**Chapter 25: The Immunities of Members of Special missions**

by Andrew Sanger[[1]](#footnote-1) and Michael Wood[[2]](#footnote-2)

# Introduction

This chapter is concerned with members of special missions, not a wider range of ‘official visitors’ who may enjoy immunity on various other grounds: for example, by virtue of high office within a State, or in respect of their official acts.[[3]](#footnote-3) For the purposes of this chapter, a special mission is a temporary mission, representing a State, which is sent by one State to another with the consent of the latter, in order to carry out official engagements on behalf of the sending State. There is an extensive literature on the subject, [[4]](#footnote-4) though much of it dates from the time when the 1969 New York Convention on Special Missions was in preparation or had recently been adopted. The present chapter seeks to give an up-to-date account of the law, practice and procedure in the field.

In today’s world, with the intensification of relations between States and the speed and ease of transport, the practice of sending and receiving special missions has become increasingly widespread. As a result, questions relating to the immunities of members of special missions arise with increasing frequency. But the immunities of the members of special missions are not governed by any widely ratified convention and remain in some respects uncertain under customary international law. This is unsatisfactory. Clarity in the field of international immunities is desirable on many grounds, not least in order to ensure the orderly conduct of diplomacy in all its forms.[[5]](#footnote-5) As has rightly been said, ‘[t]he law of immunity needs to be clear so that decisions which have to be made under pressure of time, and which have implications for international relations can be made correctly’.[[6]](#footnote-6) Clarity is perhaps especially important in a field of law largely applied by domestic prosecuting authorities and judges, and where the propensity of differences over the law can give rise to serious political tensions between States. That the UN General Assembly attaches importance to legal clarity in the field of immunities is clear from its resolution 59/38 of 2 December 2004, where it stressed ‘the importance of uniformity and clarity in the law of jurisdictional immunities of States and their property, and emphasizing the role of a convention in this regard’.[[7]](#footnote-7)

As the present chapter shows, while some uncertainties remain, the rules of customary international law concerning special missions are clear in essential respects (namely, inviolability of the person and immunity from criminal jurisdiction). It is, however, important to note at the outset that the inviolability and immunity of persons on special missions are in addition to the personal inviolability and immunities that a member of a mission may also enjoy on some other basis. For example, all visiting officials or former officials enjoy inviolability and immunity from criminal jurisdiction in respect of official acts, as provided for in general international law. Special mission immunity is therefore most relevant in situations where exceptions to immunity *ratione materiae* apply, and for legal proceedings in respect of private acts.

The rules of customary international law on special missions derive from the general practice and *opinio juris* of States, and reflect the principle of functional necessity that underlies all diplomatic law. Section II of this chapter deals with the development of the law of special missions, including its roots in the long history of the law relating to the institution of *ad hoc* diplomacy, the major – though not entirely successful – attempt in the 1960s to codify the status, privileges and immunities of special missions, and subsequent developments, including the more recent work of the International Law Commission and the Council of Europe. Section IIIthen provides an overview of the New York Convention on Special Missions, while Section IVexamines the law on special missions under customary international law. Section Vconsiders some recent procedural developments, and Section VIoffers some conclusions.

# The Evolution of the Law on Special Missions

## The Early Development of the Law on *ad hoc* Diplomacy

The preamble to the 1969 Convention on Special Missions begins by recalling ‘that special treatment has always been accorded to special missions’.[[8]](#footnote-8) Diplomacy has indeed long been conducted through both permanent and temporary missions, often referred to as permanent diplomatic missions on the one hand and special, temporary, *ad hoc* missions or itinerant envoys on the other.[[9]](#footnote-9) As the United Nations Secretariat explained in 1963:

The custom of sending a special envoy on mission from one State to another, in order to mark the dignity or importance of a particular occasion, is probably the oldest of all means by which diplomatic relations may be conducted. It was only with the emergence of national States on a modern pattern that permanently accredited diplomatic missions, entrusted with a full range of powers, came to take the place of temporary ambassadors sent specially from one sovereign to another. However, although the legal rules which were evolved to determine diplomatic relations between States were therefore based largely on the conduct of permanent missions, so that special missions came to seem merely a particular variant of the other, the sending of special missions was never discontinued. During the eighteenth and nineteenth centuries such missions were frequently dispatched in order to provide suitable State representation at major ceremonial occasions, such as coronations or royal weddings, or for the purposes of important political negotiations, particularly those held at international congresses.[[10]](#footnote-10)

In the same 1963 working paper, the UN Secretariat noted that

[i]n the previous attempts to codify or restate the law relating to diplomatic intercourse between States, it would appear that the majority of rules have usually been considered equally applicable to both special and permanent missions.[[11]](#footnote-11)

In other words, even if there was some disagreement over the precise scope of the rules applicable to special missions, there was no doubt that members of both permanent and special missions benefited from the long-standing principle that envoys sent by one sovereign to another enjoy immunity.[[12]](#footnote-12) In reaching this conclusion, the Secretariat referred to the Vienna *Règlement* of 1815; the private codification efforts of Bluntschli, Fiore, Pessôa, Phillimore and Strupp; the *Institut* resolutions of 1895 and 1929; the Havana Convention on Diplomatic Officers of 1929; and the Harvard Draft Convention on Diplomatic Privileges and Immunities of 1932.[[13]](#footnote-13)

The Vienna *Règlement* of 1815 (concerning the classes and precedence of heads of mission) made only one specific mention of special missions, providing that ‘*[l]es employés diplomatiques en mission extraordinaire n’ont à ce titre aucune supériorité de rang*’.[[14]](#footnote-14) The Havana Convention on Diplomatic Officers, which was concluded at the Sixth International Conference of American States on 20 February 1928 and which entered into force in 1929, assimilated the status of ‘extra-ordinary diplomatic officers’ to that of regular, permanent diplomatic agent.[[15]](#footnote-15) The Harvard Draft Convention on Diplomatic Privileges and Immunities of 1932[[16]](#footnote-16) contained a broad definition of a ‘mission’; namely ‘a person or group of persons publicly sent by one State to another State to perform diplomatic functions’. The commentary stated

[t]he term ‘mission’ is used to denote the diplomatic group whatever be the permanency of its tenure or its official rank (embassy, legation, special mission) … The term is broad enough to include special missions of a political or ceremonial character which are accredited to the government of the receiving state. Members of special missions probably enjoy the same privileges and immunities as do those of permanent mission.[[17]](#footnote-17)

## Codification of the Law on Special Missions in the 1960s

The developments leading up to the adoption of the 1969 New York Convention on Special Missions have been described elsewhere.[[18]](#footnote-18) In short, the International Law Commission considered the question during its work on the topic *Diplomatic Intercourse and Immunities*, which dealt primarily with permanent diplomatic missions*.* When it concluded its work on that topic in 1958, it noted that diplomatic relations also assumed other forms, including special missions, and requested the Special Rapporteur for that topic to prepare a study on *ad hoc* diplomacy.[[19]](#footnote-19) On the basis of Sandström’s report,[[20]](#footnote-20) the Commission adopted three draft articles, which would have applied the draft articles on permanent diplomatic missions to special missions.[[21]](#footnote-21) The Vienna Conference on Diplomatic Intercourse and Immunities considered the matter, including within a sub-committee, but in the end decided to recommend that the General Assembly refer the subject back to the Commission,[[22]](#footnote-22) which it duly did.[[23]](#footnote-23)

The Commission’s work on the topic *Special Missions*, under the guidance of Special Rapporteur Milan Bartoš, gives invaluable insight into both the eventual Convention on Special Missions, and into the rules of customary international law on the matter. In addition to the Secretariat’s 1963 working paper, to which reference has already been made,[[24]](#footnote-24) and Bartoš’s four reports,[[25]](#footnote-25) the Commission’s initial 16 draft articles of 1964,[[26]](#footnote-26) and full set of 50 draft articles in 1967,[[27]](#footnote-27) each with commentaries, remain important for an understanding of the current law on special missions. The Special Rapporteur’s Fourth Report contains a valuable summary of the matter.

The draft articles were considered in the Sixth Committee of the General Assembly in 1968 and 1969. A particular question that arose during the negotiation of the Convention on Special Missions was the scope of the term ‘special mission’. Some raised objections about applying its provisions to all special missions, regardless of their level, status or functions. Certain States, led by France and the United Kingdom, sought to limit application of the Convention to high-level missions that were undertaking specific diplomatic tasks.[[28]](#footnote-28) While in this objective they were not successful, States did agree that the mission should represent the State, and on the essential requirement of consent, both to the sending of the mission and to its function.

## International Developments since 1969

There have been some significant developments since the adoption of the Convention on Special Missions in 1969, in part stimulated by the Convention and reflecting the increasing importance of special missions in diplomatic practice. In addition to the State practice and case-law referred to in sections IV and V below, these include further activity within the International Law Commission and the Council of Europe.

For its part, the International Law Commission has touched on special missions in its ongoing work on the topic *Immunity of State officials from foreign criminal jurisdiction*. In 2008, in footnote to a *Preliminary Report*, Special Rapporteur Kolodkin noted that ‘[f]urther study is required to determine whether there exist customary rules of international law governing the status of members of special missions’.[[29]](#footnote-29) In 2013, the Commission made more substantive comments on special mission immunity. Draft article 1 states that the draft articles on *Immunity of State Officials* are ‘without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular connected with … special missions’.[[30]](#footnote-30)

In the commentary to draft article 1 the Commission notes that ‘the rules contained in … the Convention on Special Missions, as well as the relevant rules of customary law’ constitute ‘special rules relating to the immunity from foreign criminal jurisdiction of persons connected with carrying out the functions of representation, or protection of the interests of the State in another State, whether on a permanent basis or otherwise, while connected with a … special mission’.[[31]](#footnote-31) The commentary to draft article 3 – on persons enjoying immunity *ratione personae* – then explains that ‘the Commission considers that other “high-ranking officials” [i.e. those other than the Head of State, Head of Government and Minister for Foreign Affairs] do not enjoy immunity *ratione personae* for purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions’.[[32]](#footnote-32)

In September 2013, at the request of the UK delegation, the topic *Immunities of Special Missions* was included in the agenda of the 46th meeting of Council of Europe’s Committee of Legal Advisers on Public International Law (CAHDI). The Committee prepared a questionnaire for States on special mission immunity which addressed the question whether rules on special missions did indeed have customary status. The latest version of the *Replies by States to the Questionnaire* was published officially on the CAHDI website on 21 February 2018, but certain responses had already entered the public domain in 2016, with the most relevant parts having been annexed to the English High Court’s *Freedom and Justice Party* judgment.[[33]](#footnote-33) The CAHDI questionnaire addressed different aspects of State practice, including whether the State had signed and ratified the Convention on Special Missions; whether there was domestic law granting special mission immunity and the scope of that immunity; whether the executive had made statements on the matter; and whether the State had procedures for accepting special missions and/or whether the existence of a special mission could be inferred from governmental conduct.

# The New York Convention on Special Missions 1969

Almost 50 years after its adoption, the Convention on Special Missions has only 38 States Parties (as of late 2017). Accordingly, and in the absence of some other treaty governing the matter, such as the 1928 Havana Convention on Diplomatic Officers, the applicable international law in most situations will be the relevant rules of customary international law. Although the Convention itself has attracted limited participation, developments since 1969—and particularly those in the last few years—show considerable support for its core elements.

