subject (A/CN.4/166, Report on Special Missions, YILC 1964, Vol II; A/CN. 4/177 and A/CN.4/179, Second Report on Special Missions, YILC 1965, Vol II; A/CN.4/189 Third Report on Special Missions, YILC 1966, Vol II; A/CN.4/194, Fourth Report on Special Missions, YILC 1967, Vol II). Although we have been referred to passages in all

four reports, it is convenient to proceed by reference to the fourth report in which the Special Rapporteur summarised all his previous reports and submitted them as a whole.

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

> "113. All the research carried out by the Special Rapporteur to establish the existence of universally applicable rules of positive law in this matter has produced very little result. Despite abundant examples of the use of special missions, the Special Rapporteur has failed to establish the existence of any great number of sources of law of more recent origin which might serve as a reliable basis for the formulation of rules concerning special missions..."
>
> 114. Although the dispatch of special missions and itinerant envoys has been common practice in recent times and, as the Special Rapporteur would agree, represents the use of the most practical institutions for the settlement of questions outside the ordinary run of affairs arising in international relations, whether multi-lateral or bi-lateral, they have no firm foundation in law. Whereas ordinary matters remain within the exclusive competence of permanent missions and there are many sources of positive international law which relate to these organs of international relations ... the rules of law relative to ad hoc diplomacy and the sources from which they are drawn are scanty and unreliable.
> …
>
> 116. One question has exercised jurists, both as a matter of practice and of doctrine: what is the scope of facilities, privileges and immunities to which such missions are entitled and which the receiving States are obliged to guarantee? In the absence of other rules, attempts have been made to find rules in the comity of nations and to discover analogies with the rules of diplomatic law.
> …
>
> 120. With no well-established juridical customs and no clearly defined practice, with changes occurring in general criteria, even in those relating to resident diplomacy, with no well-grounded positions in the literature and with no institutions which can be described as accepted by the civilised nations … it is interesting to find that those who have sought to create international law *de lege ferenda* have failed to make any advance.
>
> …
>
> 121. This general paucity of rules of positive law on the subject eliminated all possibility of codification by the method of collecting and redrafting existing rules of international law and integrating them into a system.

…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This passage must be read against the background of the debate which took place within the Commission as to whether the grant of facilities, privileges and immunities to special missions was a matter of law at all, or whether it was merely a matter of comity or courtesy. It was the unanimous view of the ILC that it was a requirement of law. This passage reflects that conclusion. It also reflects a general acceptance that States are under an obligation to accord facilities, privileges and immunities to special missions and their members.

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

101. These passages from the ILC's 1967 Report indicate, therefore, that although it considered that to some extent the draft articles codified the modern rules of international law concerning special missions, in substantial part it was proposing solutions based on the analogy of the law relating to permanent diplomatic missions as reflected in the VCDR. What is unclear is the extent to which the ILC considered that its proposals in relation to special missions reflected existing rules of customary law. In this regard we note the

repeated references in the Fourth Report of the Special Rapporteur to the fact that there was a dearth of custom or positive law which could be codified. In these circumstances we consider that only limited weight can be given to the work of the ILC as supporting the existence of rules of customary law on this subject as at 1967. In our view, the most that can be said on the basis of this evidence is that:

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

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

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

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

> "The elaboration of the Convention had a major impact on the development of rules of customary international law; it was a focus for State practice. As already noted, the Commission was of the opinion that its draft reflected, at least in some measure, the rules of customary international law and this does not seem to have been contested by States. While it cannot be said that all – or even most – of the provisions of the Convention reflected customary international law at the time of its adoption, it is widely accepted that certain basic principles, including in particular the requirement of consent, and the inviolability and immunity from criminal jurisdiction of persons on special missions, do now reflect customary law.
>
> At the time of its adoption, the United Kingdom's view was that the Convention was not declaratory of international law in the same way as the Vienna Convention on Diplomatic Relations, since there was not enough evidence of State practice for it to be said that existing international law was clear and settled in the matter. But the Convention was thought to be generally declaratory of what an International Tribunal would probably have held international law to be, or what international law would have come to be in practice had the Convention not been concluded."

