IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No: CO/6384/2015

BETWEEN:

R (FREEDOM AND JUSTICE PARTY and others)

Claimants

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

-and-

(1) COMMISSIONER OF POLICE OF THE METROPOLIS
(2) AMNESTY INTERNATIONAL
(3) REDRESS

Interested Parties

SUBMISSIONS ON BEHALF OF AMNESTY INTERNATIONAL AND REDRESS

I. Introduction

1. Amnesty International and REDRESS, the Second and Third Interested Parties, (the **"Interveners"**)[1] were granted permission to intervene in writing by the order of Mr

[1] Amnesty International (AI) is a movement of over seven million members, activists, and supporters in more than 150 countries and territories, working to promote respect for and protection of internationally recognised human rights principles. It monitors relevant laws and practices in countries throughout the world, in light of international law and standards. The organisation was awarded the Nobel Peace Prize in 1977. AI Ltd in the United Kingdom operates as the international secretariat (headquarters) of all national AI entities (Sections). REDRESS is an international human rights non-governmental organisation and registered charity based in London with a mandate to assist torture survivors to seek justice and other forms of reparation. It pursues this mandate through a combination of individual casework, research and advocacy at both national and international levels.

Justice Sweeney dated 19 April 2016 (the **"Order"**). Consistently with the Interveners' application to intervene and the Order, these submissions consider only certain issues of law arising in this application.

2. The first issue (the **"CIL issue"**) is whether there is an obligation in customary international law that requires States to provide those on a special mission / "visiting foreign officials" (see further §7.2 below) with absolute personal inviolability and complete immunity from criminal jurisdiction in the forum State.

3. The second issue (the **"common law issue"**) is whether, if such an international law obligation exists, it should be received into the common law.

4. The Interveners' submissions on these two issues are summarised below and developed in the remainder of this document.

5. The CIL issue:

   5.1. The Defendants have not established that, prior to 1969 - the year that the Convention on Special Missions ("**the Convention**") was opened for signature - there was a rule of customary international law obliging States to give visiting foreign officials absolute personal inviolability and complete immunity from criminal jurisdiction.

   5.2. The Defendants have not established that, since 1969, clear and consistent state practice has emerged accompanied by the recognition of a legal obligation (*opinio juris*) that States are obliged to afford visiting foreign officials absolute personal inviolability and complete immunity from criminal jurisdiction.

   5.3. Therefore, no such rule of customary international law has been shown to exist.

6. The common law issue: if the Defendants establish that there is a clear rule of customary international law obliging States to afford visiting foreign officials absolute personal inviolability and complete immunity from criminal jurisdiction, it should not be received into the common law because (a) the recognition of an international law immunity, which bears directly on the UK's diplomatic/foreign

relations, is a matter for Parliament and (b) it is difficult to reconcile with the UK's obligations under the UN Convention Against Torture (**"UNCAT"**).

II. The CIL issue

(i) Introduction

7. The question raised by the CIL issue is: are the Defendants[2] able to satisfy the Court that there is a rule of customary international law

   7.1. obliging States to afford to

   7.2. visiting foreign officials (viz., for present purposes, high ranking State officials - other than Heads of State or Government or Ministers of Foreign Affairs - on special missions[3])

   7.3. absolute personal inviolability from arrest/detention and complete immunity from criminal jurisdiction?

8. A rule of customary international law exists where two requirements – state practice and *opinio juris* – are satisfied.

   8.1. As confirmed recently by the Court of Appeal in Serdar Mohammed v Ministry of Defence [2016] 2 WLR 247

   "The two requirements for the establishment of a rule of customary international law are: general practice by States, and the conviction that such practice reflects or amounts

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[2] The burden rests upon the party claiming the existence of a norm of customary international law to prove its case: see, e.g., JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 513C (Lord Oliver): *"[a] rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it"* (emphasis added).

[3] There does not appear to be any settled state practice on the type of foreign visitor that may be afforded privileges and immunities. This is apparent from States' responses to the Council of Europe's Committee of Legal Advisors (CAHDI) questionnaire (see §31.1 below). Some States consider that CIL requires only that immunities are extended to Heads of State or Government and Foreign Ministers (the so-called '*troika*'), others afford immunity to visiting cabinet level Ministers, other States afford immunities to some high ranking state officials below ministerial level, and some States afford immunity to all those received on a special mission, irrespective of status (including whether they hold any official state position or not). However, for the purposes of this case, the Interveners' submissions focus on high level State officials.

to law (opinio juris) or is required by social, economic, or political exigencies (opinio necessitatis): see ICJ Statute, Art. 38." (§220)

8.2. The Court of Appeal quoted from the judgment of the International Court of Justice (**"ICJ"**) in the North Sea Continental Shelf cases,[4]

"State practice … should have been both extensive and virtually uniform … 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." (§74)

8.3. The ICJ also said:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough." (§77)

8.4. The ICJ then (§78) referred to and applied the *ratio* of the decision of the Permanent Court of International Justice (**"PCIJ"**) in the SS Lotus case[5], in which France asserted that there was a general practice amongst states to abstain from bringing criminal proceedings in respect of conduct on board ships on the high seas which flew the flag of another state and that this was evidence of a norm of customary international law that the country whose flag a vessel flies has exclusive criminal jurisdiction in respect of it. The PCIJ rejected this assertion. It held that such a practice,

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

8.5. The Court of Appeal's approach in Serdar Mohammed illustrates the robust and careful examination that is necessary when an English court is asked to declare the existence of a rule of customary international law. The Court of

[4] Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands [1969] ICJ Rep. 3
[5] France v Turkey (1927) P.C.I.J. Reports, Series A, No. 10.

Appeal assessed in detail the evidence relied upon by the Government to support its assertion that there was a rule of customary international law permitting detention in non-international armed conflicts; the Court held that no such rule had been shown to exist: see, e.g. §§228-234, 242-244, 251.

8.6. D2's suggestion - that it is for the Claimants to prove "*a general practice of [States] refusing to recognise immunity from criminal prosecutions*" purports to reverse this burden of proof (cf. D2's Detailed Grounds §18). Even if the Defendants could show an historic rule of customary international law requiring States to provide such immunity to be extended to visiting foreign officials: they retain the burden of proving that it is an extant rule of customary international law.

(ii) **The Defendants' case**

9. The Defendants assert as follows:

9.1. Customary international law requires that members of special missions enjoy the "core" immunity from criminal process and personal inviolability for the duration of their mission.[6]

9.2. Prior to the promulgation of the Convention: immunity from criminal jurisdiction for members of special missions was required by customary international law.[7] In its commentary on Article 31 of the Draft Articles on Special Missions (immunities from jurisdiction), the International Law Commission (**"ILC"**) did not mention any reservation as regards immunity from criminal, cf. civil or administrative, jurisdiction.[8]

9.3. During the ILC's work on the Draft Articles - which later became the Convention - the UK raised no concerns regarding personal inviolability and

[6] D1's Detailed Grounds, §106; D2's, Detailed Grounds, §15ff.
[7] D1's Detailed Grounds, §98, D2's Detailed Grounds, §19.
[8] D1's Detailed Grounds, §107.

immunity from criminal jurisdiction.[9] The FCO has consistently maintained its view on the core immunity from criminal jurisdiction and personal inviolability for members of special missions.[10]

9.4. Commentators' statements about the uncertainty of customary international law immunity relating to special missions concern non-criminal aspects of the immunity, not its "core" aspects.[11] Authoritative commentators conclude that customary international law requires inviolability of the person and immunity from criminal jurisdiction for members of special missions.[12]

9.5. Evidence of custom on special missions is "far from limited" (D1's Detailed Grounds, §103). Prior to the promulgation of the Convention, the ILC conducted an in-depth survey of state practice and the Draft Articles were adopted by the General Assembly with 98 votes in favour.[13]

9.6. Under customary international law, a member of a special mission is entitled to the same immunities and inviolability of the person as a diplomat accredited to a permanent diplomatic mission.[14]

10. These assertions and the material relied on in support of them are analysed below.

(iii) **Customary international law relating to special missions prior to the Convention on Special Missions 1969**

11. The Defendants assert that articles 29 and 31 of the Convention[15] codified pre-existing customary international law.[16]

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[9] D1's Detailed Grounds, §101.
[10] D1's Detailed Grounds, §106.
[11] D1's Detailed Grounds, §105.
[12] D1's Detailed Grounds, §108.
[13] D1's Detailed Grounds, §103.
[14] D1's Detailed Grounds, §95, relying on Khurts Bat v Investigating Judge of the Federal Court of Germany [2013] QB 349 at §§26; 29 (Moses LJ).
[15] In the draft Convention submitted to the General Assembly by the ILC in 1967, these were enumerated as Draft Articles 24 and 26, respectively.
[16] D1's Detailed Grounds, §98; D2's Detailed Grounds, §11a.