## Participation in the Convention

The United Nations General Assembly adopted the New York Convention on Special Missions on 8 December 1969,[[34]](#footnote-34) together with an Optional Protocol on the Compulsory Settlement of Disputes[[35]](#footnote-35) and a resolution concerning the waiver of immunity in respect of civil claims.[[36]](#footnote-36) The Convention entered into force on 21 June 1985, but has not attracted widespread support, largely because it grants privileges and immunities that go beyond what is functionally necessary for a special mission.[[37]](#footnote-37) For example, the Convention grants immunities and exemptions from taxation to administrative, technical and service staff, and their families.[[38]](#footnote-38) The last State to become a party to the Convention was Montenegro, which notified its succession in October 2006. The Convention has 38 parties, and another 12 signatories (including the United Kingdom). The parties and signatories come from all of the UN regional groups: Africa, Asia-Pacific, Eastern Europe, Latin America and Caribbean, and Western Europe and Others.

## Core Elements of the Convention

The preamble to the Convention states the functional basis for the immunities of special missions: ‘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’. It also affirms ‘that the rules of customary international law continue to govern questions not regulated by the provisions of the present Convention’.

For the purposes of the Convention, a special mission is defined as a ‘temporary mission, representing the State, which is sent by one State to another 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(a)).[[39]](#footnote-39) The sending State must have previously obtained the consent of the receiving State to the mission itself (Article 2). The functions of the mission are to be agreed by mutual consent (Article 3). The receiving State must be notified of the composition of the special mission and any subsequent changes thereto (Article 11). Consent can be given through diplomatic or other agreed or mutually acceptable channel (Article 2).

With minor exceptions, the Convention provides that members of special missions shall have the same privileges and immunities as the staff of permanent diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961.[[40]](#footnote-40) In particular, representatives of the State in the special mission and members of its diplomatic staff are inviolable, and cannot be arrested or detained (Article 29); the receiving State must take reasonable steps to ensure that they are protected from attacks on their person, freedom or dignity (Article 29); and they enjoy complete immunity from the criminal jurisdiction of the receiving State (Article 31(1)). They also enjoy immunity from the administrative and civil jurisdiction of the receiving State, but with the same exceptions that apply to members of a diplomatic mission,[[41]](#footnote-41) together with an additional exception for actions relating to ‘damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned’ (Article 31(2)(d)).[[42]](#footnote-42) Administrative and technical staff of the mission are entitled to the same inviolability and immunities, except that immunity from civil and administrative jurisdiction ‘shall not extend to acts performed outside the course of their duties’ (Article 36). Both service staff and private staff of a mission are exempt from dues and taxes on the emoluments they receive by reason for their employment (Articles 37 and 38). However, service staff enjoy immunity from the jurisdiction of the receiving State in respect of acts performed in the course of their duties (Article 37), while private staff enjoy privileges and immunities ‘only to the extent permitted by the receiving State’, with the caveat that ‘the receiving State must exercise its jurisdiction over [private staff] in such a manner as not to interfere unduly with the performance of the functions of the special mission’ (Article 38). Members of the families enjoy the same privileges and immunities as provided to the family member that is part of the special mission,[[43]](#footnote-43) provided (i) they accompany such members of the special mission and (ii) they are not nationals of or permanently resident in the receiving State (Article 39). As with the Vienna Convention on Diplomatic Relations, there is no definition of ‘members of the family’.[[44]](#footnote-44)

Members of a special mission entitled to privileges and immunities under the Convention enjoy them from the moment they enter the territory of the receiving State for the purpose of performing their functions in the special mission or, if they are already present, from the moment their appointment to the special mission is notified to the receiving State (Article 43). Privileges and immunities normally cease when the functions of a member of the special mission come to end ‘at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict’. However, in respect of acts performed by a member in the exercise of his or her functions, immunity continues to subsist (Article 43). The private accommodation of the representative and members of the diplomatic staff of a special mission enjoy the same inviolability and protection as the premises of the special mission (Article 30), even though they may often be of a very temporary nature, for example in a hotel.

The Convention on Special Missions diverges in only a few minor respects from the Convention on Diplomatic Relations in its grant of facilities, privileges and immunities. In addition to the road-traffic exception to immunity from administrative and civil jurisdiction mentioned above, the tax exemption for the premises of the special mission applies only ‘[t]o the extent compatible with the nature and duration of the functions performed by the special mission’ (Article 24); the head of mission’s consent to enter the premises of the mission can be presumed ‘in the case of fire or other disaster that seriously endangers public safety’ and it is has not been possible to obtain his/her express consent (Article 25); and the special mission’s archives and documents ‘should, when necessary, bear visible external marks of identification’ (Article 26).

Members of special missions are entitled to travel across third States where the transit State has been informed in advance, either through a visa application or other notification, and has given its consent (Article 42). Two or more States may each send a special mission at the same time to another State in order to deal with questions of common interest, unless that State objects (Article 6). Special missions from two or more States may meet in the territory of a third State “only after obtaining the express consent of that State” (Article 18). Finally, like the Vienna Convention on Diplomatic Relations, the New York Convention imposes a duty on members of special missions to respect the law of the receiving State (Article 47).

# The Customary International Law on Special Missions

It is widely accepted that, like other international immunities, special mission immunity forms part of customary international law,[[45]](#footnote-45) as opposed to deriving merely from comity, political expediency or reciprocity.[[46]](#footnote-46) During the debates leading to the adoption of the Convention on Special Missions in the Sixth Committee of the General Assembly, Bartoš (in his capacity as Expert Consultant) explained that:

the question whether the privileges and immunities accorded to special missions had a basis in law or were accorded merely as a matter of courtesy had been raised as far back as the Vienna Conference of 1926 on special missions and the Sixth International Conference of American States, held at Havana in 1928. The question had not arisen at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961, because by then it had come to be recognised that States were under an obligation to accord privileges and immunities to special missions and their members. The 1926 Vienna Conference had decided that special missions had to be granted privileges and immunities in order to enable them to discharge, in complete freedom, their duties and functions in accordance with agreements reached between the sending and receiving States.[[47]](#footnote-47)

In 2012, one of the present authors suggested that the rules of customary international law on the immunities of special missions

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.[[48]](#footnote-48)

In fact, there are a number of outstanding issues, such as whether and if so to what extent customary law confers immunity from civil proceedings. These are discussed below.

## Identifying the Customary Rules on Special Missions

The present section seeks to apply the standard methodology for identifying rules of customary international law, as described in the International Law Commission’s 2016 draft conclusions,[[49]](#footnote-49) with commentaries,[[50]](#footnote-50) on ‘Identification of customary international law’, to the determination of the rules of customary international law on special missions. In particular, four points should be borne in mind.

*First*, only *a* *general practice* that is *accepted as law* (that is, accompanied by an *opinio juris*) leads to the creation, and attests to the existence, of a customary rule.[[51]](#footnote-51) Practice must be ‘widespread and representative’, but what this entails will vary depending on the circumstances.[[52]](#footnote-52) There is no absolute requirement of representation of the various geographical regions of the world, and the number and distribution of States taking part cannot be identified in the abstract.[[53]](#footnote-53) In certain circumstances a customary rule that has wide endorsement can form with relatively little practice.[[54]](#footnote-54)

As regards special mission immunity, it should be noted that the frequency of having to assert such immunity is relatively low. Leaving aside the fact that special missions have become routine events, and most of the time States are not concerned about their privileges and immunities, there may be three reasons for this: (i) special missions are short, temporary visits, which leaves little time for members to commit a crime/civil wrong or be subject to the execution of an arrest warrant; (ii) issues of immunity are often dealt with through diplomatic channels, and it is rare that such diplomatic arrangements are made public; and (iii) national prosecutors may well refrain from prosecuting when they know a foreign visitor is entitled to immunity. The representative of Germany in the Sixth Committee in 2016 stated that:

[t]he report [the Special Rapporteur’s fifth report] also analysed how national courts had dealt with the issue of immunity. However, national prosecutors had often refrained from pursuing a case after coming to the conclusion that immunity applied. As a result, there was a systematic lack of case law, and only limited conclusions could be drawn from the number and content of national rulings.[[55]](#footnote-55)

It is thus only in relatively rare cases that an issue relating to special mission immunity becomes public, either because it arises before a national court, or through a public statement. Any investigation into the customary law status of such immunity must therefore treat the lack of public practice or evidence of *opinio juris* with caution.

*Second*, when assessing the available evidence, ‘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’.[[56]](#footnote-56) The overall context requires the assessor to take into account the subject-matter and nature of the rule, as well as underlying principles of international law that might be applicable. The ‘type of evidence consulted (and consideration of its availability or otherwise) is to be adjusted to the situation, and certain forms of practice and evidence of acceptance as law … may be of particular significance, depending on the context’.[[57]](#footnote-57)

For special mission immunity, evidence of particular relevance includes decisions of national courts, claims by foreign and forum States before national courts (for example, Mongolia and the UK before the English High Court in *Khurts Bat*,[[58]](#footnote-58) and Gambia before the US District Court for the Southern District of Florida in *United States v Sissoko*),[[59]](#footnote-59) and answers to questionnaires, such as the one issued by CAHDI. It also includes practice revolving around the Convention on Special Missions and documents and statements of the International Law Commission, to the extent that they have been accepted by States as authoritative statements on the content of customary law. It is particularly noteworthy when the rules set forth in the Convention on Special Missions are applied by States that are not party to the Convention, and/or by States parties to the Convention in relation to non-parties.

*Third*, when assessing a State’s practice, ‘[a]ccount is to be taken of all available practice … which is to be assessed as a whole’, and where the practice of a State varies, ‘the weight to be given to the practice may be reduced’.[[60]](#footnote-60) For example, organs of the State may adopt different positions, or the practice of one organ may vary over time. An assessment of the weight to be given to such practice must be ‘approached with caution’ and will depend on the circumstances.[[61]](#footnote-61) As will be seen below, States are not always consistent in their view on the customary status of special mission immunity, but this alone does not necessarily mean that a rule of customary international law does not exist.

*Fourth*, the Convention on Special Missions, as also the 1928 Havana Convention, is relevant for determining the existence and content of special mission immunity under customary international law in two ways.[[62]](#footnote-62) As previously mentioned, some States that are not party to the Convention nevertheless apply at least some of its provisions as customary law;[[63]](#footnote-63) and some States that are party to the Convention apply its provisions in relation to States that are not party to the Convention, indicating that they believe the provisions are also binding as customary law.[[64]](#footnote-64) It is, however, important to remember that even if some provisions of the Convention reflect rules of customary international law, it should not be assumed that this is the case with all or even most of its provisions.

Limited participation in a convention does not necessarily mean that its terms do not reflect customary international law.[[65]](#footnote-65) For example, many provisions of the 2004 United Nations Convention on Jurisdictional Immunity of States and Their Property, are cited as reflecting customary international law, including by the ICJ, even though, as of January 2018, only 21 States have consented to be bound by it and the Convention is not yet in force.