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

103. Before leaving the work of the ILC we should draw attention to two further matters. First we note that, in 2008 when the ILC considered the immunity of State officials from criminal jurisdiction, a memorandum by the Secretariat of the ILC (UN Doc A/CN.4/596, p58, para 97) identified three cases in which "lower officials" enjoy immunity which had already been the subject of codification. One of those was "that of representatives of the sending State in a special mission and members of its diplomatic staff who also enjoy immunity from criminal jurisdiction in the receiving State under Article 31, paragraph 1, of the Convention on Special Missions, 1969." Secondly, however, the ILC in its current work on immunities has taken a cautious approach to this question observing that "further study is required to determine whether there exist customary rules of international law governing the status of members of special missions." (Preliminary report on immunity of State officials from foreign criminal jurisdiction by Mr. Kolodkin, Special Rapporteur, 28 May 2008, UN Doc A/CN.4/601, footnote 189.)

Decisions of international courts and tribunals.

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

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

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

105. We are unable to attach any weight to these oblique references. These remarks do not cast any light on the issues with which we are concerned, which were not directly in point before

the ICJ and were not the subject of any considered expression of opinion. In the *Arrest Warrant* case the court was not directly concerned with special missions. We also note that the ICJ stated (at [52]) that the Convention on Special Missions provided "useful guidance on certain aspects of the question of immunities". In *Djibouti v. France* there is nothing to support the view that the ICJ considered and rejected any rules of customary law relating to special missions. (See Wood, p. 62.)

State practice: the United Kingdom.

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

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

108. *Fenton Textile Association Limited v Krassin* (1921) 38 TLR 259 concerned the Trade Agreement of 16 March 1921 between His Majesty's Government and the Russian Socialistic Federative Soviet Republic. When sued in relation to a commercial transaction Mr. Krassin applied for service of the writ to be set aside on the ground that he was the authorised representative of a foreign State and entitled to immunity. The Court of Appeal considered that, in the light of letters received from the Foreign Office, Mr. Krassin did not appear to be an ambassador or public minister authorised and received by the sovereign and, as a special diplomatic representative for a temporary purpose, he was present in this country on the terms of a special agreement which did not confer on him the immunity he sought. Our attention has been drawn to the statement by Scrutton L.J. (at p. 262) that "so long as our Government negotiates with a person as representing a recognized foreign State about matters of concern as between nation and nation, without further definition of his position, I am inclined to think that such representative may be entitled to immunity though not accredited to or received by the King". However, as in the case of *Service v Castaneda*, we do not consider that this *obiter dictum* provides any assistance in relation to the current state of customary international law or the common law in this jurisdiction.

109. In *R v Governor of Pentonville Prison*, *ex parte Teja* [1971] 2 QB 274 India sought the return of Mr. Teja as a fugitive offender. He was arrested on a brief visit to the United Kingdom whilst carrying a document issued by the Republic of Costa Rica which stated that he was a member of a "special mission". Mr. Teja submitted that he was entitled to immunity as a diplomat and head of mission under the VCDR 1961 and the Diplomatic Relations Act 1964.

Lord Parker CJ, with whom the other members of the court agreed, rejected that submission (at p. 28) on a number of grounds. First, Mr. Teja had not been accepted or received by the United Kingdom as a diplomatic agent. Secondly, Costa Rica intended Mr. Teja to go on a special mission within the Convention on Special Missions and not within the VCDR. The Convention on Special Missions had not been implemented into domestic law. Thirdly, in any event, Mr. Teja was in the United Kingdom merely as a commercial agent of the government for the purpose of concluding a commercial contract. It was almost impossible to say that a man who is employed by a government to go to foreign countries to conclude purely commercial agreements, and not to negotiate in any way or have contact with the other government, can be said to be engaged on a diplomatic mission at all. He was there merely as a commercial agent of the government for the purposes of concluding a commercial contract. He was not there representing his state to deal with other states. Accordingly, he could not claim diplomatic privileges and immunities under Article 39 VCDR.

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

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

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

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

not reflect international law, it is inconsistent with the more recent stance of the executive. In the light of what was in issue in *Osman*, the latter reading seems the more likely to have been intended.

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

(1) In *Re Bo Xilai* (2005) 128 ILR 713 the applicant applied for an arrest warrant in respect of Mr. Bo, the Minister for Commerce and International Trade of the People's Republic of China, whom he accused of offences of torture contrary to section 134, Criminal Justice Act 1988. Senior District Judge Workman dismissed the application holding that Mr. Bo was entitled to immunity *ratione personae* as a matter of customary international law. Adopting the reasoning of the ICJ in the *Arrest Warrant* case, the judge concluded that under customary international law rules Mr. Bo had immunity from prosecution as he would not be able to perform his functions unless he was able to travel freely. In addition, he was satisfied that Mr. Bo was a member of a special mission and as such had immunity under customary international law which the judge considered had been embodied in the Convention on Special Missions.