12. Those articles provide as follows:

> *Article 29*
> *Personal inviolability*
> The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.
>
> *Article 31*
> *Immunity from jurisdiction*
> 1.The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State. […]

13. In large part the Defendants rely on the generalised observation of the ILC in its commentary on the Draft Articles (1967) that since the Second World War it is "*now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions*".[17]

14. However, close review of the ILC's work leading up to the 1967 Draft Articles and the commentary on specific Draft Articles reveals a much more nuanced picture: this is set out at §§16ff below. In summary, the review shows that there were disputes between States on a number of important topics, including – significantly - whether personal inviolability and immunity from criminal jurisdiction should be

    14.1. applicable only in respect of official acts during the mission (so the immunities and privileges would align with those afforded to consular officials rather than with those afforded to ambassadors/accredited diplomats): see further, §22 below; and

    14.2. afforded only to high-level officials rather than all members of special missions (see further, §23 below).

15. There are four key points that arise out of the ILC's work.

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[17] D1's Detailed Grounds, §98; D2's Detailed Grounds, §19.

16. **First**, and as to the purpose of the ILC's work: in the 1950s the ILC considered the international law on diplomatic relations and in 1958 elaborated draft articles on diplomatic intercourse and immunities. These draft articles addressed permanent missions only. It was resolved that the subject of special missions would be considered separately because further study was necessary to discern what rules should be applicable to "*ad hoc* diplomacy".[18] Pursuant to Article 1 of its Statute, the ILC's object is the *"progressive development of international law and its codification"*.[19] Article 15 of the Statute of the ILC explains that *"progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine"* (emphasis added). Article 16 provides for the appointment of a Special Rapporteur regarding proposals for the progressive development of international law. The appointment of Milan Bartoš as Special Rapporteur supports the fact that the study into special missions was regarded as relating to the progressive development of international law.

17. **Secondly**, in his first Report on Special Missions (1964), the Special Rapporteur described his methodology and research into whether there were any existing rules of international law on the scope/content of privileges and immunities afforded to *ad hoc* diplomats.[20] He concluded that there was a paucity of evidence on (i) the content of privileges and immunities and (ii) their applicability. This discussion was prefaced by a preliminary note in which the Special Rapporteur described the subject matter as

[18] For a summary of the context in which the ILC's work on special missions began, see Report on Special Missions by Mr Milan Bartoš, Special Rapporteur, Doc. A/CN.4/166, YBILC 1964, vol. II p.67, 69-70 (**"Bartoš, First Report"**).
[19] Statute of the International Law Commission 1947, art. 1(1).
[20] Bartoš, First Report, pp. 70-75.

"one on which no clearly defined solutions have crystallized … [t]here are no world-wide established precedents on a number of problems covered by this subject, and practice is very varied, differing from one country to another. […] We are dealing with a new question so far as the establishment of rules is concerned and indeed a new phenomenon in international relations." (§§1-2, p.69)

18. The Special Rapporteur noted that visits of Heads of State or Government on ceremonial missions or international meetings were covered by special rules but that the modern rise of the use of special missions in other circumstances was marked by considerable divergence in practices.[21] He posed the question *"Are there or are there not any rules of positive public international law concerning special missions?"* (p.75) His answer included the following:

"37. 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. …

38. (I) Although the dispatch of special missions and itinerant envoys has been common practice in recent times … they have no firm foundation in law. .. [T]he rules of law relative to ad hoc diplomacy and the sources from which they are drawn are scanty and unreliable. …

40. (II) One question has exercised jurists, both as a matter of practice and of doctrine: what is the scope of the facilities, privileges and immunities to which such missions are entitled and which the receiving States are obliged to guarantee to them? 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. …

44. (V) With no well-established juridical customs and no clearly defined practice, … with no well-grounded positions in the literature and with no institutions which can be described as accepted by the civilized nations … All the proposals made for this purpose [the creation of international law de lege ferenda] merely mention the existence of ad hoc diplomacy and recognize its rights by analogy with the status of resident diplomacy. …

45. 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. … It is difficult to apply this method [of codification and progressive development of international law] when there are no established rules and it is not clear what rules should be introduced." (pp.75-77, emphasis added)

[21] Bartos, First Report, see in particular, §§15-16, 46, 59.

19. On the specific question of the content of the facilities, privileges and immunities afforded to members of special missions, the Special Rapporteur stated[22]

> *"(1) …Even on this fundamental question, however, opinions are not unanimous. [T]he literature and the practice are still uncertain about the question whether such privileges attach to ad hoc diplomacy as of right or by virtue either of the comity of nations or of mere courtesy.*
>
> *(13) 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? …[I]t has not yet been determined, either by the Commission or in practice, precisely to what extent ad hoc diplomacy enjoys these diplomatic facilities."*(emphasis added)

20. The Special Rapporteur said that generalised assertions as to the appropriateness of extending to *ad hoc* diplomats the privileges and immunities of permanent diplomats lacked necessary specificity: "*there is a certain vagueness about this whole question*" (§§(11), (12) at p.105). He identified the need "*(17) … to draft legal rules specifying to what extent and in what circumstances the enjoyment of such rights is necessary to ad hoc diplomacy."* (p.106) In light of these observations, the Defendants' attempts to emphasise the ILC's task, vis-à-vis special missions, as being one of codification of existing rules as opposed to progressive development of international law, is misplaced (cf. D1's Detailed Grounds, §98; D2's Detailed Grounds, §§16-17).

21. Personal inviolability (draft article 24), was described by the Special Rapporteur as being simply a restatement of article 29 of the Vienna Convention on Diplomatic Relations (p.110). Draft article 26(1) provided for immunity from the criminal jurisdiction of the receiving state without qualification. In his commentary, the Special Rapporteur noted two potential limitations to this "*complete and unlimited liability*" from criminal jurisdiction (p.111). The first limitation was whether immunity from jurisdiction should only be granted in respect of an act committed by the member of the special mission in connection with his function, i.e. official acts concerned with the special mission.[23] The second limitation was whether the immunity should be akin to consular immunity rather than diplomatic immunity, i.e.

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[22] Bartoš, First Report, pp.103, 105.
[23] Bartoš, First Report, Article 26, Commentary (1) at p.111.

immunity which is limited to official acts immunity and does not preclude the receiving State's exercise of jurisdiction in respect of grave crimes.[24]

22. **Thirdly**, the extent of immunity from criminal jurisdiction and inviolability from arrest or detention was revisited in the Special Rapporteur's third Report (1966)[25] in which he referred to observations from various States.[26] In so doing, the Special Rapporteur noted a trend amongst States against the ILC's conclusion (that members of special missions ought to be afforded the same privileges and immunities as diplomats) and in support of the view that there ought, instead, to be functional limitations on the immunity.[27]

23. Of the 24 States that provided written comments on the ILC's draft articles, 13 objected to members of special missions being afforded the same privileges and immunities as members of permanent missions.[28] For example, Japan described the ILC's approach of affording members of special missions the same privileges and immunities as members of permanent missions as *lege ferenda*[29] and the United States observed that extending privileges and immunities to another substantial class of

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[24] Bartoš, First Report, Article 26, Commentary (3)-(4).

[25] The Special Rapporteur's second report preceded the States' responses. It provides a description of the discussions within the ILC itself on this topic. It notes that the ILC decided it should not seek to answer the question as to what extent existing state practice on special missions was based on customary rules or principles of comity and confirmed that its work in this area was designed to produce a set of legal rules to be applied rather than attempt to codify existing ones. Second Report on Special Missions by Mr Milan Bartoš, Special Rapporteur, Doc. A/CN.4/177, YBILC 1964 vol. II p.109, pp.110-113.

[26] Third Report on Special Missions by Mr Milan Bartoš, Special Rapporteur, Doc. A/CN.4/189, YBILC 1966, vol. II p.125 (**"Bartoš, Third Report"**).