## Definition of a Special Mission

Under customary international law, the definition of a special mission is broadly the same as that in Article 1 of the Convention on Special Missions. It is a (i) temporary mission, (ii) representing the sending State (members need not be governmental officials, but they must be representing the State and not visiting as part of a cultural exchange); (iii) which is sent by one State to another; (iv) in order to carry out official engagements or State business; *and* (v) the government of the receiving State has given its consent to receive the mission as such.[[66]](#footnote-66)

## Personal Inviolability and Immunity from Criminal Jurisdiction

The immunity of both permanent and temporary diplomatic missions derives from the age-old principle of customary international law that envoys sent by one sovereign to another are entitled to immunity, regardless of the duration of their visit.[[67]](#footnote-67) There is also a general practice accepted as law to the effect that members of special missions are entitled to personal inviolability[[68]](#footnote-68) and immunity from *criminal* jurisdiction.[[69]](#footnote-69) As there is no practice on the question if the special mission’s premises and papers are also inviolable under customary international law (although state property will likely be protected under state and diplomatic immunity),[[70]](#footnote-70) it is difficult to draw any firm conclusions. As already noted, the inviolability and immunity of persons on special missions are strictly limited in time to the duration of the mission, and are additional to the personal inviolability and immunities that the person concerned may enjoy on any other basis. All visiting officials or former officials enjoy inviolability and immunity from criminal jurisdiction in respect of official acts under customary international law.[[71]](#footnote-71) Special mission immunity is therefore most relevant in so far as there may be exceptions to immunity *ratione materiae*, and in respect of private acts.

There are a considerable number of examples of practice and *opinio juris* supporting the existence of a customary law of special mission immunity from criminal jurisdiction. In their replies to the CAHDI questionnaire, numerous States have recognised a form of special mission immunity granted by customary international law, including Albania,[[72]](#footnote-72) Austria,[[73]](#footnote-73) Belarus,[[74]](#footnote-74) Belgium,[[75]](#footnote-75) Bosnia and Herzegovina,[[76]](#footnote-76) Bulgaria,[[77]](#footnote-77) Croatia,[[78]](#footnote-78) Czech Republic,[[79]](#footnote-79) Estonia,[[80]](#footnote-80) Finland,[[81]](#footnote-81) France,[[82]](#footnote-82) Germany,[[83]](#footnote-83) Italy,[[84]](#footnote-84) the Netherlands,[[85]](#footnote-85) Romania,[[86]](#footnote-86) Serbia,[[87]](#footnote-87) Slovenia,[[88]](#footnote-88) Spain,[[89]](#footnote-89) Switzerland,[[90]](#footnote-90) Ukraine,[[91]](#footnote-91) United Kingdom,[[92]](#footnote-92) and the United States of America.[[93]](#footnote-93) In the *Freedom and Justice Party* case, after examining the responses to the CAHDI questionnaire made available to it in 2016, the Divisional Court concluded that

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.[[94]](#footnote-94)

Some specific examples of state practice and *opinio juris* are described below.

#### Finland

Finland has signed but not ratified the Convention on Special Missions. Its domestic law grants immunity to special missions by *renvoi* to both the Convention and international custom. For example, section 5 of the Act on the Privileges and Immunities of International Conferences and Special Missions provides that a member of a ‘delegation or … special mission shall enjoy all the privileges and immunities accorded to such persons by international law and *custom*’.[[95]](#footnote-95)

#### France

On 1 April 2004, Jean-François H. (N’Dengue), then Director-General of Police of the Republic of the Congo, was arrested in France. Later that day, the Director of the Cabinet of the French Minister for Foreign Affairs sent to the Procureur de la République de Meaux a note from the Protocol Service stating that Jean-François H. ‘is on official mission in France … that in this capacity, and by virtue of customary international law, he benefits from immunities from jurisdiction and execution’.[[96]](#footnote-96) The proceedings against him were subsequently dropped on the basis of this note.[[97]](#footnote-97) The *Court of Appeal of Versailles* later confirmed that the note ‘was without any ambiguity as regards the immunity of Jean-François H. notwithstanding the non-ratification by France of the New York Convention on Special Missions of 8 December 1969.[[98]](#footnote-98) France has also argued before the International Court of Justice that special mission immunity exists under general international law.[[99]](#footnote-99)

#### Germany

In the *Tabatabai* case, the German Federal Supreme Court stated that

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.[[100]](#footnote-100)

It could be argued that the German court decided that there is a customary rule entitling States to enter into special immunity agreements, not that the there is a rule requiring States to confer immunities on members of a special mission. But this would seem to be a distinction without a difference. Moreover, such an interpretation of the *Tabatabai* decision would be strained at best: there is no need for a customary rule ‘entitling States to enter into special immunity agreements’; States are anyway free to enter into such agreements by virtue of treaty law. It is more plausible that the court in *Tabatabai* meant an agreement to take part in a special mission, with the knowledge that membership of such a mission would confer immunity on its members. This interpretation is also consistent with the view of the German Government[[101]](#footnote-101) and a German Higher Administrative Court in the subsequent *Vietnamese National* case, in which it was stated that the Convention on Special Missions ‘which Germany thus far had not signed, is in its greater part recognised and applied by the Federal Government as customary international law’.[[102]](#footnote-102) In addition, a Federal Foreign Office circular dated 15 September 2015 and addressed to all German public authorities including courts stated that ‘[a]ccording to customary international law, members of so-called “special missions” … may also enjoy immunity form jurisdiction and inviolability’.[[103]](#footnote-103)

#### Mongolia

In *Khurts Bat v Investigating Judge of the Federal Court of Germany*, Mongolia ‘agreed that under rules of customary international law the defendant [Mr Bat] 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’.[[104]](#footnote-104)

#### Netherlands

In May 2011, the Dutch Advisory Committee on Issues of Public International Law (CAVV)[[105]](#footnote-105) issued an advisory report on the immunity of foreign State officials.[[106]](#footnote-106) Among its conclusions, the report said that ‘there is a sufficient basis for an obligation under customary international law to accord full immunity to the members of official missions’.[[107]](#footnote-107) The Dutch Government agreed:

[t]he government agrees with the [Advisory Committee] that under customary international law members of official missions enjoy immunity. This applies both to members of foreign official missions visiting the Netherlands and to members of Dutch official missions visiting other countries. Members of official missions can be regarded as ‘temporary diplomats’.[[108]](#footnote-108)

#### Slovenia

Slovenia is a party to the Convention on Special Missions, but it has also stated that the Convention ‘to a large extent reflects customary international law’.[[109]](#footnote-109) Slovenia’s domestic law gives effect to immunities by *renvoi* to international law.[[110]](#footnote-110)

#### South Africa

Section 4(2) of the South African Diplomatic Immunities and Privileges Act 37 of 2001 provides that

A special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as

1. a special envoy or representative enjoys in accordance with the rules of customary international law.[[111]](#footnote-111)

#### Spain

The *Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España* provides in relevant part:

Article 10(2)(b)(iii):

Even if, in general terms, a foreign State cannot claim jurisdictional immunity before Spanish courts in procedures related to a labor contract between such State and a physical person when the activity covered by such contract is executed in Spain, this general rule ceases to apply (i.e., the foreign State can claim jurisdiction immunity in this situation) if the employee is a member of the diplomatic staff of a special mission.

Article 20(1)(a):

Official bank accounts and other goods in Spain which are used, or destined for use, by special missions of a foreign State in their official activity shall enjoy enforcement immunity from Spanish courts. [[112]](#footnote-112)

Spain is a party to the Convention on Special Missions, but has also stated that it ‘considers that current obligations and/or definitions regarding immunity of special missions are essentially those explicitly established by the UN Convention on special missions and by its national legislation … but does not exclude a priori the possible application of customary international law to cases which may not be explicitly covered by the aforementioned texts’.[[113]](#footnote-113)

#### Ukraine

Ukraine has ratified the Convention on Special Missions, which is directly applicable in the Ukrainian domestic legal system[[114]](#footnote-114) and is given effect in other areas of domestic law.[[115]](#footnote-115) In response to the CAHDI questionnaire, Ukraine stated that it

is of the view that the United Nations Convention on special missions (1969) to large extent reflects customary international law. Its provisions relating to the mutual consent of the sending and the receiving State to send / to receive a special mission, the scope of privileges and immunities were repeatedly recognized as customary international law. … In the process of the elaboration of the New York Convention by the International Law Commission there was no doubt that, at least, some of its provisions had the nature of customary international law, particularly as regards to such basic principles as the requirement of consent, inviolability and immunity of persons on special missions, premises, correspondence, property, transport etc. It seems that the customary nature of the Convention’s provisions is also widely recognized by the doctrine of international law.[[116]](#footnote-116)

It also explained that under customary international law ‘members of special missions enjoy privileges and immunities at least comparable to those accorded to diplomatic missions and their staff members. In any event 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’.[[117]](#footnote-117)

#### United Kingdom

English courts have had to consider the customary status of special mission immunity and its scope on a number of occasions. The issue has arisen both in the lower courts[[118]](#footnote-118) and in the High Court.

In 2011, the Divisional Court gave judgment in *Khurts Bat v The Investigating Judge of the German Federal Court.*[[119]](#footnote-119) Germany sought the extradition from the UK of a Mongolian official who was alleged to have kidnapped and seriously mistreated a Mongolian national in Germany (and France). Mr Bat claimed immunity on various grounds, including that he was visiting the UK on a special mission. Both the Foreign and Commonwealth Office (FCO) and Mr Bat argued that under customary international law, persons on special missions were entitled to inviolability of the person and immunity from criminal proceedings, and the Court agreed (while holding that Mr Bat had not established that he was on a special mission, because the British Government (the FCO) had not consented to such special mission). Because of this coincidence of the views of the parties on the law, a later Divisional Court held that, as a matter of English law, the *Khurts Bat* judgment was not binding precedent on the point.[[120]](#footnote-120)

In 2016, the view that the immunity from criminal jurisdiction of persons on special mission immunity formed part of customary international law was put to the test in further proceedings in the Divisional Court. The Freedom and Justice Party, which had formed the elected Government of Egypt under President Morsi between June 2012 and July 2013,[[121]](#footnote-121) sought judicial review of the decision not to arrest Lt General Mahmoud Hegazy, the director of the Egyptian Military Intelligence Service in July and August 2013.[[122]](#footnote-122) Hegazy was alleged to have been involved in torture in connection with the events in Raba’a Square in Cairo in July 2013, contrary to section 134 of the Criminal Justice Act 1988.[[123]](#footnote-123) However, the Metropolitan Police Service (MPS) declined to arrest him when he was visiting the UK in September 2015, on the ground that he was a member of a special mission and therefore entitled to immunity from criminal jurisdiction.[[124]](#footnote-124) It was not entirely clear to what extent the MPS acted on advice given by the FCO and/or the Office of the Director of Public Prosecutions (DPP). The Divisional Court accepted the claimants’ request for an advisory declaration on special mission immunity as it applied in the law of England and Wales,[[125]](#footnote-125) and granted 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.[[126]](#footnote-126)

In this case, the Divisional Court was called upon to identify the existence, or otherwise, of a rule of customary international law concerning the personal inviolability and immunity from criminal proceedings of persons on special missions. The two judges, Lord Justice Lloyd Jones and Mr Justice Jay, considered the matter in depth. They began by recalling the generally accepted requirements for establishing rules of customary international law, relying on the jurisprudence of the International Court of Justice (ICJ)[[127]](#footnote-127) and the International Law Commission’s 2016 draft conclusions on *Identification of customary international law*.[[128]](#footnote-128) They then examined State practice in relation to relevant treaties;[[129]](#footnote-129) the work of the International Law Commission on special missions between 1960 and 1967 (in particular the fourth report of Special Rapporteur Bartoš); the negotiations in the Sixth Committee on the Convention on Special Missions in 1968 and 1969; and decisions of international courts and tribunals, particularly *Arrest Warrant,* and *Djibouti v France* in the ICJ.[[130]](#footnote-130) The judgment contains a detailed analysis of UK and other State practice, including judicial decisions and executive statements from Austria, Belgium, Finland, France, Germany, the Netherlands and the United States. For the UK’s part, the judges noted that the FCO’s skeleton argument in *Khurts Bat* ‘provides a detailed statement of the position of the executive on the issue supported by extensive reference to State practice’.[[131]](#footnote-131) They also looked in some detail at the responses by States to the CAHDI questionnaire, relied upon by the claimants (even though they do not seem to have been officially published); of particular relevance were the responses to question 5, which read:

[d]oes 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.[[132]](#footnote-132)

Finally, the judges noted that there was a considerable body of scholarly support for the view that, at the very least, the inviolability and immunity from criminal jurisdiction of the members of special mission were required by customary international law.[[133]](#footnote-133) In writings from the 1960s­–80s, it was generally thought that a customary norm requiring such immunity “may emerge”,[[134]](#footnote-134) but at that time, the Convention was not thought to have acquired the status of customary international law and the recognition of special missions had “not been accompanied by the development of clear and comprehensive rules of customary international law concerning their privileges and immunities.”[[135]](#footnote-135) However, by the mid-1990s

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.[[136]](#footnote-136)

The above-mentioned practice and scholarly writings led Lloyd Jones LJ and Jay J to conclude that customary international law obliges a receiving State to secure the inviolability and immunity from criminal jurisdiction members of special missions accepted as such.[[137]](#footnote-137)

#### United States of America

The practice of the US Government also supports the view that customary international law requires inviolability and immunity from criminal jurisdiction.[[138]](#footnote-138) In particular, the US Department of State has filed suggestions of immunity for ministerial-level officials visiting the US on a special diplomatic mission in various cases before federal courts. For example, in *Li Weixum v Bo Xilai*, the State Department said ‘[n]ot only is the United States asserting such [special mission] immunity as customary international law in this case, but it has made similar assertions in other cases notwithstanding the fact that the United States has not joined the Special Missions Convention’.[[139]](#footnote-139)

#### Other Statements

Some States have indicated that they believe customary law may require special mission immunity (e.g., Ireland,[[140]](#footnote-140) Malta[[141]](#footnote-141)) or that there might be an emerging rule that effect (e.g., Norway,[[142]](#footnote-142) Mexico[[143]](#footnote-143)), but they have not taken a formal position on the precise scope of that immunity.

If a member of a special mission is entitled to immunity, then as long as the receiving State has given consent,[[144]](#footnote-144) the person is entitled to immunity from criminal jurisdiction. Such individuals also enjoy the inviolability of the person of equivalent rank accredited to a permanent diplomatic mission.[[145]](#footnote-145) This includes the receiving State’s obligation to treat them with due respect and to take all appropriate steps to prevent any attack on their person, freedom or dignity. The inviolability of archives and papers is likely to be covered state by immunity, and diplomatic immunity, if such papers are those of the embassy.

There is little if any State practice or *opinio juris* suggesting a contrary rule of customary international law; that is, one to the effect that there is no immunity for persons on special missions, and/or that such persons do not enjoy inviolability or immunity from criminal jurisdiction. Two cases that are occasionally cited in this regard are *R v Governor of Pentonville Prison, ex parte Osman (No 2)*[[146]](#footnote-146) and *USA v Sissoko*,[[147]](#footnote-147) but neither is persuasive on this point.

In *Osman (No 2)*, an English Divisional Court was provided with a sworn affidavit by an FCO official, in which it was stated that ‘Her Majesty’s Government has not signed the New York Convention on Special Missions and does not regard it as being declaratory of international customary law’.[[148]](#footnote-148) In evaluating the effect of the affidavit, the Court observed that ‘[o]ne possibility might have been to suggest that the applicant was head of a special mission. This suggestion has been rightly disclaimed. There was nothing ‘special’ about the tasks entrusted to the applicant by the Letters of Full Powers. No notification of such a mission was ever given to HMG’.[[149]](#footnote-149) There was no discussion on the status of special mission immunity under customary law. In any event, the FCO officer’s affidavit as evidence of UK’s position on special mission immunity is now superseded by both *Khurts Bat* and *Freedom and Justice Party*, as well as by governmental statements before Parliament.[[150]](#footnote-150)

In *Sissoko*, Gambia argued that Foutanga Sissoko enjoyed immunity because Gambia had designated him a ‘Special Adviser to a Special Mission’ and that this designation had been accepted by the United States.[[151]](#footnote-151) The United States District Court for the Southern District of Florida rejected this argument *inter alia* on the ground that the Convention on Special Missions did not form part of customary international law. It reached this conclusion on the basis that neither the United States, The Gambia nor any member of the UN Security Council had signed the Convention,[[152]](#footnote-152) rather than from an analysis of State practice and *opinio juris*. There was no consideration of the existence of customary rules independent of Convention, and the Court distinguished *Sissoko* from other cases on the basis that the was no suggestion of immunity from the federal government. The only recognition that the United States made of Sissoko was the issuance of a visa; in other words, there was no consent to his presence in the US as part of a special mission.

## Immunity from Civil Jurisdiction

The question whether the rules of customary international law on special mission immunity extend to immunity from *civil* jurisdiction remains open. As mentioned above, one of the reasons for the limited participation in the Convention on Special Missions was the view of some States that full immunity from civil jurisdiction goes beyond what is functionally necessary for a temporary visitor. Nevertheless, there is some State practice and evidence of acceptance as law in support of immunity from civil jurisdiction. The Netherlands has stated that ‘there is sufficient basis to conclude an obligation exists under customary international law to accord full immunity to the members of official missions’ and that ‘[m]embers of official missions enjoy full immunity – for the duration of the mission – for all their acts, whether performed in an official or in a private capacity’.[[153]](#footnote-153) If ‘full immunity’ is taken to conclude immunity from civil jurisdiction, then the Netherlands goes further than the above-mentioned States and would recognize immunity from civil jurisdiction in respect of both official and private acts. Section 4(2) of the South African Diplomatic Immunities and Privileges Act 37 of 2001 provides that ‘[a] special envoy or representative from another state, government organization is immune from the criminal and *civil* jurisdiction of the courts of the Republic’.[[154]](#footnote-154) Croatia,[[155]](#footnote-155) the Czech Republic,[[156]](#footnote-156) Romania[[157]](#footnote-157) and Serbia[[158]](#footnote-158) have stated that the Convention on Special Missions reflects customary international law. Austria,[[159]](#footnote-159) France,[[160]](#footnote-160) and Switzerland[[161]](#footnote-161) have stated that they understand the Convention to reflect customary law only *partially*, but have not indicated whether this includes immunity from civil jurisdiction. Albania considers ‘[t]he 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’ and that ‘[t]he scope *rationae materiae* of immunities comprises immunity from civil and criminal jurisdiction in respect of official acts’.[[162]](#footnote-162) The United Kingdom was more equivocal, stating that ‘[i]t 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’.[[163]](#footnote-163) Such a hindrance to those on a temporary mission would be relatively rare, but might occur when, for example, property is seized in connection with civil proceedings. The US Government has filed ‘Suggestions of Immunity’ in a number of civil cases involving senior representatives of foreign governments on official visits, stating that they are entitled to immunity from suit.[[164]](#footnote-164)

## Types of Special Missions to which Immunity Applies

The question of the type of special mission to which immunity applies was a contentious matter during the negotiation of the Convention on Special Missions. State practice suggests a range of different and nuanced positions. Some States limit special missions to high-levelofficials.[[165]](#footnote-165) The United States has noted that it would grant immunity to ‘high-level’ or ‘ministerial-level officials’ but that such immunity would not ‘encompass all foreign travel or even all high-level visits of officials’.[[166]](#footnote-166) A number of States view the Convention on Special Missions as reflecting customary law, and thus understand the scope of the customary law of special missions as mirroring that of the Convention.[[167]](#footnote-167) Others have declined to take a position on the scope of the immunity under customary law and/or have indicated that they are awaiting further clarity on the issue.[[168]](#footnote-168) Some States have adopted definitions that are identical to Article 1(a) of the Convention.[[169]](#footnote-169) Given this variation in practice, the most likely position is that immunity under customary international law applies *at least* to visitors on high-level missions representing the State in the same way as permanent diplomatic missions, with some States conferring immunity on a wider range of missions.

Official visitors on a high-level mission need not be members of the Government or Government employees. A State may be represented by individual politicians (even those in opposition to the government, if it so wishes),[[170]](#footnote-170) individuals who are not part of government but have relevant technical expertise, or by members of the judiciary. The Netherlands would extend special mission immunity to persons who represent an opposition faction in an internal conflict that is visiting another State to conduct peace negotiations.[[171]](#footnote-171) The Dutch Government has explained that in such situations, ‘the members of the official mission would not enjoy full immunity if the sending State does not consent or notify the receiving State of the official mission’.[[172]](#footnote-172) The Convention on Special Missions also covers meetings of the representatives of two or more States in a third State;[[173]](#footnote-173) there is no reason why such meetings should not be included within the scope of the rules of customary international law.

# Procedural Matters

The receiving State must consent to the visit as a special mission,[[174]](#footnote-174) but there is no requirement in the Convention on Special Missions or under customary international law that consent take a particular form. It is only necessary for the receiving State to have previously agreed through diplomatic or other mutually agreed channels to receive the visitors as part of a special mission entitled to immunity.[[175]](#footnote-175) It is not necessary that the sending and receiving States use the term ‘special mission’. The issuance of a visa—even a diplomatic or official visa – does not necessarily mean that the State consents to a special mission.[[176]](#footnote-176) Immigration authorities may not be concerned with the question of immunities or of whether the executive has consented to the visit as a special mission. Consent may be implied from all the circumstances, although some States also provide a formal process for obtaining consent[[177]](#footnote-177) and/or a procedure to obtain express confirmation of whether the State has consented to a visit as a special mission. For example, following the High Courtdecision in *Khurt Bat*,[[178]](#footnote-178) the British Government informed the UK Parliament of ‘a new pilot process by which the Government will be informed of inward visits which may qualify for special mission immunity status’. In doing so, it explained that

[a] special mission is a temporary mission, representing a state, which is sent by one state to another with the consent of the latter, in order to carry out official engagements on behalf of the sending state.

It further explained that

[i]n the case of *Khurts Bat v the Federal Court of Germany* [2011] EWHC 2029 (Admin) the High Court recognised that, under customary international law, members of a special mission enjoy immunities, including immunity from criminal proceedings and inviolability of the person, and that these immunities have effect in the United Kingdom by virtue of the common law. However, the Court made clear that not everyone representing a State on a visit of mutual interest is entitled to the immunities afforded to members of a special mission but only where a visit is consented to as a special mission. In the case of inward missions to the United Kingdom, the Court affirmed that it is a matter for Her Majesty’s Government to decide whether to recognise a mission as a special mission.[[179]](#footnote-179)

In a Note of the same date to diplomatic missions and international organizations in London, the FCO drew attention to this new procedure ‘of which missions may wish to avail themselves, in order to clarify where the United Kingdom consents to an official visit as a special mission’. The Note stated that

The FCO is mindful of the obligations incumbent upon the United Kingdom under customary international law in respect of special missions. Under customary international law, a special mission is a temporary mission, representing a State, which is sent by one State to another State with the consent of the latter, in order to carry out official business. In this context, ‘official business’ will normally involve official contacts with the authorities of the United Kingdom, such as a meeting [with] officials of Her Majesty’s Government, or attendance at a ceremonial occasion, for example a Royal Wedding.[[180]](#footnote-180)

Notwithstanding this and other procedures for ensuring advance consent, under customary international law there does not seem to be a strict requirement that consent must be given prior to the arrival of the members of the special mission.[[181]](#footnote-181)

# Conclusion

From the State practice and *opinio juris* referred to above, it can be seen that under customary international law members of special missions, accepted as such by the receiving State, enjoy inviolability of the person and immunity from criminal jurisdiction for the duration of the mission. Beyond this, however, uncertainties remain: these include the precise scope of missions in respect of which immunity arises (with some States recognising immunity for all missions, regardless of their level and function); and whether and if so how far customary law requires States to grant immunity from civil jurisdiction.