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

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

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

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

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

Government. On the hearing of the appeal, the two central issues in the present proceedings were the subject of agreement.

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

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

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

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

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

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

(3) Nevertheless, customary international law requires the grant of inviolability and immunity from criminal proceedings to members of special missions and effect should be given to this by the courts of England and Wales.

119. Reference has been made earlier in this judgment to the fact that, following the decision of this court in *Khurts Bat*, on 4th March 2013 the FCO (acting by the then Secretary of State, the Rt. Hon. Mr. William Hague MP) made a written Ministerial Statement on "special mission immunity" announcing a "new pilot process by which the Government will be informed of inward visits which may qualify for special mission immunity status". It expressed the Government's view that members of special missions "enjoy immunities, including immunity from criminal proceedings and inviolability of the person" to which the common law gives effect.

120. In our view, there is only limited support in judicial decisions in the United Kingdom for the existence of rules of customary international law requiring the inviolability and immunity from criminal jurisdiction of members of special missions. Although they are not authoritative, the decisions of District Judges in criminal proceedings summarised at paragraph [114] above, show that in practice it has been accepted that members of special missions are entitled to immunity from criminal jurisdiction. Similarly, the decision of this court in *Khurts Bat* cannot be considered an authoritative decision on the point because the immunity of a member of a special mission was accepted by the parties. However, there is unequivocal evidence of the current position of the executive, in particular in its submissions in *Khurts Bat*. It seems clear that, while the executive does not accept that all of the provisions of the Convention on Special Missions reflect customary international law, it does consider 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.

State practice: the United States

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

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

123. In its objection to the Magistrate Judge's report and recommendation, The Gambia submitted to the US District Court Southern District of Florida (995 F. Supp. 1469 (1997)) that procedures concerning accreditation set out in a diplomatic circular note were inapplicable because they applied only to diplomats assigned to permanent missions and that in the absence of governing US law the court must look to customary international law and the

Convention on Special Missions. The court rejected the submission that a special advisor to a special mission in the United States should be accorded full diplomatic immunity in circumstances where there had not been proper accreditation. It also observed:

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

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

125. In *Kilroy v Windsor (Prince Charles, Prince of Wales)* (Civil Action No. C-78-291, United States District Court, Northern District of Ohio, Eastern Division, 1978) the complainant brought an action against the Prince of Wales alleging that his rights under the US Constitution had been violated in that, during a ceremony in which an honorary degree was being conferred on the Prince, the complainant put a question regarding the treatment of prisoners in Northern Ireland and was removed from the premises. The Legal Advisor to the US State Department wrote to the Attorney General requesting that the Department of Justice file a suggestion of immunity in respect of the Prince on the ground that his visit was a special diplomatic mission. The Department of Justice filed a suggestion of immunity which stated, inter alia, that under customary rules of international law recognised and applied in the United States senior officials on special diplomatic missions are immune from the jurisdiction of the United States. The suggestion of immunity was upheld by District Judge Lambros. It should be noted that this case was concerned with immunity from civil jurisdiction and therefore goes rather further than the rule for which the Defendants contend in the present proceedings.

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

> "…upon an Executive branch determination, senior foreign officials on special diplomatic missions are immune from personal jurisdiction where jurisdiction is based solely on their presence in the United States during their mission.
>
> …
>
> Other states have recognised special mission immunity and its foundation in international law. The full extent of that immunity may remain unsettled, but need not be decided here in any event. Minister Bo's case falls well within the widespread consensus that, at a minimum, States are constrained in their ability to exercise jurisdiction, as here, over ministerial-level officials invited on a special diplomatic mission."

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

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

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

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

> "In summary, it is clear from United States practice and case-law that the US Government considers that official visitors, accepted as such by the Executive, are entitled to immunity for the duration of their visit. US practice supports the existence of customary rules regarding the immunity of official visitors. It also demonstrates that the applicability of this immunity is dependent on the consent and recognition, accorded by the receiving

> State's Executive, of the official visit as such." (Wood, Max Planck UNYB 16 (2012) at p. 97)

State practice: other States

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

Austria

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

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

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

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

Belgium.

