The Immunity of Official Visitors

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Abstract

This article reviews the customary international law concerning official visitors, in particular the inviolability of the person and immunity from criminal jurisdiction that they enjoy. It looks at State practice, including the case-law. It also considers the work of the ILC and the literature.

Three separate heads of immunity may come into play in the case of any particular official visit: the immunity *ratione personae* of holders of high-ranking office; "official act" immunity; and the immunity of official visitors, including those on special missions. As regards the third head, the rules of customary international law are both wider and narrower than the provisions of the *Convention on Special Missions*. They are wider in that the class of official visitors who may be entitled to immunity is broader than that foreseen in the Convention. They are narrower in that the range of privileges and immunities is more limited, being essentially confined to immunity from criminal jurisdiction and inviolability of the person.

Keywords

Official Visitors; Special Missions; Immunity; Inviolability; Convention on Special Missions

I. Introduction

The heir to the Throne of State A visits State B to receive an honorary degree. State A's former President visits State B for a reception in his honour, and also pays a courtesy call on the Prime Minister. The head of the national security office of State A visits State B intent on meeting officials of State B, but no meetings are arranged. The former Foreign Minister of State A, now leader of the opposition, visits State B to discuss with its Foreign Minister important questions of international relations. State A's Solicitor General visits State B to give a lecture at a university. Are these visitors, and persons accompanying them, entitled under customary international law to immunity from the jurisdiction of State B?

The aim of this article is to consider the customary international law concerning official visitors, in particular the inviolability of the person and immunity from criminal jurisdiction that they enjoy. In doing so, it looks at State practice, including the case-law, as well as the work of the ILC[1] and the literature.[2]

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1 In addition to the ILC's work on special missions, discussed in Section III below, its former Special Rapporteur on Immunity of State officials from foreign criminal jurisdiction (Kolodkin) produced three reports: *Preliminary report on immunity of State officials from foreign criminal jurisdiction* (Doc. A/CN.4/601, 29 May 2008); *Second report on immunity of State officials from foreign criminal jurisdiction* (Doc. A/CN.4/631, 10 June 2010); *Third report on immunity of State officials from foreign criminal jurisdiction* (Doc. A/CN.4/646, 24 May 2011) ("Kolodkin, Preliminary Report", "Kolodkin, Second Report" and "Kolodkin, Third Report"). The current Special Rapporteur (Escobar Hernández) submitted her first report in May 2012: *Preliminary report on immunity of State officials from foreign criminal jurisdiction* (Doc. A/CN.4/654 of 31 May 2012) ("Escobar Hernandez, Preliminary Report"). In addition, the UN Codification Division produced a Memorandum on *Immunity of State officials from foreign criminal jurisdiction* (Doc. A/CN.4/594, 31 March 2008) ("Secretariat Memorandum").

2 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. 2, 2nd edition 1947, 1232-1234; C. Eagleton, "The Responsibility of the State for the Protection of Foreign Officials", *AJIL* 19 (1925), 293-314; H. Wriston, *Executive Agents in American Foreign Relations*, 1929; G.H. Hackworth, *Digest of International Law*, Vol. IV, 1940, 412-414; H. Wriston, "The Special Envoy", *Foreign Aff.* 38 (1959/1960), 219-237; M. Waters, "The Ad Hoc Diplomat: A Legal and Historical Analysis", *Wayne Law Review* 6 (1959/1960), 380-393; Ph. Cahier, *Le Droit diplomatique contemporain*, 1962, 361-372; M. Waters, *The Ad Hoc Diplomat: A Study in Municipal and International Law*, 1963; M. Bartoš, "Le statut des missions spéciales de la diplomatie *ad hoc*", *RdC* 108 (1963), 425-560; A. Watts, "Jurisdictional Immunities of Special Missions: The French Property Commission in Egypt", *ICLQ* 12 (1963), 1383-1399 (1383); J.V. Louis, "Le procès des diplomates français au Caire", *A.F.D.I.* 9 (1963), 231-251; J. Nisot, "Diplomatie *ad hoc* – les missions spéciales", *RBDI* 4 (1968), 416-422; M.R. Donnarumma, *La Diplomazia 'Ad Hoc'*, 1968; M. Whiteman, *Digest of International Law*, Vol. 7, 1970, 33-47; M. Bothe, "Die strafrechtliche Immunität fremder Staatsorgane", *ZaöRV* 31 (1971), 246-270; F. Przetacznik, "Jurisdictional Immunity of the Members of a Special Mission", *IJIL* 11 (1971), 593-609; M.R. Donnarumma, "La Convention sur les missions speciales (8 décembre 1969)", *RBDI* 8 (1972), 34-79; M. Paszkowski, "The Law on Special Missions", *Annuaire Polonais de Droit International* 6 (1974), 267-288; A. Maresca, *Le missioni speciali*,