1. Volterra Fietta Junior Research Lecturer at Newnham College and the Lauterpacht Centre for International Law, University of Cambridge. [↑](#footnote-ref-1)
2. Barrister, 20 Essex Street, London; Member of the UN International Law Commission. [↑](#footnote-ref-2)
3. M. Wood, ‘The Immunity of Official Visitors’ (2012) 16 *Max Planck Yearbook of United Nations* Law, 35. See also Chapter 27 on ‘Material Immunity of Foreign Officials from Criminal Jurisdiction for 'Acts Committed in the Official Capacity' and Possible Exceptions Thereto’ by Concepción Escobar Hernández. [↑](#footnote-ref-3)
4. M. Bartoš, ‘Le statut des missions spéciales de la diplomatie *ad hoc*’ (1963) 108 *Recueil des Cours,* 425; P. Cahier, *Le Droit Diplomatique Contemporain*, 2nd edn. (Librairie E Droz, 1962), pp. 361–72; M. Dehaussy, ‘Travaux de la Commission du Droit International des Nations Unies’ (1967) 13 *Annuaire français de droit international*, 434; R. Donnarumma, *La diplomazia ‘ad hoc’* (Tipomeccanica, 1968);

   M. R. Donnarumma, ‘La Convention sur les missions spéciales (8 décembre 1969)’ (1972) 8 *Revue belge de droit* *international*, 34; J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014), pp. 133–5; E. Franey, *Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (LAP LAMBERT Academic Publishing, 2011), pp. 135–49; H. Fox and P. Webb, *The Law of State Immunity*, 3rd edn.(Oxford University Press, 2015), pp. 567–70; M. Hardy, *Modern Diplomatic Law* (Manchester University Press, 1964), pp. 89–94; N. Kalb, ‘Immunities, Special Missions’ in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012); A. Maresca, *Le missioni speciali* (Giuffre, 1975); B. Murty, *The International Law of Diplomacy* (New Haven Press/Nijhoff, 1989), pp. 262–6, 454–61; J. Nisot, ‘Diplomatie *ad hoc*–les missions spéciales’ (1968) 2 *Revue belge de droit international*, 416­­–22; M. Paszkowski, ‘The Law on Special Missions’ (1974) VI *Polish Yearbook of International Law*, 267–88; F. Przetacznik, ‘Jurisdictional Immunity of the Members of a Special Mission’ (1971) 11 *Indian Journal of International Law*, 593; F. Przetacznik, ‘Diplomacy by Special Missions’ (1981) 59 *Revue de droit international, de sciences diplomatiques et politiques*, 109; I. Roberts (ed.), *Satow’s Diplomatic Practice*, 7th edn. (Oxford University Press, 2017);

   M. Ryan, ‘The Status of Agents on Special Missions in Customary International Law’ (1978) 16 *Canadian Yearbook of International Law*, 157; J. Salmon, *Manuel de Droit Diplomatique* (Bruylant, 1994), pp. 535–546; A. Sanger, ‘Immunity of State Officials from the Criminal Jurisdiction of a Foreign State’ (2013) 62 *International and Comparative Law Quarterly*, 193; I. Sinclair, *The International Law Commission* (Grotius Publications, 1987), pp. 59–61; M. Waters, *The Ad Hoc Diplomat: A Study in Municipal and International Law* (M. Nijhoff, 1963); C. Wickremasinghe, ‘Immunities enjoyed by Officials of States and International Organizations’ in M. D. Evans (ed.), *International Law*, 5th edn. (Oxford University Press, 2018) (forthcoming); M. Wood and A. Sanger, *The Immunities of Special Missions* (Council of Europe, 2018) (forthcoming); H. Wriston, ‘The Special Envoy’ (1959-60) 38 *Foreign Affairs*, 219; J. Young, ‘The United Kingdom and the Negotiation of the 1969 New York Convention on Special Missions’ (2014) 36(1) *The International History Review*, 171. [↑](#footnote-ref-4)
5. The International Court of Justice has emphasised the ‘extreme importance’ of the law of diplomatic relations, referring to ‘the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected’:*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Merits) [1980]ICJ Rep 3, para. 92. This applies as much to *ad hoc* diplomacy as it does to permanent diplomatic missions. [↑](#footnote-ref-5)
6. Franey (n 4), p. 31. [↑](#footnote-ref-6)
7. United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, not yet in force, UN Doc. A/RES/59/38, 16 December 2004, seventh preambular paragraph. [↑](#footnote-ref-7)
8. Convention on Special Missions, 8 December 1969, in force 21 June 1985, 1400 UNTS 231. [↑](#footnote-ref-8)
9. See Mr Ruda, Chairman of the ILC in UNGA Sixth Committee, 23rd Session, 1039th Meeting, UN Doc. A/C.6/SR.1039, 15 October 1968, paras 31–2: ‘the use of special missions having been, in fact, the earliest form of diplomacy. State practice on the subject went back to the very beginning of formal relations between nations. The historical works on India established that constant contacts and relations were maintained between some of the States of ancient India and certain Asia, European and African States through special missions. Similarly, the Greek city states and Rome had developed in accident times an elaborate system of *ad hoc* diplomacy’. [↑](#footnote-ref-9)
10. (1963) II *Yearbook of the International Law Commission*, 151, para. 3. See also Bartoš’s first report on special missions (A/CN.4/166), paras 11–19 ((1964) II *Yearbook of the International Law Commission*, 70–3). In the 1420s, Venice regarded its procurator in Rome, Bembo, ‘as dispensing them from the necessity of sending special missions, … it would be bold to assert that Bembo was the first resident ambassador at the Papal See, and thus the founder of the first lasting resident embassy in history. But he certainly had no immediate predecessor, and the language of the Senate indicates that they regarded his appointment as an innovation’; G. Mattingly, *Renaissance Diplomacy* (Penguin Books, 1954), p. 74. [↑](#footnote-ref-10)
11. (1963) II *Yearbook of the International Law Commission*, 152, para. 6. [↑](#footnote-ref-11)
12. See, e.g., the conclusion of the English Divisional Court in: United Kingdom, England and Wales High Court of Justice, Divisional Court, *The Freedom and Justice Party and others v. Secretary of State for Foreign and Commonwealth Affairs and others*, Case No. 2010, 5 August 2016, [2016] EWHC 2010 (Admin), that as of 1967 ‘[t]here was some customary law’ on special missions immunity (para. 101). [↑](#footnote-ref-12)
13. Ibid., pp. 152–4, paras. 6–10. [↑](#footnote-ref-13)
14. *Règlement de Vienne sur le rang entre les agents diplomatiques*: for the text of the *Règlement*, see (1958) II *Annuaire de la Commission du droit international*, p. 97, note 29. [↑](#footnote-ref-14)
15. Convention on Diplomatic Officers, 20 February 1928, in force 21 May 1929, 155 LNTS No. 3581. Articles 3 and 4 of the 1928 Convention read: ‘Diplomatic envoys are classed as ordinary or extraordinary. Those who permanently represent the Government of one State before that of another are ordinary. Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary. Except as concerns precedence and etiquette, diplomatic officers, whatever their category, have the same rights, prerogatives and immunities. Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the officers are accredited.’ The following States became parties to the Havana Convention: Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Haiti, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela. In addition, the following have signed: Argentina, Bolivia, Guatemala, Paraguay, USA. [↑](#footnote-ref-15)
16. See ‘Diplomatic Privileges and Immunities’ (1932) 26 *The American Journal of International Law*, *Supplement: Research in International Law*, 15, 17ff; also reproduced in J. Grant and J. Barker (eds.), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (Fred B Rothman & Co, 2007). [↑](#footnote-ref-16)
17. Ibid., p. 42. [↑](#footnote-ref-17)
18. Wood (n 3), pp. 53–8. [↑](#footnote-ref-18)
19. (1958) II *Yearbook of the International Law Commission*, 89-105. [↑](#footnote-ref-19)
20. ‘Ad Hoc Diplomacy, Document A/CN.4/129, Report by A.E.F Sandström’ (1960) II *Yearbook of the International Law Commission*, 108. [↑](#footnote-ref-20)
21. (1960) II *Yearbook of the International Law Commission* *1960*, pp. 179–180. The three draft articles read as follows:

    *Article 1*

    *Definitions*

    The expression “special mission” means an official mission of State representatives sent by one State to another in order to carry out a special task. It also applies to an itinerant envoy who carries out special tasks in the States to which he proceeds.

    The expression “1958 draft” denotes the Draft Articles on Diplomatic Intercourse and Immunities prepared by the International Law Commission in 1958.

    *Article 2*

    *Applicability of section 1 of the 1958 draft*

    Of the provisions of section 1 of the 1958 draft, only articles 8, 9 and 18 apply to special missions.

    *Article 3*

    *Applicability of sections II, III and IV of the 1958 draft*

    The provisions of sections II, III and IV apply to special missions also.

    In addition to the modes of termination referred to in article 41 of the 1958 draft, the functions of a special mission will come to an end when the tasks entrusted to it have been carried out. [↑](#footnote-ref-21)
22. United Nations Conference on Diplomatic Intercourse and Immunities, ‘Resolutions Adopted by the Conference – I. Special Missions’*,* Doc. A/CONF.20/10/Add.1, 10 April 1961, Official Records, vol. II, pp. 89–90. In reaching is decision, the Committee took note of the International Law Commission’s comments that the draft articles on special missions constituted only a preliminary draft and ‘that the time at its disposal had not permitted the Commission to undertake a thorough study of the matter’, as well as the limited time available at the Vienna Conference to study the subject in full. [↑](#footnote-ref-22)
23. UNGA Res 1687(XVI), UN Doc A/RES/1687(XVI), 18 November 1961. [↑](#footnote-ref-23)
24. See (n 10) above. [↑](#footnote-ref-24)
25. M. Bartoš, ‘First Report on Special Missions by Mr. Milan Bartoš, Special Rapporteur’, UN Doc. A/CN.4/166, 1 April 1964; M. Bartoš, ‘Second Report on Special Missions by Mr. Milan Bartoš, Special Rapporteur’, UN Doc. A/CN.4/179, 21 April 1965; M. Bartoš, ‘Third Report on Special Missions by Mr. Milan Bartoš, Special Rapporteur’, UN Doc. A/CN.4/189 and Add.1 & 2, 13 June, 17 June and 11 July 1966; M. Bartoš, ‘Fourth Report on Special Missions by Mr. Milan Bartoš, Special Rapporteur’, UN Doc. A/CN.4/194 and Add.1-5, 5 April, 18 April, 21 April, 9 May, 10 May and 17 May 1967. [↑](#footnote-ref-25)
26. (1964) II *Yearbook of the International Law Commission*, pp. 210–26. [↑](#footnote-ref-26)
27. (1967) II *Yearbook of the International Law Commission*, pp. 347–68. [↑](#footnote-ref-27)
28. Paszkowski (n 4), pp. 273–84. [↑](#footnote-ref-28)
29. R. Kolodkin, ‘Preliminary report on immunity of State officials from foreign criminal jurisdiction,