132. In *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) ICJ Reports 2002 p. 3 Belgium stated that "… representatives of foreign States who visit Belgium on the

basis of an official invitation… would be immune from enforcement of an arrest warrant in Belgium."

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

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

Finland.

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

France.

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

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

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

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

> "There is not yet any settled answer to the question whether, and if so to what extent, any jurisdictional immunity is enjoyed by Government officials who are not members of an Embassy or a Consulate but who are

> sent on an official mission to a Foreign State." (Jurisdictional Immunities of Specialist Missions: The French Property Commission in Egypt, (1963) 12 ICLQ 1383.)

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

> "Lorsque des personnes ont, comme en l'espèce, des fonctions essentiellement internes, il n'est pas nécessaire qu'elles soient protégées par des immunités en tout temps et en toutes circonstances; il suffit qu'elles puissent bénéficier d'immunités lorsqu'elles se rendent à l'étranger, pour le compte de leur Etat, dans le cadre d'une mission officielle. Tel est l'objet des immunités reconnues aux membres des missions spéciales, qui constituent une garantie suffisante pour des personnes exerçant une fonction, telle que celle de procureur de la République ou de chef de la sécurité nationale, qui n'implique pas de fréquents déplacements à l'étranger." (referred to by Wood, Max Planck UNYB 16 (2012) at p.77)"

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

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

Germany.

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

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

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

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

> "[286] …It is contentious amongst scholars of international law whether its provisions are already now the basis of State practice as customary international law. Professor Doehring, whom the Provincial Court heard as an expert, has indicated that no court decisions on that issue are known. He is of the opinion that the content of the Convention has not up to now created ascertainable pre-effects in the sense of the coming into being of customary international law supported by a general *opinio juris* (for the same view see also Wolf, *Europäische Grundrechtezeitschrift* 1983, pp. 401, 403; also doubtful is Bothe, *Zeitschrift für Ausländisches und Öffentliches Recht und Völkerrecht* 1971, pp. 246, 265). Lagoni (in Menzel & Ipsen, *Völkerrecht,* 2nd ed., 1979, p. 282), on whom Doehring relies, sees in the Convention merely a possibility of "indications for recognition by customary international law of the Special Mission as an institution of international law and of the diplomatic status of its members". On the other hand, Bockslaff & Koch in their comprehensive article on the case at hand (*German Yearbook of International Law,* vol.25 pp. 539-584) are of the opinion that it follows from numerous statements of States and from State practice that the Convention reflects valid customary international law, at a minimum with respect to Articles 1a, 2 and 3, which lay down the requirements for a special mission (p. 551).
>
> [287] The experts presented by the defence, Professors Bothe, Delbrück and Wolfrum, also proceed on the assumption that the Convention "could be seen as an expression of valid customary law in its basic or minimum requirements", but not in its entirety (Delbrück; Wolfrum speaks of a "minimum consensus" with reference to a memorandum of the UN Secretariat).

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

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

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

The Netherlands.

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

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

In response the Government stated:

> "In the CAVV's opinion, all members of official missions may be entitled to full immunity under customary international law. The Government endorses this. Members of official missions

> can be seen as "temporary diplomats". They, like diplomats, require the immunity so they can carry out their mission for the sending State without interference. However, unlike diplomats, members of official missions only require this immunity for a limited period, namely the duration of the mission to the receiving State."

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

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

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

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

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

147. However, the CAHDI 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.

The views of jurists.

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

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

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

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

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

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

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

> "Scholars generally agree that "clear and comprehensive rules of customary international law" on the immunity of temporary diplomatic missions are lacking. In 1969 the General

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

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

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

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

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

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

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

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

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

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

In her assessment she draws the following conclusions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion on customary international law.