[27] Bartoš, Third Report §§166-170 at p.143.

[28] A/CN.4/193 and Add.1-5, Special Missions: Comments by Governments on the draft articles on special missions adopted by the Commission in 1965 ("**Comments by Governments"**), YBILC 1967 vol. II p.371: Australia (p.372), Austria (p.373, with specific reference to article 26), Belgium (p.374), Canada (p.377), Czechoslovakia (p.380), Finland (p.381), Gabon (p.382), Greece (p.383), Japan (pp.386-7), Netherlands (p.389), Sweden (pp.393-4), United Kingdom (pp.396-7) and the United States of America (pp.398-9).

[29] Comments by Governments, see n.28 above, p.387. See also the Bartos First Report in which he describes the drafting of draft articles on the facilities, privileges and immunities to be afforded to special missions as *lex lege ferenda*, at p.103. At the start of its comments, Japan made the general remark that "*There is at present no established international practice with respect to special missions, and the matters concerning them are left to the solution on a "case-by-case" basis. The Government of Japan sees no need, at the present stage, to formulate a special set of rules governing them but rather considers it more practical to allow the matter to be handled as each particular case arises.*" (p.386)

individuals *"would not be warmly received [in States with sizable diplomatic communities]"*.[30]

24. In relation to personal inviolability (draft article 24), Belgium, Canada, Greece, the Netherlands and the UK proposed that inviolability from arrest and detention should be restricted to official acts, and Belgium and the Netherlands specified this to be official acts in connection with their mission.[31] Canada proposed a compromise position in which, additionally, there would be no personal inviolability in respect of grave crimes, as reflected in article 41 of the Vienna Convention on Consular Relations.[32] Expressly or by implication in their written comments, Canada, Greece, the Netherlands and the UK proposed a similar restriction on immunity from criminal proceedings (article 26), limiting it to functional immunity only. Contrary to D1's assertion (Detailed Grounds, §101), the UK did raise specific concerns in relation to personal inviolability and immunity from criminal jurisdiction, proposing instead *"a restriction of immunity and inviolability to … official acts"*.[33] The ILC clearly understood the UK's position to be that immunity from criminal jurisdiction should be limited because, in response to it, the ILC commented *"[t]he Commission, on the other hand, strongly believes that members of the special mission should enjoy complete immunity from criminal jurisdiction"* (emphasis added).[34] This is not mentioned in the

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[30] Comments by Governments, n.28 above, p.399.

[31] Above n.28, Belgium p.376: *"members of missions should be granted only a personal inviolability limited to the performance of their functions"*; Canada p.377: personal inviolability from arrest and detention for personal acts *"should be denied to special missions, since it is equivalent to a virtual immunity from criminal jurisdiction and is thus not a necessary consequence of an immunity which Canada considers should be restricted to cover only official acts by public political agents. As a compromise, Canada proposes incorporating the limitation applicable to consuls "shall not be liable to arrest or detention preceding trial, except in cases of grave crime …"*; Netherlands pp.391-2: personal inviolability should *"be restricted to acts performed in the fulfilment of the mission's duties"* and only extended to include all deeds on agreement between sending and receiving states. It proposed adopting a new article akin to relevant provisions in the 1963 Vienna Convention for consular officials; Greece p.383: did not specify the nature of the limitation it preferred but identified article 24 (and 26) as one which *"should provide for less extensive privileges and immunities than they now do"*; and UK p.397: personal inviolability should be restricted to official acts.

[32] Above n.28, p.377.

[33] Above n.28, p.397.

[34] YBILC 1967 vol. II p.88. For an earlier discussion of the ILC's consideration of the UK's reservation, see Fourth Report by Mr Milan Bartoš, Special Rapporteur, Doc. A/CN.4/194, YBILC 1967, vol. II p.86 (**"Bartoš, Fourth Report"**). Insofar as Sir Michael Wood's 2012 article suggests that during the preparation of the Convention, the proposal that "official acts" immunity should be conferred on special missions was in

particular part of the ILC's Commentaries referred to in D1's Detailed Grounds.[35] This debate and the UK's position undermine D1's assertion that it has been the FCO's consistent position that customary international law requires members of special missions to be granted full personal inviolability and complete immunity from criminal jurisdiction.[36]

25. The fact and content of these debates undermine the assertions that Articles 29 and 31 of the Convention codify pre-existing rules of customary international law relating to personal inviolability and immunity from criminal jurisdiction. It is noteworthy that the language of these discussions is normative: i.e. as to what "should" be the case. The dialogue is not framed in terms of what is "required" as a matter of customary international law and the codification of any such existing requirements. Given this preparatory work and State responses, it is not accurate (cf. D1's Detailed Grounds, §103) to describe the General Assembly of the United Nations' resolution endorsing the ILC's Draft Articles as being evidence of state practice/*opinio juris*.

26. **Fourthly**, the material produced in the course of the ILC's work on the Draft Articles also shows that some States placed considerable significance on the concept of consent and mutual agreement to special missions. The debates around this issue are - once again - against a backdrop of certain States having a restrictive view of special mission privileges and immunities and objecting to the proposal that members of special missions should be accorded all of the privileges and immunities conferred upon members of permanent diplomatic missions. In his Fourth Report,[37] the Special

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respect of immunity from civil jurisdiction only: this would appear to be incorrect. See M. Wood *The Immunity of Official Visitors* (2012) Max Planck Yearbook of United Nations Law ("**Wood (2012)"**) p.37.

[35] D1's Detailed Grounds §107 referring to p.362 of the ILC's Commentaries.

[36] cf. D1's Detailed Grounds, §106. The concerns referred to there are set out in §§100-101 but do not refer to the UK's views on functional immunity. See also, the FCO's position described in R v Governor of Pentonville Prison, ex p. Osman (No 2) (1988) 88 ILR 378, 393, discussed at §43.3.6 and n.77 below.

[37] In his Fourth Report the Special Rapporteur described the work that had been done to date within the ILC on special missions, including his own work. In relation to the question '*Are there or are there not any rules of positive public international law concerning special missions?*' his conclusions as to the paucity of settled state practice remained as expressed in his First Report (on which see §18 above) (see, e.g., Fourth Report §§113-136 pp.15-19). The Fourth Report then goes on to describe the discussions on this that were also described in the Second Report, before considering the States' various responses.

Rapporteur recorded the UK's concerns to ensure that states retained discretion with respect to the reception of missions from foreign states. The Special Rapporteur's response shows that the concept of consent went beyond the discretion of a State to decide whether or not to receive a special mission and extended to the scope of the immunities which would be afforded; this is inconsistent with the notion of a pre-existing rule of customary international law obliging States to provide such immunities. The UK's concern was expressed as follows (in relevant part).[38]

> *"There may be cases in which the receiving State wishes to permit a mission to come without necessarily according it the full privileges and immunities laid down in the draft articles but as the articles are at present drafted this might be very difficult."*

27. In response, the Special Rapporteur stated,

> *"(13) The Special Rapporteur understands the United Kingdom Government's concern, but he thinks that the meaning of the draft articles on special missions submitted by the Commission had not been fully grasped. In the first place, no State is obliged to receive a special mission from another State without its consent. Secondly, in the Commission's draft, the task of a special mission is determined by mutual consent of the sending State and of the receiving State; on receiving a visiting foreign mission, the receiving State is entitled to make it clear that it is not considered as a special mission; and finally, the existence and extent of privileges and immunities can also be determined by mutual consent of the States concerned."* (emphasis added)

28. In conclusion: the ILC materials, when viewed holistically rather than in part (cf. the Defendants' Detailed Grounds), support the fact that there was considerable debate over whether inviolability of the person and immunity from criminal jurisdiction *ought* to be (a) restricted to a certain category of (high-level) individuals and (b) limited to official acts in relation to special missions, akin to consular immunities, and limited so as not to include grave crimes. The debate is premised on the fact that States had discretion to determine the existence and extent of privileges and immunities afforded to members of special missions. This premise is significant for at least three reasons. First, it may explain why it was not possible to identify a clear rule of customary international law that could be said to *oblige* States to provide certain immunities, including personal inviolability and full immunity from criminal

[38] Bartoš, Fourth Report, p45.

jurisdiction. Secondly, it may explain why concrete support for the entire Convention amongst States was and remains so limited. Thirdly, it may explain why - in response to the recent survey by the Council of Europe's Committee of Legal Advisors (known as CAHDI) on the extent of any customary international law rules and the exact scope of privileges and immunities that should be afforded to special missions (as to which see §31 below)[39] - a number of States continue to assert their discretion to assess on a "case by case" basis what privileges and immunities they will extend and to whom. The ILC material therefore demonstrates that even in respect of what the Defendants call the "core of special mission immunity", namely personal inviolability and immunity from criminal jurisdiction, there was no settled position – either factually or legally - prior to 1969. No evidence to the contrary has been filed by the Defendants.