    by Roman Anatolevich Kolodkin, Special Rapporteur’, UN Doc. A/CN.4/601, 29 May 2008, 183. [↑](#footnote-ref-29)
30. ‘Report of the International Law Commission (65th session)’, UN Doc. A/68/10, 2013, 51, para. 48. [↑](#footnote-ref-30)
31. Ibid., 56, para. 11. [↑](#footnote-ref-31)
32. Ibid., 65, para. 12. [↑](#footnote-ref-32)
33. Council of Europe, Committee of Legal Advisers on Public International Law (CAHDI), ‘Replies by States to the questionnaire on “Immunities of Special Missions”’, 7 December 2017 (hereafter ‘CAHDI Replies to Questionnaire’). See also the *Freedom and Justice Party* case (n 12). The Annex to the judgment is entitled ‘Committee of Legal Advisors on Public International Law (CAHDI) Replies by States to the questionnaire on immunities and special missions’, and sets out Questions 5 and 6 and the responses thereto (hereafter ‘*Freedom and Justice Party*, CAHDI Annex’). The States whose responses were available to the Divisional Court in 2016 were Albania, Andorra, Armenia, Austria, Belarus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Italy, Latvia, Mexico, The Netherlands, Norway, Romania, Serbia, Switzerland, Sweden, United Kingdom and the United States of America. [↑](#footnote-ref-33)
34. Convention on Special Missions, 8 December 1969, in force 21 June 1985, 1400 UNTS 231. The resolution adopting the Convention was adopted by a non-recorded vote of 98–0–1 (Malawi abstaining): Convention on Special Missions and Optional Protocol concerning the Compulsory Settlement of Disputes, UNGA Res 2530(XXIV), UN Doc. A/RES/2530(XXIV), 8 December 1969. [↑](#footnote-ref-34)
35. Optional Protocol to the Convention on Special Missions concerning the compulsory settlement of disputes, 8 December 1969, in force 21 June 1985, 1400 UNTS 339. As of October 2017, there were 17 States Parties. [↑](#footnote-ref-35)
36. Settlement of civil claims in connexion with the Convention on Special Missions, UNGA Res 2531(XXIV), UN Doc. A/RES/2531(XXIV), 8 December 1969, which recommended ‘that the sending State should waive the immunity of members of its special mission in respect of civil claims of persons in the receiving State when it can do so without impeding the performance of the functions of the special mission, and that, when immunity is not waived, the sending State should use its best endeavors to bring about a just settlement of the claims’. [↑](#footnote-ref-36)
37. According to Sinclair (n 4), p. 61, ‘[t]his effort at progressive development and codification has accordingly been only partially successful, no doubt because of the reluctance of Governments to accord a wide range of privileges and immunities to special missions and their members when, in the view of the Governments concerned, the grant of such privileges and immunities was not justified by functional reasons’. See discussion below on the core provisions of the Convention. [↑](#footnote-ref-37)
38. See Section III(2) on the core provisions of the Convention (n 34). [↑](#footnote-ref-38)
39. In defining a special mission, the Convention allows for such missions between States that do not ordinarily have permanent diplomatic or consular relations, on the basis that ‘any mission might be better than none at all’: G. Berridge, *Diplomacy: Theory and Practice*, 5th edn (Palgrave Macmillan, 2015), p. 263. [↑](#footnote-ref-39)
40. See also Chapters 23 and 24 on diplomatic and consular immunities by Sanderijn Duquet and Eileen Denza. [↑](#footnote-ref-40)
41. See Article 31 of the Vienna Convention on Diplomatic Relations (VCDR), 18 April 1961, in force 24 April 1964, 500 UNTS 95. [↑](#footnote-ref-41)
42. The exceptions shared with permanent missions include actions (a) relating to private immovable property situated in the territory of the receiving State, unless the person concerned holds it on behalf of the sending State for the purposes of the mission; (b) relating to succession in which the person concerned is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) relating to any professional or commercial activity exercised by the person concerned in the receiving State outside his official functions. [↑](#footnote-ref-42)
43. In other words, members of the families of representatives of the sending State in the special mission and of its members of its diplomatic staff are entitled to immunities in articles 29 to 35 of the Convention; members of families of members of the administrative and technical staff are entitled to immunities as specified in article 36 of the Convention. [↑](#footnote-ref-43)
44. For practice on the interpretation and application of ‘members of the family’, see E. Denza, *Diplomatic Law. A Commentary*, 4th edn(Oxford University Press, 2016), pp. 319-24. [↑](#footnote-ref-44)
45. See the *Freedom and Justice Party* (n 12), paras. 74–165; J Crawford, *Brownlie’s Principles of Public International Law*, 8th edn (Oxford University Press, 2012), p. 414; Fox and Webb (n 4), pp. 567–8; Foakes (n 4), p. 134; Wickremasinghe (n 4), p. 390; Franey (n 4), p. 218. [↑](#footnote-ref-45)
46. The International Court has reaffirmed the important and fundamental point ‘that immunity is governed by international law, and is not a matter of mere comity’: *Jurisdictional Immunities of the State* *(Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, para. 55. This is equally the case with the immunity of members of special missions: (1967) II *Yearbook of the International Law Commission*, 358, para. (1) of the ‘General considerations’ at the beginning of Part II of the draft articles; the *Freedom and Justice Party* case (n 12), paras. 74 and 99. [↑](#footnote-ref-46)
47. UNGA Sixth Committee, 23rd Session, 1069th Meeting, UN Doc. A/C.6/SR.1069, 2, para. 12. [↑](#footnote-ref-47)
48. Wood (n 3), pp. 72­–3. [↑](#footnote-ref-48)
49. The 16 draft conclusions were adopted by the Commission in 2016, on first reading, together with commentaries. ‘Report of the International Law Commission (68th session)’, UN Doc. A/71/10, 2016, 76-117. [↑](#footnote-ref-49)
50. As the ILC emphasised, the draft conclusions are to be read together with the commentaries: ibid., note 245. [↑](#footnote-ref-50)
51. Ibid., conclusion 2 and commentary. [↑](#footnote-ref-51)
52. Ibid., conclusion 8, commentary, para (3). [↑](#footnote-ref-52)
53. Ibid. [↑](#footnote-ref-53)
54. Ibid., note 294, referring to the judgment of the Federal Court of Australia in *Ure v The Commonwealth of Australia* (4 February 2016, [2016] FCAFC 8, para. 37): ‘we would hesitate to say that it is impossible to demonstrate the existence of a rule of customary international [law] from a small number of instances of State practice. We would accept the less prescriptive proposition that as the number of instances of State practice decreases the task becomes more difficult’. [↑](#footnote-ref-54)
55. Mrs Kerstin Pürschel, Permanent Mission of Germany to the United Nations in UNGA Sixth Committee, 71st Session, 29th Meeting, UN Doc. A/C.6/71/SR.29, 2 December 2016, 4, para. 14. [↑](#footnote-ref-55)
56. See (n 49), conclusion 3 and commentary. [↑](#footnote-ref-56)
57. Ibid., commentary para. (3). See also the *Jurisdictional Immunities* case(n 46), para. 55. [↑](#footnote-ref-57)
58. See (n 103) below. [↑](#footnote-ref-58)
59. United States, District Court for the Southern District of Florida (SDFla), *United States of America v. Sissoko* (1997), Case No. 96-759-CR, 3 September 1997, 995 F. Supp. 1469, 1470 (S.D. Fla 1997), 121 ILR 599, 601. [↑](#footnote-ref-59)
60. See (n 49), conclusion 7 and commentary. [↑](#footnote-ref-60)
61. Ibid. [↑](#footnote-ref-61)
62. See (n 49), conclusion 11 and commentary. [↑](#footnote-ref-62)
63. For example, Austria and Romania in CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-63)
64. For example, the Czech Republic has stated that ‘[w]ith regard to States which are not parties to the Convention, the customary nature of the relevant rules will be assessed on a case-by-case basis’: *Freedom and Justice Party*, CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-64)
65. See (n 49), conclusion 11 and commentary para (3): ‘The extent of participation in a treaty may be an important factor in determining whether it corresponds to customary international law; treaties that have obtained near universal acceptance may be seen as particularly indicative in this respect. But treaties that are not yet in force or which have not yet attained widespread participation may also be influential in certain circumstances, particularly where they were adopted without opposition or by an overwhelming majority of States.’ [↑](#footnote-ref-65)
66. See, e.g., ‘Written Ministerial Statement, House of Commons, 4 March 2013’, reproduced in (2013) *British Yearbook of International Law*, 735-6 (‘[a] special mission is a temporary mission, representing a state, which is sent by one state to another with the consent of the latter, in order to carry out official engagements on behalf of the sending state’), and ‘FCO Diplomatic Note No A061/13, 4 March 2013’, reproduced in (2013) *British Yearbook of International Law*, 736­-7 (‘[u]nder customary international law, a special mission is a temporary mission, representing a State, which is sent by one State to another State with the consent of the latter, in order to carry out official business’). The Dutch Government has enumerated four conditions that must be satisfied in order for a special mission to attract immunity:

    ‘a. The official mission must be temporary in nature (generally “a relatively short time, ranging from part of a day to a period of several weeks”;

    b. The mission must be “from one state to another”. But “this does not mean that all the members of an official mission must be government officials. They may include, for example, parliamentarians or representatives of the business community”.

    c. “An official mission must be a mission to the government of the receiving state.”

    d. “The receiving state must have consented to receive the mission in question.”’