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

164. In a further submission the Claimants maintain that, even if members of a special mission are entitled to immunity from criminal jurisdiction, this applies only in relation to official acts. They refer to the fact that the conduct alleged against Lt. General Hegazy constitutes torture contrary to section 134, Criminal Justice Act 1988 and submit that, accordingly, it cannot be considered an official act. In our view, this submission is unfounded for a number of reasons. First, although there are instances where such a limitation has been suggested (see, for example, the case of Jean-Francois H, referred to at paragraph [138] above), State practice in general does not support any such limitation on special mission immunity in customary international law. Thus, Kalb, writing in the Max Planck Encyclopaedia of Public International Law, refers to the current practice in the United Kingdom, where immunity has been upheld repeatedly at first instance notwithstanding that the intended proceedings allege

conduct amounting to international crimes. She concludes that special mission immunity applies even in cases concerning international crimes. Secondly, any such limitation would be inconsistent with the rationale of the immunity which is a functional immunity intended to permit the mission to perform its functions without hindrance. Thirdly, any such limitation would be inconsistent with the personal inviolability of a member of a special mission which is now shown to be required by customary international law.

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

VI. The Common Law

166. If we are correct in our conclusion that customary international law requires a receiving State to secure the inviolability and immunity from criminal jurisdiction of an accepted member of a special mission, it becomes necessary to consider whether, and if so by what means, effect is to be given to such a rule in proceedings before courts in this jurisdiction. Blackstone's view that the law of nations is adopted to its full extent by the common law as part of the law of England (Blackstone, Commentaries on the Laws of England, Fourth Book, Fifth Chapter) has had many adherents both judicial (for example, Lord Denning M.R. in *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* [1977] 1 QB 529) and academic (for example, H. Lauterpacht (1939) Transactions of the Grotius Society 51; Sir Robert Jennings and Sir Arthur Watts in Oppenheim's International Law, 9th Ed., (1992), pp. 56-7). However, it is not possible to make sweeping deductions from such broad statements of principle as the relationship between customary international law and the common law in this jurisdiction is far more complex. It seems preferable to regard customary international law not as a part but as a source of the common law on which national judges may draw. (See *R v. Jones (Margaret)* [2007] 1 AC 136 per Lord Bingham at 155; Crawford, Brownlie's Principles of Public International Law, 8th Ed., pp. 67, 71.) As part of this process they will have to consider whether any impediments or bars to giving effect to customary international law may exist as a result of domestic constitutional principles. Moreover, as Lord Mance JSC pointed out in *R. (Keyu) v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2015] 3 WLR 1665 at [149], it appears that judges in this jurisdiction may face a policy issue as to whether to recognise and enforce a rule of customary international law. However, given the generally beneficent character of international law the presumption should be in favour of its application. As Lord Mance observed in *Keyu* (at [150]):

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

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

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

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

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

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

Section 1 provides:

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

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

171. Secondly, Mr. Hickman submits that it would be inappropriate for the courts to recognise the immunity of members of special missions from criminal proceedings because this would

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

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

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

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

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

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

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

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

179. Fifthly, Mr. Hickman submits that the matter is controversial, requires democratic deliberation and raises difficult policy issues unsuitable for resolution by the courts. In particular he points to the fact that the immunity would be available where it was sought to bring a prosecution pursuant to section 134, Criminal Justice Act 1988 which creates a criminal offence of torture in domestic law in compliance with the requirements of the UN Convention against Torture ("UNCAT"). In this regard he draws attention, first, to the fact that the prohibition on torture in international law is a peremptory norm of *jus cogens* from which derogation is not permitted. This, however, does not assist the Claimants. It has now

been demonstrated conclusively by the ICJ (*Jurisdictional Immunities* case), the European Court of Human Rights (*Al-Adsani v. United Kingdom* (2002) 34 EHRR 11) and the House of Lords (*Jones v. Saudi Arabia*) that the grant of immunity in circumstances required by international law does not derogate in any way from the substantive prohibition. The submission confuses substantive prohibitions on conduct in the area of criminal responsibility with the distinct procedural question as to whether there exists adjudicative jurisdiction in respect of that conduct. In this context, we note that in the present case the Claimants have, correctly in our view, abandoned their pleaded ground that the immunity of a member of a special mission does not apply where he is charged with torture. Secondly, in this regard, reference is made to *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147. However, that case was concerned with a restriction on the immunity *ratione materiae* of a former head of state arising from the UN Convention on Torture and the reasoning has no application to the immunity *ratione personae* of a member of a special mission. There is no inconsistency between the offence created by section 134 and the recognition of immunity *ratione personae* from criminal proceedings of a member of a special mission.

VII. Conclusion

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

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

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

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

ANNEX

Committee of Legal Advisors on Public International Law (CAHDI)

Replies by States to the questionnaire on immunities and special missions

Question 5 asks:

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

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

Albania.

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

Answer to Question 5.