(iv) **Customary international law relating to special missions after the Convention on Special Missions 1969**

29. Moreover, no clear rule of customary international law has emerged since 1969. This is apparent from the following four matters.

30. **First**, the Convention does not, itself, show that there is a clear rule of customary international law regarding absolute personal inviolability and immunity from criminal jurisdiction. This is because it has not been widely adopted by the States. Although opened for signature in 1969, the Convention only received the minimum number of 22 states parties necessary for it to enter into force as between those states parties on 21 June 1985. To date, only 38 states are parties to the Convention.

31. **Secondly**, the Defendants have not submitted (a) recent evidence of extensive/virtually uniform state practice showing absolute inviolability and full criminal immunity for members of special missions or (b) extensive, recent evidence recognising that such immunities are a legal requirement. This is unsurprising. Such

[39] Committee of Legal Advisors on Public International Law (CAHDI), Replies by States to the questionnaire on "Immunities of special missions" 23 February 2016 ("**CAHDI Survey**").

evidence of state practice as there is shows that States remain concerned to retain discretion in respect of when a mission should be regarded as being a special mission and also discretion as to what privileges and immunities are to be afforded to those on the special mission.

31.1. This retention of discretion by States, and their concern to retain discretion, is apparent from the answers provided in the CAHDI Survey of states in respect of immunities granted to special missions. In this survey, 24 states responded. The following points are notable:

31.1.1. First, 11 States declined to express any, or any final, opinion on whether, or to what extent, the provisions of the Convention reflect customary international law.[40] This is telling. If – as the Defendants contend - it was universally/nearly universally accepted that customary international law obliges States to afford complete personal inviolability and full criminal immunity to members of special missions then one would expect no reticence amongst states in expressing that to be the case. Instead, the only States to so respond to the CAHDI questionnaire are Italy,[41] the UK,[42] Romania[43] and the Netherlands[44].

31.1.2. Secondly, a number of respondents expressed clear limitations on the extent of the immunities they afford to members of special missions and reserved to themselves a discretion in this regard. (Some also revealed the paucity of State practice in this field.) The equivocal nature of the responses undermines the Defendants' assertion of widespread acceptance amongst states that they are obliged under customary international law to afford special mission immunity, viz., complete

[40] Andorra (pp.13-14), Armenia (p.18), Denmark (pp.34-35), Finland (p.40), Georgia (p.46), Ireland (p.53), Latvia (p.57), Mexico (pp.85-86), Norway (p.62), Sweden (p.77) and the United States of America (p.89). The responses of each of these countries are described further below.
[41] CAHDI Survey: Italy p.55.
[42] CAHDI Survey: UK p.77.
[43] CAHDI Survey: Romania p.63.
[44] CAHDI Survey: Netherlands p.60.

personal inviolability and full immunity from criminal jurisdiction. For example:

(1) Albania stated that customary international law rules in respect of high level missions relate to immunity from civil and criminal jurisdiction in respect of official acts, and expressly excludes from that scope, immunity for acts constituting international crimes[45] (pp.9-10).

(2) Andorra provided little detail but stated its understanding that customary international law for special missions had developed from an absolute to a "*limited immunity*" (pp.13-14).

(3) Belarus stated that under customary international law the extent of immunities afforded to those on special missions depends on their status: all members of special missions are afforded official acts immunity; heads of state and government and foreign ministers enjoy full diplomatic immunity irrespective of the nature of the acts in question; and other senior officials *may* be granted similar immunities if they are key actors conducting crucial aspects of diplomacy (p.83).

(4) France stated that it considers that the immunity provided to members of special missions is restricted to their official acts in connection with their mission (pp.43-44).

(5) Mexico is a State Party to the Convention. Nonetheless, it stated that "*it has no defined position as to the existence of a customary rule*" concerning immunity *ratione personae* afforded to special missions, and it afforded immunity to foreign visitors on special missions in relation to their official acts only (pp. 85-86).

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[45] Albania also stated that it only afforded immunities to state officials on high level missions who held diplomatic passports. This limitation is in contrast to the position of D1: D1 has previously suggested that a person may enjoy immunity from criminal jurisdiction because of a special mission even though they do not hold any official post within a foreign State, see Re. Mikhail Gorbachev, Dept. Senior District Judge Daphne Wickham, judgment 30 March 2011 (unrep.) (the former president of the USSR was not identified as holding any official position at the time of his visit to the UK).

31.2. The German case of Tabatabai 80 ILR 388 is not an example of state practice that there is a customary international law obligation requiring States to afford members of special missions personal inviolability and immunity from criminal jurisdiction in all circumstances (cf. D1's Detailed Grounds, §110c). Thus:

31.2.1. The German Supreme Court described the norm in a discretionary, and not prescriptive, way,

> "*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*" (p.419 at [287] emphasis added). [46]

31.2.2. The Court noted that the agreement between the Iranian and Federal Republic's governments was for Dr Tabatabai to be granted "*all privileges and exemptions*" (p.421 at [289]).

31.2.3. It considered the functional nature of the immunity as distinct from immunity *ad personam*, describing the starting point as one

> "*according to which there is no general rule of international law which effectively guarantees immunity to a special envoy, where that immunity does not protect any function and is merely granted ad personam.*" (p.412 at [276], emphasis added.)

31.2.4. The Court's discussion of the functional theory of immunity focuses on what is necessary to protect the objective (i.e. function) of the mission as agreed between the sending and receiving states, as distinct from a more restrictive functional immunity in relation to official acts only (immunity *ratione materiae*) (pp.420-421).

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[46] Although the Court referred to State practice and *opinio juris* it did not identify any evidence of widespread State practice and *opinio juris* to support its conclusions on the existence of a norm of customary international law. Instead, it referred to opinions of various legal scholars (pp.418-419 at [286], [287]). The Court also addressed, and ultimately rejected, the contention that provisions of the Convention had crystallised into customary international law.

31.2.5. On the facts of that case, the Supreme Court noted that Dr Tabatabai was a member of the political leadership of Iran (he had been the deputy prime minister), he had made numerous missions to Europe, and Germany in particular, to conduct high level diplomatic negotiations on behalf of his state and that was his mission on this occasion (pp.411-417; see also, the summary of facts at pp.390-391).

31.2.6. The Court accepted that immunity from municipal criminal jurisdiction was necessary to protect the function of Dr Tabatabai's mission and rejected the lower court's finding that there had been only an *ex post facto* agreement between the governments to protect Dr Tabatabai himself from prosecution to maintain good relations between the states. (p.415).

31.3. The position in France is also a restricted one regarding immunity from criminal jurisdiction granted to special missions: it is limited to the official acts of the mission's members. This is consistent with the French response to the CAHDI questionnaire.[47] In the case of Jean-Francois N'Dengue, the Congolese Director-General of National Police, the French Ministry of Foreign Affairs issued a communiqué to the Versailles court of appeal asserting that he was entitled to immunity from criminal process in respect of alleged human rights abuses as a member of a special mission. The Versailles court released him on that basis. However, on appeal to the Cour de Cassation, that higher court appears to have endorsed the appellant's contention that the Versailles court's reliance on the French government's communiqué and its conclusion as to the entitlement to immunity was incorrect (although the appeal was refused on other grounds). Wood describes the Cour de Cassation's judgment as follows: "*The Cour de Cassation … seems to have concluded that the Cour d'Appel had not been*

[47] CAHDI Survey: France, response to Question 5 pp.43-44. In the Survey, France identifies the Cour de Cassation's decision in N'Dengue as relevant domestic jurisprudence.

competent to deal with immunity and was moreover wrong, since the Director-General of Police was only entitled to official act immunity."[48]

31.4. D1 identifies cases in Austria (Syrian National Immunity Case), the US (Bo Xilai and Kilroy v Windsor) and France (Hubert X) as "*judicial support for the existence of customary international law on Special Mission immunity*" (D1 Detailed Grounds, §110(c)), as well as two 19th Century English authorities. None of these cases provides any, or any adequate, support for the proposition for which they are cited.