    Letter of 26 April 2012 from the Minister of Foreign Affairs and the State Secretary for Security and Justice to the Senate and the House of Representatives on the immunity of members of foreign official missions (the Netherlands). See also responses in CAHDI Replies to Questionnaire (n 33) (in particular those of France, Germany, Italy, the Netherlands, Ukraine and the United Kingdom), and see the discussion below on the types of special mission to which immunity applies. [↑](#footnote-ref-66)
67. The immunity of permanent and temporary diplomats derives from the same customary law principle of immunity (see the section above on ‘The Early Development of the Law on ad hoc Diplomacy’), even if there are – for the reasons enumerated above – fewer examples of state practice concerning temporary missions than of diplomatic missions. When the International Law Commission separated permanent and temporary missions (resulting in the VCDR and Convention on Special Missions respectively), they did so because of the functional differences between these two types of diplomacy and because of the difficulty of reaching an agreement on the definition of temporary diplomacy, and not because it was doubted that *ad hoc* diplomats benefited from inviolability and immunity from arrest and prosecution. [↑](#footnote-ref-67)
68. See CAHDI Replies to Questionnaire (n 33), in particular statements by Albania; Belarus; Belgium (see also Article 1*bis*, §2 of the Belgian Code of Criminal Procedure); Finland (see also sections 9 and 17 of the Act on the Privileges and Immunities of International Conferences and Special Missions (572/1973)); France; Germany; Malta; Switzerland; Ukraine; and the United Kingdom. [↑](#footnote-ref-68)
69. See discussion below. [↑](#footnote-ref-69)
70. See, e.g., UN Convention on Jurisdictional Immunities of States and Their Property (n 7), Arts. 22–8 of the Vienna Convention on Diplomatic Relations (n 41) and Arts. 31–38 of the Vienna Convention on Consular Relations (VCCR), 24 April 1964, in force 19 March 1967, 596 UNTS 261. The *Tehran Hostages* case (n 5), 30-1. [↑](#footnote-ref-70)
71. See also Chapter 27 on ‘Material Immunity of Foreign Officials from Criminal Jurisdiction for ‘Acts Committed in the Official Capacity’ and Possible Exceptions Thereto’ by Concepción Escobar Hernández. [↑](#footnote-ref-71)
72. CAHDI Replies to Questionnaire (n 33) (‘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.’) [↑](#footnote-ref-72)
73. Ibid. (‘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.’) [↑](#footnote-ref-73)
74. Ibid. (‘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.’) [↑](#footnote-ref-74)
75. Ibid. (‘*Oui. Les immunités accordées aux missions spéciales sont pour l’essentiel basées sur le droit international coutumier. L’immunité de juridiction pénale des missions spéciales couvre tous les actes accomplis à titre officiel pendant la durée de la mission, à l’exception des actes constitutifs de crimes internationaux (crime de génocide, crime contre l’humanité et crime de guerre, notamment).*’) [↑](#footnote-ref-75)
76. Ibid. (‘If the sending state notifies the receiving state (Bosnia and Herzegovina) through diplomatic channels about the “Special mission”, members of the mission, the scope, travelling dates and other details, the mission will enjoy immunities and privileges based on the customary international law and Convention on Special Missions.’) [↑](#footnote-ref-76)
77. Ibid. (‘The Republic of Bulgaria considers that some aspects regarding the immunity of special missions may derive from customary international law … .’) [↑](#footnote-ref-77)
78. Ibid. (‘The Republic of Croatia considers that the provisions of the Convention on special missions, in particular the provisions concerning the scope of privileges and immunities, reflect customary international law. With regard to States that are not Parties to the Convention, the customary nature of relevant rules shall be assessed on a case-by case basis.’) [↑](#footnote-ref-78)
79. Ibid. (‘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.’) [↑](#footnote-ref-79)
80. Ibid. (‘Estonia considers immunities afforded to special missions to derive from customary international law in as far as the principles relating thereto are not covered by the 1969 Convention and in relation to countries that are not states parties to it.’) [↑](#footnote-ref-80)
81. Ibid. See discussion below. [↑](#footnote-ref-81)
82. Ibid. (‘*S’agissant de la définition d’une mission spéciale, elle considère que les règles posées par la Convention de New York sur les missions spéciales du 8 décembre 1969 reflètent le droit international coutumier.*’) [↑](#footnote-ref-82)
83. Ibid. (‘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.’) [↑](#footnote-ref-83)
84. Ibid. (‘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.’) [↑](#footnote-ref-84)
85. Ibid. (‘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.’) [↑](#footnote-ref-85)
86. Ibid. (‘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.’) [↑](#footnote-ref-86)
87. Ibid. In answer to the question ‘[d]oes your State consider the certain obligations and/or definitions regarding immunity of special missions derive from customary international law?’, Serbia replied ‘Yes, it does.’ [↑](#footnote-ref-87)
88. Ibid. (‘The Republic of Slovenia is of the view that the UN Convention on special missions to a large extent reflects customary international law.’) [↑](#footnote-ref-88)
89. Ibid. (‘Spain considers that current obligations and/or definitions regarding immunity of special missions are essentially those explicitly established by the UN Convention on special missions and by its national legislation … but does not exclude a priori the possible application of customary international law to cases which may not be explicitly covered by the aforementioned texts.’) [↑](#footnote-ref-89)
90. Ibid. (‘*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 particulier de la portée des privilèges et immunités.*’) [↑](#footnote-ref-90)
91. Ibid. (‘Ukraine is of the view that the United Nations Convention on special missions (1969) to large extent reflects customary international law.’) [↑](#footnote-ref-91)
92. Ibid. See discussion below. [↑](#footnote-ref-92)
93. Ibid. See discussion below. [↑](#footnote-ref-93)
94. See the *Freedom and Justice Party* case (n 12), para. 147 and CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-94)
95. Act on the Privileges and Immunities of International Conferences and Special Missions (572/1973; amendments up to 1649/1991 included), unofficial translation available at <http://www.finlex.fi/fi/laki/kaannokset/1973/en19730572.pdf>. See also CAHDI Replies to Questionnaire (n 33) (emphasis added). [↑](#footnote-ref-95)
96. ‘*Le Ministère des affaires étrangères confirme que l’Ambassadeur du Congo en France a certifié que M. N’Dengue, porteur d’un document signé par le président de la République du Congo, est en mission officielle en France à compter du 19 mars 2004, qu’à ce titre, et en vertu du droit inter- national coutumier, il bénéficie d’immunités de juridiction et d’exécution*.’ (reproduced in: France, Cour de Cassation (Chambre Criminelle), *Appeal by X and others*, Appeal No. 07-86412, 9 April 2008, available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000018642947>. [↑](#footnote-ref-96)
97. See Judgment of 20 June 2007 of the *Cour d’Appel de Versailles (Chambre de l’Instruction)*, referred to above (n 95). [↑](#footnote-ref-97)
98. The relevant part of the *Cour d’Appel’s* judgment can be found in the judgment of 9 April 2008 (n 95). The *Cour de Cassation* turned down the appeal on other grounds but seems to have concluded that the *Cour d’Appel* had not been competent to deal with immunity and was moreover wrong, since the Director-General of Police was only entitled to official act immunity. [↑](#footnote-ref-98)
99. See *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France)* (Counter-Memorial of the French Republic), 13 July 2007, <http://www.icj-cij.org/en/case/136/written-proceedings>, para. 4.34. In the *Case concerning Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (provisional measures) before the International Court of Justice, Counsel for France stated: ‘*il* [the Vice-President of the Republic of Equatorial Guinea] *peut parfaitement se déplacer à titre officiel dans le cadre d’une mission diplomatique spéciale, car il bénéficiera alors d’une immunité conformément au droit international*’ ((Verbatim Record), 18 October 2016, CR 2016/15, 37, para. 19 (Ascensio)). See also, 19 October 2016, CR 2016/17, 16, para. 12 (Ascensio). [↑](#footnote-ref-99)
100. Germany, Federal Supreme Court, *Tabatabai* Case, 27 February 1984, 80 ILR 388, 411. [↑](#footnote-ref-100)
101. See V. Thalmann, ‘French Justice’s Endeavours to Substitute for the ICTR’ (2008) 6 *Journal of International Criminal Justice*,995-1002. [↑](#footnote-ref-101)
102. Germany, Higher Administrative Court Berlin-Brandenburg, *Vietnamese National Case*, Case No. OVG 8 S 39.06, 15 June 2006 (overturning a decision of the Administrative Court Berlin). [↑](#footnote-ref-102)
103. See: Rundschreiben vom 15.09.15 Zur Behandlung von Diplomaten und anderen bevorrechtigten Personen in der Bundesrepublik Deutschland, GMBL vom 19.11.2015, S. 1206ff. (1210),