> "Albania considers that issues related to immunity of special missions derive from customary law. The customary rules that are applied to a "high-level" mission are related with immunity from civil and criminal jurisdiction in respect of their official acts."

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

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

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

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

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

Andorra.

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

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

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

Armenia.

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

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

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

Comment

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

Austria.

Austria has acceded to the Convention on Special Missions.

Answer to Question 5:

> "Although Austria is aware of the progressive elements in the Convention, it considers it as reflecting by and large customary international law. Austria thus applies the provisions of the Convention in relation to any State. If a state not party to the Convention contested the customary status of a provision in a particular situation, a detailed case-by-case analysis would be necessary."

Answer to Question 6:

> "Every member of a special mission enjoys immunity from criminal jurisdiction for official acts. As to immunity in civil and administrative proceedings, Article 31(2) of the Convention applies."

Comment

Contrary to the submission of the Claimants, the fact that Austria is a party to the Convention does not detract from the significance of the fact that it applies its provisions, which it considers as reflecting by and large customary international law, in relation to all States.

If the answer to Question 6 is intended to mean that there is no immunity from criminal jurisdiction for acts other than official acts, it is inconsistent with the provisions of the Convention which Austria says it applies to all States. Furthermore, any exercise of criminal jurisdiction would be an infringement of the inviolability of the member of the mission, which Austria appears to accept.

Accordingly we consider that Austrian practice is in conformity with general international practice and consistent with the proposed rule. It also provides positive support for the existence of the rule.

Belarus

Belarus has acceded to the Convention on Special Missions.

Answer to Question 5:

> "Customary international law applied to the status of members of special missions stems from the principle of sovereign immunity and depends on the category of the mission in question. The Heads of States, the Heads of Governments and Foreign Ministers enjoy the full diplomatic immunity irrespective of the nature of the act performed. The same extent of immunity may be recognized with regard to the other senior State officials on a mission abroad when they are key actors of exercising some crucial aspects of the external policy of State.
>
> The immunity of other members of special missions is based upon the explicit or implied consent of the receiving State to a special mission and encompasses, at least inviolability and immunity in respect of official acts."

Comment

The response indicates that the extent of immunity may depend on the seniority of the member of the mission. However, it accepts that in the case of all members of special missions inviolability and immunity in respect of official acts are the minimum required.

Czech Republic.

The Czech Republic is a party to the Convention on Special Missions by succession, Czechoslovakia having acceded to the Convention.

Answer to Question 5:

> "The Czech Republic is of the view that the Convention, in particular the provisions concerning the scope of privileges and immunities, to large extent reflects customary international law. With regard to States which are not parties to the Convention, the customary nature of relevant rules will be assessed on a case-by-case basis."

In answer to Question 6 it states that as the Czech Republic is a party to the Convention it applies its relevant provisions and here refers, inter alia, to personal inviolability and immunity from jurisdiction.

Comment

The Czech Republic does not identify the provisions of the Convention which may not reflect customary international law. However, its statement that the Convention, in particular the provisions concerning the scope of privileges and immunities, to a large extent reflects customary international law provides general support for the proposed rule.

Denmark.

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

Answer to Question 5:

> "No detailed analysis has been made hereof but a preliminary view would be that Denmark does not regard the Convention on Special Missions as such to reflect international custom although certain principles which mirror general principles under State immunity law are of customary nature."

Comment

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

Estonia.

Estonia has acceded to the Convention on Special Missions.

In response to Question 5 Estonia simply stated that it was a party to the Convention.

Comment

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

Finland.

Finland has signed but not ratified the Convention on Special Missions and accordingly is not a party.

Answer to Question 5:

> "No official statements by Finland on the nature of obligations and/or definitions regarding immunity of Special Missions have been made."

However, in response to Question 6 it draws attention to the Act on the Privileges and Immunities of International Conferences and Special Missions (572/1973) which provides that the person of members of the delegation or the special mission shall be inviolable (section 9) and that members of the delegation or the special mission shall enjoy the same immunity from criminal jurisdiction as members of diplomatic missions in Finland (Section 10).

Comment

Finland's practice is consistent with the existence of the proposed rule and provides positive support for its existence.

France.