Some 50 years ago, in 1963, Watts could write,

> "There is not yet any settled answer to the question whether, and if so to what extent, any jurisdictional immunity is enjoyed by government officials who are not members of an embassy or a consulate but who are sent on an official mission to a foreign State."[3]

That this is no longer the case is due in no small measure to the influence of the *Convention on Special Missions of 1969* and domestic

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1975; M. Ryan, "The Status of Agents on Special Missions in Customary International Law", *CYIL* 16 (1978), 157-196; F. Przetacznik, "Diplomacy by Special Missions", *RDI* 59 (1981), 109-176; A. Verdross/ B. Simma, *Universelles Völkerrecht*, 3rd edition, 1984; J. Wolf, "Die völkerrechtliche Immunität des ad hoc-Diplomaten: untersucht anläßlich des Urteils des Landgerichts Düsseldorf in der Strafsache gegen Dr. Sadegh Tabatabai", *EuGRZ*, 10 (1983), 401-406; I. Sinclair, *The International Law Commission*, 1987, 59-61; L. Dembinski, *The Modern Law of Diplomacy*, 1988, 55-61; B. Murty, *The International Law of Diplomacy*, 1989, 262-266, 454-461; G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Vol. I/1, 1989, 296-298; M. Herdegen, "Special Missions", *EPIL* 4 (2000), 574-577; R. Jennings/ A. Watts (eds), *Oppenheim's International Law*, 9th edition, 1991, paras. 531, 533; J. Salmon, *Manuel de droit diplomatique*, 1994, 535-546; "Special Missions", in: A. Watts (ed.), *The International Law Commission 1949-1998*, 1999, Vol. I, 344-345; K. Ipsen, *Völkerrecht*, 5th edition, 2004, 591-596; P. Daillier/ M. Forteau/ A. Pellet, *Droit International Public*, 8th edition, 2008, para. 458; M. Shaw, *International Law*, 6th edition, 2008, 774-775; R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, 2008, 167-168; G. Buzzini, "Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti* v. *France* Case", *LJIL* 22 (2009), 455-483; I. Roberts (ed.), *Satow's Diplomatic Practice*, 6th edition, 2009, 187-193; C. Wickremasinghe, "Immunities Enjoyed by Officials of States and International Organizations", in: M.D. Evans, *International Law*, 3rd edition, 2010, 390-392; D. Akande/ S. Shah, "Immunities of State Officials, International Crimes and Foreign Domestic Courts", *EJIL* 21 (2010), 815-852 (821-823); E. Franey, *Immunity, Individuals and International Law*, 2011, 135-149; J. Foakes, "Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts", *Chatham House Briefing Paper*, November 2011 (IL BP 2011/2); N. Kalb, "Immunities, Special Missions", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition, 2012, 413-414; M. Wood, "Convention on Special Missions: Introductory Note", UN Audiovisual Library of International Law.

3 Watts (1963), see note 2, 1383.

case-law. The question of the immunity of official visitors under customary international law, including those on "special missions",[4] arises with increasing frequency. The law in this field may seem uncertain, given the variety of situations that arise. Yet, from the practice of States, the main outlines of the law are clear. The focus is on immunity from criminal jurisdiction since it is this that gives rise to most incidents in practice. But official visitors may enjoy a range of privileges and immunities, including in respect of civil and administrative jurisdiction. At least, they do so when the *Convention on Special Missions of 1969* applies.