31.4.1. The Austrian Syrian National Immunity Case (1998) 127 ILR 88 concerned the managing director of the Syrian tobacco company tasked with attending the International Tobacco Fair in Vienna and, whilst there, using it as an opportunity to make contact with the UN Industrial Development Organisation (UNIDO) to promote the Syrian tobacco industry (p.90). He was arrested pursuant to a German extradition request (p.89). The case does not assist with the analysis of what immunities, if any, States are obliged to afford to a visiting foreign official on special mission. In this case, the court's analysis stops with the factual finding that the UNIDO had not consented to the alleged mission.[49]

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[48] Wood (2012) fn.132, n.34 above. The case of Hubert X does not assist with the analysis of what immunities must be afforded to members of special missions since the court's analysis stops with the factual finding that the defendant was not on a special mission (contra, D1's Detailed Grounds, §110(c)).

[49] The court considered the issue of immunities first under the UNIDO's Headquarters Agreement with Austria, secondly under the customary international law relating to privileges and immunities afforded to representatives sent to international organisations, "*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 thirdly "*by analogy also the UN Convention on special missions*" (p.92). The Convention, which is self-executing and directly applicable under Austrian law (see CAHDI Survey: Austria p.23) specifically excludes missions to international conferences and organisations from its scope. The UNIDO Headquarters Agreement provides members of permanent missions diplomatic immunity (s.32) and *ad hoc* missions personal inviolability and immunity from legal process in respect of their official acts (s.33, applying the privileges and immunities provided by Article IV (section 11) of the Convention on the Privileges and Immunities of the United Nations, 1946). The Vienna Convention of 14 March 1975, which provides for complete immunity from the host State's criminal jurisdiction, has not been widely taken up by States and is not yet in force.

31.4.2. The position under US law, as set out in the US Government's response in the CAHDI Survey, is that "*it is generally inappropriate for States to exercise jurisdiction over ministerial-level officials invited on a special diplomatic mission*" (p.89, emphasis added).[50] It is particularly important to recall that as a matter of US law, the Executive's determination of matters relating to foreign relations, including decisions to afford immunities, is conclusive before US courts. As stated in Kilroy v Windsor (1987) such a determination is "*binding and not reviewable*".[51] This is also explained in the US response in the CAHDI Survey (p.90). As noted therein, immunity for officials on special missions has only been asserted by the US executive and recognised by the US courts in civil cases. US v Sissoko (1997) appears to be the only case in the US considering whether visiting foreign officials are entitled to immunity from criminal (as opposed to civil) jurisdiction on the basis of being on special mission.[52] Since the US did not submit any "*suggestion of immunity*" the court was not bound by an Executive determination; it rejected the submission that the Convention reflected customary international law that "*binds this Court*".[53]

31.4.3. As to the position in France, see §31.3 above.

31.4.4. As to the 19th Century English cases, these are addressed in detail at §43.3 below. They are not "*judicial recognition*" of special missions immunity. Both Defendants misunderstand the term "special envoy" in Engelke v Musmann [1928] A.C. 433, 450 (Lord Phillimore). It was used as an

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[50] The US response, which is drafted in terms of "appropriateness" rather than obligation, is consistent with its "suggestions of immunity" in the Kilroy and Bo Xilai cases insofar as its reserves to the State Department the discretion to allow immunity in particular cases. In Kilroy v Windsor Civ. No. C-78-291 (N.D. Ohio, 1978) 1978 U.S. Dist. LEXIS 20419, the State Department's "suggestion of immunity" read *"the Department recognizes and allows the immunity of the Prince of Wales from the jurisdiction of the District Court in this action"* (at *3, emphasis added). See also, Li Weixum v Bo Xilai 568 F.Supp.2d 35 (D.D.C 2008).

[51] 1978 U.S. Dist. LEXIS 20419, *2.

[52] The Gambia intervened in this case and asserted immunity on behalf of the defendant as an *ad hoc* diplomat on a special mission to the US.

[53] United States v Sissoko 995 F.Supp. 1469, 1471 (S.D. Fla 1997). Neither the US nor Gambia was a state party to the Convention.

abbreviation for "ministers plenipotentiary and envoys extraordinary", a recognised class of diplomat accredited to a permanent mission and was not a reference to a visiting official on special mission. Service v Castaneda (1845) 1 Holt Eq. Rep. 159 does not assist either as it concerns the recognition of immunity afforded to an Ambassador's inferior who was not a "*domestic servant*" within the strict meaning of the statute, not a visiting foreign official independent of the permanent legation.

31.5. Analysis of the available material on state practice therefore shows that if there are any conclusions to be drawn then they are that (1) States have discretion regarding (a) who to treat as being on a special mission and (b) the immunities/privileges (if any) to grant that person(s)[54] and (2) whether, and if so to what extent, a State affords a visiting foreign official on special mission immunity from criminal jurisdiction is determined by its domestic law and/or conventions, and not by a peremptory rule of customary international law.

32. **Thirdly**, Khurts Bat is not authority in support of the proposition that there is such a clear rule of customary international law.

32.1. First, from the summary of the parties' submissions and the judgment of Moses LJ, it does not seem that the Court was provided with much, if any, of the historical material which has been set out above (§§17-27) and which shows the equivocal views of a number of states, including the UK, regarding the scope of immunities and special envoys/missions.

32.2. Secondly, the judgment does not consider either R v Governor of Pentonville Prison ex p. Teja [1971] 2 QB 274 or R v Governor of Pentonville Prison, ex p. Osman (No 2) (1988) 88 ILR 378. In both of these cases, the Divisional Court rejected submissions that the claimants were entitled to immunity from

[54] There are, in addition, well-recognised divergences between States' practices and opinions on when or by what mechanism any purported obligations to afford privileges and immunities to special missions may arise. The CAHDI Survey reflects that in this area there is likewise no settled practice.

criminal jurisdiction on the basis that they were on special diplomatic missions. In both decisions, the Court held that such immunity did not arise because the UK had not enacted legislation to incorporate the terms of the Convention and in neither case was it considered that there might exist an independent norm of customary international law that gave rise to the claimed immunity. (These decisions are described in greater detail at, respectively, §§43.3.5 and 43.3.6 below.)

32.3. Thirdly, and as to Moses LJ's conclusion that under customary international law, "*the status of immunity conferred by a special mission is that which is conferred on a permanent diplomatic mission*" (§26): this conclusion should be approached with caution since it was based on the parties' agreed position that the requested person, if on a special mission, was entitled under the rules of customary international law to inviolability of the person and immunity from suit and, therefore, the Court does not analyse this in any detail (§22).[55]

32.4. Fourthly, the States' responses in the more recent CAHDI Survey, which of course was not material before the Court, undermine the contention that there is evidence of widespread state practice and clear recognition amongst states that they are required in all circumstances to grant special missions complete personal inviolability and immunity from criminal jurisdiction (*opinio juris*).

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[55] Nor is there any discussion of whether any requirement of customary international law to afford members of a special mission the same immunities as those due to accredited diplomats is or may depend upon the status of the head of that mission or the status of the individual member, in other words, whether the extent of any obligation is dependent upon (i) whether the head of mission is a Head of State or Government, or Foreign Minister or cabinet-level Minister, or senior official of a certain rank, and (ii) in cases in which the head of mission is of qualifying rank, whether immunity should be extended to all members of his delegation irrespective of rank. As to this: in Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) [2008] ICJ Rep 177 the ICJ considered whether Djbouti's Prosecutor General or Head of National Security enjoyed immunities from criminal process in France other than immunity *ratione materiae* (§185): "*The Court notes first 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.*" (§194) The ICJ makes no reference to the existence of any rules of customary international law on special missions. If – as the Defendants contend - States are indeed obliged, as a matter of customary international law, to afford to those on special missions specific, identifiable immunities then one would expect such a rule to have been identified by the ICJ. In Khurts Bat Moses LJ referred to this case (at §58) but not to §194.

33. **Fourthly**, the commentators relied on by the Defendants do not provide adequate support for the proposition.