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

Answer to Question 5:

> "Concerning the privileges and immunities enjoyed by members of a special mission, it is clear that the scope of such privileges and immunities remains very uncertain in law. The New York Convention only partially reflects the state of customary international law. The New York Convention has only been ratified by a few States. One of the reasons for this limited number of ratifications (38 as of 1 March 2014) as well as the non-ratification of France, is the very wide range/extent of privileges and immunities recognised for members of special missions, who benefit from privileges and immunities enjoyed by members of diplomatic missions. In these circumstances, the rules imposed by the New York Convention do not appear to be considered, taken as a whole, as reflecting the state of customary international law on the topic. However, there is little doubt that a special envoy, who is not a national of the receiving State, should benefit from immunities necessary to the exercise of his/her functions, namely personal inviolability, which prohibits any coercive measure on the person of the special envoy such as arrest, and immunity from jurisdiction for official acts in the exercise of his/her functions under and within the framework of the Special Mission."

Comment

In common with a number of other States, including the United Kingdom, France does not accept that the Convention on Special Missions in its entirety reflects customary international law.

However, notwithstanding the reference to immunity from jurisdiction for official acts, France's response supports the existence of a rule requiring personal inviolability which would be inconsistent with any exercise of criminal jurisdiction.

Georgia.

Georgia has acceded to the Convention on Special Missions.

Answer to Question 5:

> "There is no genuine approach in Georgia towards the certain obligations and/or definitions regarding immunity of special missions as the manifestation of customary international law. Georgian governmental bodies solely rely on those international instruments which were consented to be bound by the state and as long as there are hardly any completed or ongoing judicial cases in Georgian courts regarding the immunity of special missions it is difficult to assess authoritatively the possible affiliation of certain provisions from those instruments with customary international rules."

Comment

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

Germany.

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

Answer to Question 5:

> "The German Government takes the view that immunity of the members of special missions from judicial, in particular from criminal proceedings, is part of customary international law. Moreover, if there has been explicit consent on transit, customary law also stipulates the granting of privileges necessary for transit. Beyond these core privileges, States enjoy discretion concerning the exact scope of immunities and privileges of individual Special Missions. The basis for any regime of immunities has to be the mutually agreed function of the individual mission and the necessities arising out of this function."

Comment

The Claimants submit that this response is inconsistent with the view of the German Federal Supreme Court in *Tabatabai* that "it is contentious amongst scholars of international law whether [the provisions of the Convention on Special Missions] are already now the basis of state practice as customary international law…"

However, *Tabatabai* was heard between 1983 and 1986. There has been a great deal of developing state practice in this field since that date which, in our view, supports the emergence of the proposed rule.

Germany's response to the questionnaire provides unequivocal support for the existence of the proposed rule.

Ireland.

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

Answer to Question 5:

> "Ireland accepts that members of special missions may be entitled to certain immunities but has not taken a position as to the precise scope of immunities applicable to special missions under customary international law. Any situation that was to arise would be considered on a case-by-case basis. If an issue of special mission immunity arose in the context of legal proceedings in Ireland, it would be for the relevant court to determine to what extent immunity applied with reference to customary international law."

Comment

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

Italy

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

Answer to Question 5:

> "Italy considers that immunity of the members of special missions from judicial proceedings, and in particular from criminal proceedings, is part of customary international law. Beyond this, States enjoy discretion with regard to the exact scope of immunities granted to a special mission, depending on its function and the necessities it entails."

Comment

This response provides unequivocal support for the existence of the proposed rule.

Latvia

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

Answer to Question 5:

> "Since Latvia has not had sent or received any Special Mission the customary law of diplomatic missions had never been applied."

It states that for the same reason there is no national regulation regarding immunities for Special Missions.

Comment

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

Mexico

Mexico has acceded to the Convention on Special Missions

Answer to Question 5:

> "Albeit Mexico acknowledges the existence of certain State practice to grant ratione personae immunity from jurisdiction to officials of special missions whenever they are performing public functions and prior the host State consent on such immunity, it has no defined position as to the existence of a customary rule in this respect, Rather, Mexico has voluntarily opted to be legally bound in this respect by the rules codified in the [United Nations Convention on Special Missions]."

Comment

Unlike Austria and the Czech Republic Mexico's response does not address what rules it applies vis à vis a State which is not a party to the Convention. This response provides no relevant evidence of State practice either for or against the proposed rule.