     <http://www.auswaertiges-amt.de/cae/servlet/contentblob/669230/publicationFile/189128/Rundschreiben_Beh_Diplomaten.pdf>. [↑](#footnote-ref-103)
104. See United Kingdom, England and Wales High Court of Justice, Queen’s Bench Division, *Khurts Bat v. Investigating Judge of the German Federal Court and others*, Case No. 2029, 29 July 2007, [2011] EWHC 2029 (Admin), [2013] QB 349, 361. [↑](#footnote-ref-104)
105. The CAVV is an independent body that advises the Government, the House of Representative and the Senate of the Netherlands on issues of international law. [↑](#footnote-ref-105)
106. Advisory Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*, CAVV), ‘Advisory Report on the Immunity of Foreign State Officials’, No. 20, 2011. [↑](#footnote-ref-106)
107. Ibid., 31. See also, at 34: ‘[i]f 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 crimes. … The CAVV bases the granting of immunity in such cases on customary international law.’ [↑](#footnote-ref-107)
108. The Netherlands, Ministry of Foreign Affairs, ‘*Regeringsreactie op CAVV Advies Nr. 20, inzake de immuniteit van buitenlandse ambtsdragers*’, 19 October 2011, House of Representatives, 2011-2012, 33000-V, No. 9, 5 (for an unofficial English translation, see: <http://cms.webbeat.net/ContentSuite/upload/cav/doc/Advice_nr__20_-_government_response_to_advice_on_immunity_foreign_state_officials.pdf>). [↑](#footnote-ref-108)
109. CAHDI Replies to Questionnaire (n 33), 94. [↑](#footnote-ref-109)
110. See Art. 141 of the Criminal Procedure Act and Art. 28 of the Civil Procedure Act, available in CAHDI Replies to Questionnaire (n 33), 93. [↑](#footnote-ref-110)
111. Section 4(2) of the South African Diplomatic Immunities and Privileges Act 37 of 2001, as amended by the Diplomatic Immunities and Privileges Amendment Act 35 of 2008, available at <http://www.dirco.gov.za/chiefstatelawadvicer/documents/acts/diplomaticimmunitiesandprivilegesact.pdf>. Section 4(3) also requires that ‘[t]he Minister must by notice in the [Government] Gazette recognise a special envoy or representative for the purposes of subsection (2)’. [↑](#footnote-ref-111)
112. In English: Organic Law 16/2015, of October 27th, about privileges and immunities of foreign States, International Organizations with headquarters in Spain, and international conferences and meetings celebrated in Spain. [↑](#footnote-ref-112)
113. See CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-113)
114. See Art. 9 (‘International treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine’) and Article 19 (‘International treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine and have to be applied in a manner similar to any other act of national legislation’) of the Constitution, as mentioned in CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-114)
115. See Art. 6(2) of the Code of Criminal Procedure and Plenary Session Resolution of the High Specialized Court for Civil and Criminal Cases for Consideration of Civil Cases with foreign element of 16.05.2013 No 2754/0/4–13, both mentioned in CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-115)
116. CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-116)
117. Ibid. [↑](#footnote-ref-117)
118. United Kingdom, England and Wales Bow Street Magistrates Court, *Re v. Bo Xilai*, 8 November 2005, 128 ILR 713, 713-5; France, Court of Appeal Paris, *France v. Durbar*, 16 June 2008, see Franey (n 4) pp. 147–9; *Re Ehud Barak*, 29 September 2009, reproduced in Franey (n 4) pp. 146–7; *Re Mikhael Gorbachev*, 30 March 2011(unreported). The fact that decisions of the lower courts are not a precedent as a matter of English law does not prevent them being relevant as UK practice, or as a subsidiary means for the identification of international law within the meaning of Article 38 of the ICJ Statute. [↑](#footnote-ref-118)
119. *Khurts Bat v. Investigating Judge of the German Federal Court and others* (n 103), 633. For discussion, see R. O’Keefe, ‘Decisions of British Courts during 2011 involving Questions of Public or Private International Law: A. Public International Law’ (2012) 82 *British Yearbook of International Law* 564. 613–28 and Sanger (n 4) 193–224. [↑](#footnote-ref-119)
120. The *Freedom and Justice Party* case (n 12), para. 117. This position under English law does not prevent *Khurts Bat* forming part of UK practice, or as constituting a subsidiary means for the identification of international law. [↑](#footnote-ref-120)
121. The other claimants were the Minister of Investment in the Government of Egypt in May 2013 (ceasing to hold office in July 2013), the ‘Foreign Relations Secretary of the Freedom and Justice Party of Alexandria’ from June 2012 to July 2013 and a British citizen and surgeon who went to Egypt in July and August 2013 to assist in emergency field hospitals. [↑](#footnote-ref-121)
122. The *Freedom and Justice Party* case (n 12), para. 2. [↑](#footnote-ref-122)
123. This section criminalises torture committed by ‘in the United Kingdom or elsewhere’ and regardless of the nationality of the perpetrator. [↑](#footnote-ref-123)
124. The Head of Diplomatic Missions and International Organizations United of the Protocol Directorate of the FCO issued a certificate on 14 September 2015 confirming that the FCO ‘has consented to the visit to the United Kingdom of Egyptian Chief of Defence Staff, Lt General Mahmoud Hegezazy … from 15–19 September as a special mission’, ibid., para. 15. [↑](#footnote-ref-124)
125. The decision not to prosecute was also challenged on other grounds, but the Court rejected these: ibid., paras. 29–73. [↑](#footnote-ref-125)
126. Ibid., para. 180. The claimants have been given leave to appeal to the Court of Appeal. [↑](#footnote-ref-126)
127. *North Sea Continental Shelf Cases* for the ‘test’ of identifying customary international law and *Jurisdictional Immunities of the State* for guidance on identifying ‘evidence’ of customary norms, ibid., paras 78-9. [↑](#footnote-ref-127)
128. In particular, conclusions 3 and 8 (ibid., paras. 77ff) although not the accompanying commentaries (which were not adopted until 9 August 2016, after the handing down of the judgment). [↑](#footnote-ref-128)
129. Specifically, the Havana Convention regarding Diplomatic Officers of 1928, the Vienna Convention on Diplomatic Relations, and the New York Convention on Special Missions of 1969 (ibid., paras. 83-4). [↑](#footnote-ref-129)
130. The *Freedom and Justice Party* case (n 12), para. 105. [↑](#footnote-ref-130)
131. Ibid.*,* para. 118. [↑](#footnote-ref-131)
132. Ibid., para. 144. The States whose responses were available to the Divisional Court in 2016 are listed in (n 33) above. [↑](#footnote-ref-132)
133. Ibid., paras. 148–62. [↑](#footnote-ref-133)
134. American Law Institute, *Third Restatement of the Foreign Relations Law of the United States* (1986), p. 470. [↑](#footnote-ref-134)
135. R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th edn.(Oxford University Press, 1991), para. 533. See, however, Dehaussy (n 4), 440-1 and 443 for the view that in 1967 the ILC was at least in part codifying existing law. [↑](#footnote-ref-135)
136. The *Freedom and Justice Party* case(n 12), para. 162. The Divisional Court cited Wood (n 3), 60 and 72–3; N Kalb (n 4); Crawford (n 45), p. 414; Fox and Webb (n 4), pp. 567-8; Foakes (n 4), p. 134; *Halsbury’s Laws of England* (LexisNexis Butterworths, 2010) vol. 61, para. 264; Wickremasinghe (n 4), p. 390; P. d’Argent, ‘Immunity of State Officials and the Obligation to Prosecute’ in A. Peters, E. Lagrange, S. Oeter and C. Tomuschat ‘eds.), *Immunities in the Age of Global Constitutionalism* (Bril Nijhoff, 2015), p. 245: ‘The same is true for diplomats and members of special missions, but only in relation to possible criminal proceedings in the states to which they are accredited or on mission.’; I Roberts (ed.), *Satow’s Diplomatic Practice,* 6th edn. (Oxford University Press, 2009). [↑](#footnote-ref-136)
137. The *Freedom and Justice Party* case (n 12), para. 165. [↑](#footnote-ref-137)
138. The US response to the CAHDI questionnaire was, however, somewhat equivocal: CAHDI Replies to Questionnaire (n 33), 126. [↑](#footnote-ref-138)
139. United States, District of Columbia District Court, *Li Weixum v. Bo Xilai*, Civ. No. 04-cv-0649 (RJL), *Further Statement of Interest of the United States in Support of the United States’ Suggestion of Immunity*, 6 December 2006, <https://www.state.gov/documents/organization/98772.pdf>, 12. See also: United States, District of Columbia District Court, *Li Weixum v. Bo Xilai*, Civ. No. 04-0649 (RJL), *Suggestion of Immunity and Statement of Interest of the United States*, 24 July 2006, 4; Letter from Legal Adviser Bellinger Concerning Immunity of Bo Xilai, 24 July 2006, <https://www.state.gov/documents/organization/98830.pdf>: ‘[c]onsistent with the rules of customary international law … it is appropriate to recognise the immunity of a high-level official on a special diplomatic mission form the jurisdiction of United States federal and state courts’); United States, District Court for Northern District of Ohio, *Kilroy v. Charles Windsor, Prince of Wales*, Civ. No. C-78-291, *Suggestion of Immunity*, 81 ILR 605. See also J. Bellinger III, ‘Immunities’, Opinio Juris, 18 January 2007, see under <http://opiniojuris.org/2007/01/18/immunities/> and J. Bellinger, ‘The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities’ (2011) 44 *Vanderbilt Journal of Transnational Law* 819, 831-2. See also United States, District of Columbia District Court, *In Re: Matter of the Application of Mikhail B. Khodorkovsky for an Order Seeking Discovery under 28 USC 1782*, Case No. 09-mc-205, 17 April 2009 (D.D.C. 2009). [↑](#footnote-ref-139)
140. CAHDI Replies to Questionnaire(n 33) (‘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’ (emphasis added) and ‘immunities can be applicable to special missions by virtue of customary international law, which forms part of Irish law’. [↑](#footnote-ref-140)
141. Ibid. (‘Whilst Malta acknowledges that members of special missions may be entitled to certain immunities, it has not as yet taken a formal position as to the precise scope of these under customary international law, and any situation that were to arise would be considered on an individual basis.’) [↑](#footnote-ref-141)
142. Ibid. (‘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”, emphasis added) [↑](#footnote-ref-142)
143. Ibid.(‘Mexico acknowledges the existence of certain State practice regarding immunity of special missions that might be interpreted as an emerging rule of customary international law. However, Mexico has not taken a position as to the existence of a customary rule of international law in this field. Rather, Mexico has voluntarily opted to be legally bound by the rules codified in the [Convention on Special Missions]’. [↑](#footnote-ref-143)
144. Ibid., Austria; Belarus (though note reference to the Convention on Special Missions); Czech Republic; Germany; Italy; the Netherlands; United Kingdom. [↑](#footnote-ref-144)
145. The *Khurts Bat* case(n 103), 362, para. 26. [↑](#footnote-ref-145)
146. United Kingdom, England and Wales High Court of Justice, Queen’s Bench Divison, *R. v. Governor of Pentonville Prison, ex parte Osman (No 2)*, 21 December 1988, 88 ILR 378. [↑](#footnote-ref-146)
147. See the *USA v Sissoko* case (n 59). [↑](#footnote-ref-147)
148. The *Osman* case (n 145), 385. [↑](#footnote-ref-148)
149. Ibid., 393. [↑](#footnote-ref-149)
150. Discussed in detail below. [↑](#footnote-ref-150)
151. The *USA v. Sissoko* (n 59), 1470. [↑](#footnote-ref-151)
152. The United Kingdom had in fact signed the Convention. [↑](#footnote-ref-152)
153. CAHDI Replies to Questionnaire(n 33). [↑](#footnote-ref-153)
154. See (n 110) above (emphasis added). [↑](#footnote-ref-154)
155. CAHDI Replies to Questionnaire(n 33) (‘The Republic of Croatia considers that the provisions of the Convention on special missions, in particular the provisions concerning the scope of privileges and immunities, reflect customary international law. With regard to States that are not Parties to the Convention, the customary nature of relevant rules shall be assessed on a case-by case basis.’) [↑](#footnote-ref-155)
156. Ibid. (‘the Convention, in particular the provisions concerning the scope of privileges and immunities, to large extent reflects customary international law’.) [↑](#footnote-ref-156)
157. Ibid. [↑](#footnote-ref-157)
158. Ibid. To the question ‘Does your State consider that certain obligations and/or definitions regarding immunity of special missions derive from customary international law?’, Serbia answered ‘Yes, it does.’ [↑](#footnote-ref-158)
159. Ibid. (‘[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. … As to immunity in civil and administrative proceedings, Article 31 (2) of the Convention applies.’) [↑](#footnote-ref-159)
160. Ibid. [↑](#footnote-ref-160)
161. Ibid. [↑](#footnote-ref-161)
162. Ibid. [↑](#footnote-ref-162)
163. Ibid. [↑](#footnote-ref-163)
164. See the *Li Weixum v. Bo Xilai* (n 138) and *Kilroy v. Charles Windsor, Prince of Wales* (n 138) cases. [↑](#footnote-ref-164)
165. See, e.g., Albania (CAHDI Replies to Questionnaire(n 33), 10): includes Head of State and Government, Speaker of Parliament, Minister of Foreign Affairs and their family members accompanying them; diplomats and high officials holding a diplomatic passport. [↑](#footnote-ref-165)
166. Ibid. See also cases listed in (n 163) above. [↑](#footnote-ref-166)
167. See, e.g., CAHDI Replies to Questionnaire(n 33): the Czech Republic; Romania (noting that ‘[i]n practice, immunity of special missions would be granted to holders of diplomatic passports or service passports (for members of the administrative and technical staff’); Serbia; and Switzerland. [↑](#footnote-ref-167)
168. Ibid.: Ireland; Norway; Sweden. [↑](#footnote-ref-168)
169. Ibid.: France; Germany; Italy; the Netherlands; and the United Kingdom. [↑](#footnote-ref-169)
170. For example, Tzipi Livni, then Israeli Opposition Leader, visited the UK in 2011. See O. Bowcott, ‘Tzipi Livni Spared War Crime Arrest’, The Guardian, 6 October 2011, <https://www.theguardian.com/world/2011/oct/06/tzipi-livni-war-crime-arrest-threat>. [↑](#footnote-ref-170)
171. Advisory Report on the Immunity of Foreign State Officials (n 105), 34. See also CAHDI Replies to Questionnaire (n 33). [↑](#footnote-ref-171)
172. CAHDI Replies to Questionnaire(n 33). [↑](#footnote-ref-172)
173. See Art. 18 of the Convention on Special Missions (n 8). [↑](#footnote-ref-173)
174. The *Khurts Bat* case(n 103), para. 29; Art 2 of the Convention on Special Missions (n 8). [↑](#footnote-ref-174)
175. See Art 2. Of the Convention on Special Missions (n 8), which also stipulates that consent should be obtained ‘through the diplomatic or another agreed or mutually acceptable channel’. [↑](#footnote-ref-175)
176. The *Khurts Bat* case (n 103), paras. 27ff. [↑](#footnote-ref-176)
177. E.g.: Finland (Section 13 of the Government Rules of Procedure Representation of Foreign States and Organisations in Finland); Germany (a formal notification to the Federal Foreign Office; although consent can still be implied): CAHDI Replies to Questionnaire (n 33), 53 and 62. See also: Italy (a formal notification to the Italian Ministry of Foreign Affairs, although an official invitation by competent Italian authorities would normally indicate implied consent to the mission: *Freedom and Justice Party*, CAHDI Annex (n 33)). [↑](#footnote-ref-177)
178. The *Khurts Bat* case(n 103). [↑](#footnote-ref-178)
179. Written Ministerial Statement, House of Commons (n 66). [↑](#footnote-ref-179)
180. FCO Diplomatic Note No A061/13, 4 March 2013 (n 66). For the practice under this procedure, see the reply to a written question of 12 July 2013 ((2013) *British Yearbook of International Law*, 737). See also United Kingdom, Foreign & Commonwealth Office, Diplomatic Missions and International Organisations Unit Protocol Directorate, ‘Freedom of Information Act Request 2000 Request Ref. 0926–16’, 25 October 2016, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/601028/0926-16_Letter_07.03.17.pdf>, stating that during the period 1 October 2014 to 30 September 2015, the FCO consented to 15 requests for a special mission, covering 47 visitors in total. [↑](#footnote-ref-180)
181. See, e.g., the *Tabatabai* case (n 99), 411. [↑](#footnote-ref-181)