33.1. These writings do not provide evidence of the requisite level of state practice or *opinio juris*.

33.2. Sir Michael Wood's article (a) only considers state practice regarding 8 states; (b) the state practice relates to a number of matters and does not relate exclusively to the question of criminal jurisdiction immunity; (c) the state practice on criminal jurisdiction immunity *per se* is very limited and (d) the material in the Annex has, in any event, been overtaken by the CAHDI survey, which received responses from 24 states. This article is not, therefore, a source that can bear the weight that the Defendants seek to place upon it.

33.3. The commentary in Crawford, *Brownlie's Principles of Public International Law* (2012) and Fox and Webb, *The Law of State Immunity* (2015) simply cite Sir Michael Wood's 2012 article as their only source. Those commentaries do not, therefore, advance the analysis.

33.4. The American Law Institute's *Restatement of the Law (Third), Foreign Relations Law of the United States* was published in 1987 and as such, the comment relied upon by D1 has been overtaken by the Sissoko decision of 1997 and the US response in the CAHDI Survey. §464 is one of the provisions currently under revision; to date the revised draft version has not been published as a "tentative draft" as it has not yet been put before the Council or the membership of the ALI for approval.[56] Furthermore, the 1987 comment to §464 is inconsistent with the US government statement in the CAHDI Survey: the 1987 comment uses the term "high officials", said to enjoy the equivalent of diplomatic immunity, as incorporating non-cabinet level officials. In contrast, the US response in the CAHDI Survey refers only to visiting "ministerial-level officials" who may

[56] Details of the status of the redrafting are available at https://www.ali.org/projects/show/foreign-relations-law-united-states/#_status (accessed 30/5/16).

enjoy such immunities.[57] The US response in the CAHDI Survey is also more circumspect, describing it as "generally inappropriate" that such officials are subject to domestic jurisdiction. The comment in the Restatement is in more positive language but, significantly, it does not (i) suggest that the US is required by customary international law (or otherwise) to extend such immunities to visiting high level officials received as such, or (ii) consider the situation in the context of allegations of serious international crimes in criminal proceedings.[58]

33.5. Nadia Kalb's 2012 entry in the *Max Planck Encyclopaedia of Public International Law* does not consider the question of the extent of immunities, it is more equivocal in its generalised statements and (in sections not quoted by D1) notes that (i) in Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), the ICJ considered that *"high ranking officials such as the Public Prosecutor and Chief of National Security did not enjoy full immunity when the Special Missions Convention 1969 did not apply";* and (ii) the particular status of special missions is often determined on a case-by-case basis by agreement between the sending and receiving States.

33.6. Foakes, *The Position of Heads of State and Senior Officials in International Law* (2014) contains no analysis as to distinctions drawn between persons of different seniority on special mission[59] or the extent to which inviolability may be limited. The author refers only to four jurisdictions (the UK, the US, the Netherlands and France). In relation to France, she refers to the decision of the Versailles court of appeal discharging N'Dengue but makes no mention of the subsequent contra-indications by the French Cour de Cassation in that case.

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[57] See §31.4.2 above and CAHDI Survey p.89.

[58] The Third Restatement also predates the entry into force of UNCAT in 1987, the US signature of it in 1988 and the US ratification in 1994.

[59] Van Alebeek for example, writing in 1987, suggested that it was generally agreed that diplomatic immunity applied to missions of Heads of State, Heads of Government and cabinet level Ministers. R Van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (OUP 1987) p.168.

33.7. The sources cited in footnote 72 of D1's Detailed Grounds are much more equivocal than §108(c)(f) suggests. Shaw does not offer "*clear support*" for D1's proposition. He briefly discusses special missions, considering the Convention, Tabatabai and Sissoko only. After summarising the decision of the German Supreme Court in Tabatabai he notes the US court's conclusion in Sissoko that the "*Convention on Special Missions, to which the US was not a party, did not constitute customary international law and was thus not binding upon the Court*" (p.775). In respect of neither case, nor the status of immunities afforded to visiting officials as a matter of customary international law more generally, does Shaw offer any other analysis or conclusions. The relevant pages of E. Franey's 2011 publication of her Ph.D dissertation (pp.135-149) contain a very limited analysis of the Convention and therefore no, or very little, weight can be attached to her sweeping conclusion that "*[t]he convention is now considered to be declaratory of customary international law*". Dr Franey considers Tabatabai, R v Governor of Pentonville Prison ex p. Teja [1971] 2 QB 274 (on which see §43.3.5 below) and the English magistrates' court cases Re Bo Xilai and Re. Barak (on which see §43.2 below)[60] and Court of Appeal, Paris v Durbar.[61] Formerly the senior clerk at the City of Westminster Magistrates' Court, Dr Franey provides a useful insight into the process by which the English magistrates' court cases were decided but her descriptions are of very limited use in determining the existence or content of any customary international law norms. C. Wickremasinghe's contribution to Shaw's 2010 book is much more circumspect than D1 posits, stating "*[t]here is authority for the proposition that some special missions, in particular, high level missions, enjoy immunities as a matter of customary international law*".

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[60] Re. Bo Xilai, Judgment of Senior District Judge Timothy Workman (2005) 128 ILR 713; Re. Ehud Barak, Dept. Senior District Judge Daphne Wickham, judgment 29 September 2009 (unrep.)

[61] Court of Appeal, Paris v Durbar, District Judge Nicholas Evans, judgment 26 June 2008 (unrep.). In his challenge to a European Arrest Warrant issued by the French court, the defendant asserted he had been appointed an *ad hoc* envoy by the Government of the Central African Republic. The district judge found against the defendant on the facts. He also stated that "*[e]ven if, which I do not accept, the defendant was entitled to some form of immunity [as a member of a special mission] whilst he visited France in October 2006, I do not accept that provides him with continuing immunity…*"

33.8. In any event, this commentary must, now, be re-evaluated in light of the States' responses in the CAHDI Survey (in which, for example, France confirms its position to be that customary international law only requires immunity to be extended in relation to official acts connected with the special mission in question). The CAHDI Survey has been considered above: §31.1.

34. **Fifthly**, contrary to D1's Detailed Grounds §102, recent ILC work on the immunity of State officials from foreign criminal jurisdiction does not confirm that "*core special mission immunity*" is recognised by the ILC as being part of customary international law. The study, as originally proposed by the first Special Rapporteur, Roman Anatolevich Kolodkin, sought to include the status of officials on special mission within its scope and it is in that regard that he provides some specific observations about special missions in his preliminary Report ("**Kolodkin First Report**").[62] He questions whether immunity from criminal jurisdiction is a matter of customary as opposed to conventional international law.[63] In contrast to the immunity of diplomats and consular officials, Kolodkin identifies only the Convention as governing immunity afforded to members of special missions; the rules of customary international law are not identified as a source of such immunity.

> "*The immunity of diplomatic agents is governed by the rules of customary international law and the provisions of the 1961 Vienna Convention on Diplomatic Relations; the immunity of consular officials is governed by the rules of customary international law, the provisions of the 1963 Vienna Convention on Consular Relations and the provisions of bilateral consular conventions; the immunity of members of special missions is governed by the provisions of the 1969 Convention on Special Missions*." (§98)

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[62] Preliminary report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur, 28 May 2008, UN Doc. A/CN.4/601. Special Rapporteur Kolodkin appears to adopt the same position in his second report (at §37), referring to customary international law and the relevant Convention in relation to diplomatic immunity but the Convention alone when referring to special missions. Second report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur, 10 June 2010, UN Doc. A/CN.4/631

[63] The Memorandum of the Secretariat that preceded the Kolodkin First Report had assumed this immunity was a rule of customary international law as well as being contained within the Convention. However, given its lack of detailed consideration it is of little, if any, weight. This Memorandum is referred to in Wood (2012) fn.1, together with the reports of the Special Rapporteurs Kolodkin and his successor, Hernandez. See Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat, 31 March 2008, UN Doc. A/CN.4/596.