The Netherlands

The Netherlands has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

> "In the view of the Netherlands, there is sufficient basis to conclude an obligation exists under customary international law to accord full immunity to the members of official missions. The underlying reason for the immunity of the members of official missions is to facilitate the smooth conduct of international relations. Members of official missions may be seen as "temporary diplomats". They, like diplomats, require this immunity in order to carry out their mission for the sending state without interference. Unlike diplomats, members of special missions only require this immunity for a short period, namely the duration of the mission to the receiving State. Therefore, members of official missions enjoy immunity in The Netherlands based on the provisions of Dutch law…"

Comment

This response provides unequivocal support for the existence of the proposed rule.

Norway

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

Answer to Question 5:

> "Norway does see an emerging customary law developing on this topic, but has not taken a position as to the precise scope of immunities applicable to special missions. Any situation that was to arise would be considered on a case-by-case [basis]. We welcome a future discussion on the topic."

Comment

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

Romania

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

Answer to Question 5:

> "Although not a party to the UN Convention on Special Missions, Romania considers that its provisions reflect the customary international law in this field and Romania applies the Convention as such."

Comment

This response provides unequivocal support for the existence of the proposed rule.

Serbia

Serbia is a party to the Convention on Special Missions by succession, Yugoslavia having signed and ratified the Convention.

Answer to Question 5:

> "Yes, it does."

In response to Question 6 it states that the extent of the privilege and immunities granted to special missions is determined according the United Nations Convention on Special Missions.

Comment

Contrary to the submission of the Claimants, this is an unequivocal response. Furthermore, the fact that Serbia is a party to the Convention does not detract from its force. Customary international law will govern the immunity applied in Serbia to special missions from States which are not parties to the Convention.

This response provides unequivocal support for the existence of the proposed rule.

Switzerland

Switzerland has signed and ratified the Convention on Special Missions.

Switzerland answered Question 5 in the affirmative as follows:

> "Oui. Nous pouvons mentionner les éléments suivants (liste non exhaustive qui ne préjuge pas de la position de la Suisse à l'égard d'autres domaines qui ne seraient pas évoqués ci-dessous):
>
> - De manière générale, la Suisse considère que la Convention sur les missions spéciales constitue dans une large mesure une codification du droit international coutumier, s'agissant en particular de la portée des privilèges et immunités.
> - Principe visant à accorder des privilèges et immunités à la mission spéciale et à ses membres dans une mesure comparable à ce qui est accordé aux missions diplomatiques et à leurs membres.
> - Statut du chef d'Etat, chef de gouvernement et ministre des affaires étrangères, étant entendu que la définition prévue à l'art. 21 de la Convention sur les missions spéciales ne saurait limiter les immunités dont ces personnes peuvent jouir en vertu du droit international coutumier lorsqu'elles ne sont pas en mission spéciale au sens de la Convention."

Comment

The fact that Switzerland is a party to the Convention does not detract from the significance of its response.

This response provides unequivocal support for the existence of the proposed rule.

Sweden

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

Sweden answers Question 5 in the negative and states:

> "In the preparatory work to the Swedish Act on Jurisdictional Immunity of States and their Property (prop. 2008-09:204) there is a reference to special missions stating that Sweden has not signed the Convention and that it is uncertain if the Convention reflects customary law. There is no position expressed in the matter."

Comment

Sweden considers it uncertain whether the Convention on Special Missions reflects customary international law.

United Kingdom

The United Kingdom has signed but not ratified the Convention on Special Missions and accordingly it is not a party.

The United Kingdom answers Question 5 in the affirmative. It also states:

> "It is clear that persons on a special mission enjoy personal inviolability and immunity from criminal jurisdiction. It is likely that persons on a special mission

> would enjoy immunity from civil jurisdiction in so far as the assertion of civil jurisdiction would hinder them performing their official functions as members of a special mission. However there are no recent judicial precedents concerning the immunity of members of a special mission from civil jurisdiction.
> …
>
> As other persons enjoying immunity ratione personae, the members of a special mission enjoy personal inviolability and immunity from criminal jurisdiction without exception."

Comment

This response provides unequivocal support for the existence of the proposed rule.

United States of America

The USA has not signed or ratified the Convention on Special Missions.

Answer to Question 5:

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

Comment

The United States limits itself to expressing its view that there is a widespread consensus that, at a minimum, a certain level of immunity is required to be accorded to ministerial level members of special missions. Accordingly, this response, unlike the US practice referred to in the judgment, provides no relevant evidence of State practice either for or against the proposed rule.