> "*Further study is required to determine whether there exist customary rules of international law governing the status of members of special missions. As has already been noted, there are very few parties to this Convention. In addition, in order for members of special missions to enjoy the immunity granted by this Convention, a number of conditions specified therein must be met*." (fn.189)

35. The ILC's discussion of the Kolodkin First Report during its 60th session shows that there was no consensus on this issue. The relevant passages of the ILC report of this discussion[64] are cited but not quoted by D1 (D1's Detailed Grounds fn.66). They read, in relevant part (with emphasis added),

> "*Some members emphasized that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations had already been codified and need not be addressed in the context of this topic*." (§280)
>
> "*According to a view, certain State officials enjoy immunity ratione personae when exercising official functions abroad because they would be considered as being on a special mission*." (§290)

36. The view expressed at §290 was in the context of whether cabinet level officials would enjoy the immunity *ratione personae* recognised by the ICJ as being afforded to the "*troika*" of Heads of State, Heads of Government and Foreign Ministers.

37. Ultimately, it was decided that the status of foreign officials who have already been considered by the ILC (e.g., permanent diplomats, visiting foreign officials on special mission, State representatives to international organisations) would not be revisited and included in the present study. Accordingly, there is nothing more than passing reference to special missions as being one of the specific regimes outside the scope of the ILC's work on the immunity of State officials from foreign criminal jurisdiction. It is not possible to discern from this any clear, considered or widespread view that visiting foreign officials on special mission are entitled to complete personal inviolability and full immunity from criminal jurisdiction as a matter of customary international law.[65]

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[64] Report of the International Law Commission on the work of its sixtieth session, UN Doc. A/63/10.
[65] In addition to the passages identified in fn.66 of D1's Detailed Grounds, see also, the Second report on the immunity of State officials from foreign criminal jurisdiction by Concepcion Escobar Hernandez, Special

38. Similarly, Art 3(1)(a) UN Convention on Jurisdictional Immunities of States and their Properties does not advance matters. Article 3(1)(a) acknowledges the existence of immunities for officials on special mission in international law; but says nothing as to its source.

III. The common law issue

(i) Introduction

39. The Interveners make the following two submissions on the common law issue in the event that the Court finds that there exists a rule of customary international law obliging States to afford personal inviolability and/or immunity from criminal jurisdiction to visiting foreign officials on special missions.

40. The starting point is that there are certain circumstances in which norms of customary international law will not be received into the common law. This is not in dispute between the parties.

41. The Interveners submit, **first**, that those circumstances are necessarily context specific: see Lord Mance in R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] 3 WLR 1665, 1703 §144ff. In this specific instance, there are two particular factors that make it constitutionally inappropriate for the common law to receive a norm of customary international law that obliges States to provide to those foreign officials on special mission absolute personal inviolability and full immunity from criminal jurisdiction. Those two factors are as follows:

    41.1. This is an area of foreign and diplomatic relations in which the UK's general international law obligations, conventional and customary (and including in respect of serious international crimes) may also be engaged. Given the potential political and diplomatic sensitivities it would be constitutionally appropriate for Courts to defer to Parliament and for Parliament to consider the extent to which such a norm should be a part of English law. By contrast, whilst

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Rapporteur, 4 April 2013 UN Doc. A/CN.4.661 ("**Hernandez Second Report**") §70 in which the Convention is identified as an international instrument establishing the special regime for special missions.

the views of the UK executive (i.e. D1) are obviously relevant as constituting part of the state practice to which the Court may have regard, those views are not determinative of the question of law before the Court. Furthermore, although the Defendants give a restricted meaning to R v Jones [2007] 1 AC 136 (i.e. as being limited to cases in which an extension of the criminal law is sought by way of the recognition of an international crime so as to create a crime in domestic law), the principles identified by Lord Bingham (at pp.159D-160G) are arguably equally applicable to situations in which victims of serious crimes will otherwise be denied redress and alleged perpetrators of such crimes will be granted impunity, thereby undermining a fundamental objective of criminal prosecution and punishment which is to protect the substantive rights in question.[66] Such decisions are the preserve of Parliament.[67] They necessarily involve the balancing of important interests, as recognised in the Arrest Warrant Case (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal)[68]:

> *"[I]mmunity . . . is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception."*

In this case, however, Parliament has not had the opportunity to consider the competing interests. Articles 29 and 31 of the Convention are said by the Defendants to reflect customary international law but since the Convention has not been ratified by the UK, these provisions have not been subject to any prior

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

[67] An illustration of the appropriate role of Parliament (viz., to extend diplomatic immunities to officials of foreign States and Governments located in the UK who would not fall within the category of accredited envoys and members of permanent legations) is the (now repealed) Diplomatic Privileges (Extension) Act 1941 which extended diplomatic immunities and privileges to, amongst others, members and officials of allied foreign governments established in the UK and foreign authorities established in the UK and recognised as being empowered to maintain armed forces with His Majesty's forces.

[68] Arrest Warrant of 11 April 2000 (Dem Rep. Congo v. Belg.), Judgment, 2002 ICJ Rep. 3, 71 (Feb. 14).

Parliamentary scrutiny, as is now required under Part 2 of the Constitutional Reform and Governance Act 2010 and was formerly achieved by the Ponsonby Rule.

41.2. The alleged special mission immunity is difficult to reconcile with the UK's international law obligation to prosecute or extradite any person suspected of torture located in territory under its control. This obligation exists pursuant to UNCAT, which is incorporated into domestic law by section 134 of the Criminal Justice Act 1988. Common law should be slow to incorporate a customary international law norm the effect of which would be to enable the UK executive to, by consenting to special mission status, clothe that person with immunity from criminal liability which that person would otherwise face pursuant to s.134. This would be contrary to "*one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers*" (R v Bow Street Magistrate, ex parte Pinochet (No 3) [2000] 1 AC 205F per Lord Browne-Wilkinson).[69] Pinochet (No 3) is not "binding authority" for the proposition that immunity *ratione personae* for a visiting foreign official is "not affected" by the Criminal Justice Act 1988/the UK's UNCAT obligations (cf. D2's Detailed Grounds §§31, 33). The analogy with Head of State immunity does not work: the source of that immunity is not the consent of the receiving State but customary international law.

42. D1 states that a "core" special mission immunity is "*necessary to allow diplomacy through special envoys to function properly*"[70]. If this is right then it is an argument in support of putting the matter before Parliament for it to consider the appropriateness of codifying, into domestic legislation, such an immunity. It is not a rationale that can justify the incorporation of such an immunity (assuming it exists as a norm of customary international law) into common law.

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[69] See also Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) [2012] ICJ Rep. 422, 460 §115: "*the obligation on a State to prosecute, provided for in Article 7, paragraph 1 of the Convention [Against Torture], is intended to allow the fulfilment of the Convention's object and purpose, which is 'to make more effective the struggle against torture' (Preamble to the Convention)*".
[70] D1's Detailed Grounds, §106.

43. **Secondly**, the Defendants rely on case law to support their submissions that full immunity from criminal jurisdiction for officials on special missions has already been received by and incorporated into common law.[71] The cases do not support such a proposition:

43.1. Re Khurts Bat: given the agreement of the parties in that case (to the effect that there is a rule of customary international law requiring States to afford immunity to officials received on special mission) there was no substantive consideration by the Divisional Court of whether or to what extent that norm should be incorporated into the common law.

43.2. Re the magistrates' court decisions (Bo Xilai[72], Barak[73], Gorbachev[74]): these are first instance judgments which state that special mission immunity applies and that this immunity is reflected in article 31 of the 1969 Convention. The judgments are devoid of any analysis or authority on this issue and the relevant paragraphs of Barak and Gorbachev largely replicate the language of Bo Xilai.

43.3. Re. the older authorities referred to at D1's Detailed Grounds, §110a and D2's Detailed Grounds, §§21-23:

43.3.1. It is not the case that diplomats were always afforded absolute personal inviolability and immunity from all criminal process, cf. the suggestions in the Defendants' Detailed Grounds. The receiving State retained the power to prosecute a foreign Sovereign's Ambassador in respect of conduct amounting to a crime under customary international law: see Lord Coke, quoted in Taylor v Best (1854) 14 CB 487:

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[71] D1's Detailed Grounds, §112; D2's Detailed Grounds, §§24-27.

[72] Re. Bo Xilai, Senior District Judge Timothy Workman (2005) 128 ILR 713. NB. The earlier magistrates' court decision Re. Mofaz concerned the application for an arrest warrant for the visiting Israeli Defence Minister by a private prosecutor for grave breaches of the Fourth Geneva Convention. Recognising that he was working in "*somewhat uncharted waters*", the magistrate found that as a Defence Minister, the putative defendant was entitled to the immunities that would be afforded to a Foreign Minister, following the ICJ's decision in the Arrest Warrant Case, not special mission status. Re Mofaz (2004) ILDC 97 §15.

[73] Re. Ehud Barak, Dept. Senior District Judge Daphne Wickham, judgment 29 September 2009 (unrep.)

[74] Re. Mikhail Gorbachev, Dept. Senior District Judge Daphne Wickham, judgment 30 March 2011 (unrep.), see n.45 above.

But, if a foreign ambassador, being prorex, committeth here any crime which is contra jus gentium, as, treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador, as unworthy of so high a place, and may be punished here, as any other private alien, and not to be remanded to his sovereign but of curtesy.[75]

43.3.2. The pre-Second World War cases identified by the Defendants (D1's Detailed Grounds §110a; D2's Detailed Grounds at §§21-23 citing Service v Castaneda (1845) 1 Holt Equity Reports 159; Fenton Textile Assoc. Ltd. v Krassin (1921) TLR 259; Engelke v Musmann [1928] AC 433) relate to commercial dealings. The cases are primarily concerned with ascertaining whether the defendants were accredited diplomats or otherwise attached to permanent missions for the purpose of immunity from suit. Insofar as the Defendants rely on those cases in support of the proposition that common law has in the past received and recognised some immunities that were clearly well-established in international custom: this is not contentious. These cases are not, however, authority that common law/customary international law requires States to provide those on a special mission with complete immunity from criminal jurisdiction in common law (cf. D1's Detailed Grounds, §110a; D2's Detailed Grounds, §22). Nor can these cases on permanent missions be used as the basis for an extended analogy with special missions (which have a distinct pedigree in modern history). The cases are addressed in turn below.

43.3.3. In Service v Castaneda (1845) 1 Holt Eq Rep 159 the Vice Chancellor accepted that the defendant was an agent attached to the Spanish embassy under the direct control and direction of the Spanish

[75] Coke, The Institutes of the Law of England, Fourth Part (4 Inst. 153) (1797), quoted in the report of the parties' submissions in Taylor v Best (1854) 14 C.B. 486, 490, 500, 501. See also Vattel's Law of Nations (Eng. trans. 1979) book 4, ch. 6 §100, which states, "*If an embassador commit any of those atrocious crimes which sap the very foundations of the general safety of mankind, – if he attempt to assassinate or poison the prince who has received him at his court, – he unquestionably deserves to be punished as a treacherous enemy guilty of poisoning or assassination.*"

Ambassador *"very much of the nature of an inferior servant"* (at p.167). This was the *ratio* of the Vice-Chancellor's decision that Castaneda enjoyed the immunity from suit afforded to his master, from that *"particular process, which he now seeks to have dissolved"* (p.169).[76]

43.3.4. In Fenton Textile Association Ltd v Krassin [1921] Lloyd's List L.R. 466, the defendant was described by the Foreign Office as the *"authorised Representative of the Soviet Government"* in the UK who had been received as such by His Majesty's Government. Krassin is an example of the application of a restrictive approach by the courts and not an expansive one for which the Defendants contend. The Foreign Secretary had suggested that Monsieur Krassin should enjoy full immunity from suit; the Court of Appeal disagreed. It found that the defendant was not entitled to any immunities other than those provided for in the Anglo-Russian trade agreement notwithstanding that he had been received by and entered into negotiations with the Foreign Office on public matters other than those falling under the specific agreement. The comments of Scrutton LJ that are relied upon by D2 (at §22, Detailed Grounds) were clearly *obiter*.

43.3.5. D2 suggests that the Divisional Court in R v Governor of Pentonville Prison ex p. Teja [1971] 2 QB 274, by quoting Scrutton LJ in Krassin, approved of a view that officials on special mission are entitled to full immunity from legal process by operation of the common law (D2's Detailed Grounds, §22). Lord Parker relied on that passage from Krassin solely for the proposition that diplomatic immunity could only be conferred on a diplomat accepted and received as such. Since such

[76] Note: The Diplomatic Privileges Act of 1708 (stat. 7 Ann c12) provided *"domestic servants"* of *"ambassadors and public ministers of any foreign prince or State authorised and received as such by Her Majesty"* with personal inviolability and immunity from jurisdiction, like their masters. The term 'domestic servants' as used in the statute referred to those physically in an ambassador's household but the common law recognised that an ambassador might employ a servant who did not reside in his house: Darling and Knight v Atkins (1769) 3 Wilson, KB 33, 95 ER 917, 918. That is the distinction that is reflected in Service v Castaneda.

consent had not been given on the facts in Teja, the applicant could not bring himself within the immunities he claimed under the Diplomatic Privileges Act 1964 and articles 29 and 31 of the Vienna Convention on Diplomatic Relations 1961. Lord Parker CJ went on to consider briefly whether the applicant was on a special mission. There is no suggestion in the judgment that immunities for those on special mission existed in customary international law/the common law. Instead, only the Convention was identified as a source of potential immunity; it was rejected as such since it had "*not been made the law of this country*" (p.238D).

43.3.6. R v Governor of Pentonville Prison, ex p. Osman (No 2) (1988) 88 ILR 378 concerned whether a person claiming to be a Liberian Ambassador-at-large on special mission to the UK, based at or working with the Liberian embassy, was entitled to immunity from criminal process (including extradition). Most of the relevant part of the judgment is taken up with considerations regarding the Diplomatic Privileges Act 1964. Some consideration is given to whether in the alternative, he was entitled to immunity on the basis he was on a special mission. The judgment of Mustill LJ includes a summary of, and quotation from, the FCO's evidence to the effect that the applicant would not be entitled to any immunity. In response to the Liberian suggestion that the applicant was the head of a special mission and therefore entitled to diplomatic immunities, the FCO wrote (at p393): "*Her Majesty's Government has not ratified the New York Convention on Special Missions and does not regard it as being declaratory of international customary law.*"[77] The FCO affidavit then goes on, separately, to discuss the requirement of consent to a special mission that is contained within article 2 of the Convention.

[77] Given that this affidavit was made in response to a claim of immunity from criminal jurisdiction on the basis of being on a special mission, its content undermines D1's assertion that the FCO has "*maintained this view consistently over the years*" that "*customary international law does require that members of Special Mission enjoy the 'core' immunity from criminal process and personal inviolability*". (D1's Detailed Grounds, §106.)

Mustill LJ rejected the possibility that the applicant was the head of a special mission, stating that had the applicant been on a special mission "*the applicant's status would not have been recognized under English law, since the United Kingdom has not enacted legislation pursuant to the Convention on Special Missions 1969*" (p.393). There is no suggestion that special mission immunities might arise as a matter of common law, pursuant to a pre-existing norm in customary international law. Mustill LJ considered Scrutton LJ's observations in Krassin: he did not identify it as providing support for the suggestion now made by the Defendants that immunity for officials on special mission is recognised in common law.

43.3.7. Engelke v Musmann [1928] A.C. 433 was a civil action to recover rent arrears from an accredited member of the German Embassy, confirmed as such by the Foreign Office, whose name had been notified to the Foreign Office by the German Ambassador and therefore included on the Diplomatic List. The question for the Appellate Committee was whether certification of these facts by the Foreign Office was conclusive of the defendant's diplomatic status or whether he should be subject to cross-examination on the point. As noted in §31.4.4 above, the Defendants have focused upon Lord Phillimore's use the term 'special envoy' to describe one of the classes of diplomats to whom "diplomatic privileges immunity from legal process" must be afforded (at p.450, quoted in D2's Detailed Grounds, §23; see also D1's Detailed Grounds, §110a). The Defendants have misunderstood Lord Phillimore's reference to this term of art in diplomatic law. Lord Phillimore referred to the four classes of "diplomatic agents" (p.449) then recognised: ambassadors, envoys, resident ministers and *charge d'affairs*. The full descriptive term for this second class was 'ministers plenipotentiary

and envoys extraordinary.'[78] Lord Phillimore's reference to 'special envoy' is a short hand reference for this second class of accredited diplomat attached to a permanent mission. It is not a reference to a member of a special mission.

IV. Conclusion

44. A summary of the Interveners' submissions on the two legal issues addressed above – the CIL issue and the common law issue - are at §§5-6.

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[78] See Jennings and Watts, *Oppenheim's International Law* (9th ed. 2009) Part 4 §469, for a description of the four classes of diplomats agreed upon at the Congress of Aix-la-Chapelle 1818.