With the introduction of permanent diplomatic missions in the fifteenth and sixteenth centuries, the institution of special missions declined, to reappear in full force by the time of World War II. As a working paper prepared in 1963 by the UN Secretariat explained,

> "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 wed-

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4 The term "special mission" is in common use among international lawyers following the adoption of the 1969 Convention on Special Missions. But other terms are found in State practice and case-law. The term "official visit" may be preferable to "special mission". "Special mission" is not widely understood by those unfamiliar with diplomacy, and may conjure up unrelated images – of espionage, or the operations of special forces. In any event, the term is closely associated with the Convention on Special Missions of 1969, from which, as will be seen, customary rules differ significantly.

dings, or for the purposes of important political negotiations, particularly those held at international congresses."[5]

According to Milan Bartoš, also writing in 1963, it was widely assumed that *ad hoc* diplomacy was confined to ceremonial and protocol visits, visits by Heads of State, Heads of Government and Foreign Ministers (to which special rules already applied), and delegates attending international organizations and conferences. But, as Bartoš explains, this was not in fact the case. Especially from about 1941 onwards,[6] *ad hoc* diplomacy to handle particular issues has become more and more common, both in bilateral relations and in the form of "special representatives" or "special envoys" designated by States (or international organizations) to handle particular issues.

The inviolability of the person and immunity from criminal jurisdiction of official visitors is distinct from other heads of immunity, such as those of (i) diplomatic agents;[7] (ii) consular officers;[8] (iii) representatives to international organizations and to international conferences;[9] (iv) officials of international organizations;[10] (v) persons associated with in-

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5 "Special Missions. Working paper prepared by the Secretariat" (Doc. A/CN.4/155, in: *ILCYB* 1963, Vol. II, 151-158, paras. 3-11).

6 Bartoš, see note 2, 431-432.

7 E. Denza, *Diplomatic Law*, 3rd edition, 2008; R. van Alebeek, "Immunity, Diplomatic", in: Max Planck Encyclopedia, see note 2; H. Hestermeyer, "Vienna Convention on Diplomatic Relations (1961)", in: Max Planck Encyclopedia, see note 2.

8 L. Lee/ J. Quigley, *Consular Law and Practice*, 3rd edition, 2008; A. Paulus/ A. Dierselt, "Vienna Convention on Consular Relations", in: Max Planck Encyclopedia, see note 2.

9 The matter is governed by multilateral agreements on the privileges and immunities of particular international organizations, and by their respective headquarters agreements. The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975, has not (as of April 2012), entered into force. M. Hertig Randall, "The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975)", in: Max Planck Encyclopedia, see note 2.

10 Wickremasinghe, see note 2, 398-400; H.G. Schermers/ N.M. Blokker, *International Institutional Law*, 5th revised edition, 2011, paras. 534-537; M. Möldner, "International Organizations or Institutions, Privileges and Immunities", in: Max Planck Encyclopedia, see note 2.

ternational courts and tribunals;[11] (vi) Heads of State, Heads of Government, Ministers for Foreign Affairs and certain other holders of high office in the State;[12] (vii) persons enjoying "official act" immunity;[13] and (viii) visiting forces.[14]

In each case, where appropriate, immunities may extend to members of the "entourage" or "retinue" of the persons concerned when they are visiting a foreign State. While these heads of immunity may overlap, in the sense that a person may enjoy (or claim) immunity under more than one head at the same time,[15] they are quite distinct.

In its Judgment of 3 February 2012 in the case of *Germany* v. *Italy*,[16] the ICJ indicated its approach to identifying the rules of customary international law in the field of State immunity. The Court made the important preliminary point, upon which both Parties agreed, "that immunity is governed by international law and is not a matter of mere comity."[17] The Court continued,

> " ... the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*. (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of*

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11 The matter is governed by particular treaties for each international court or tribunal.

12 Section II 1 below.

13 Section II 2 below.

14 T. Desch, "Military Forces Abroad", in: Max Planck Encyclopedia, see note 2; P.J. Conderman, "Status of Armed Forces on Foreign Territory Agreements (SOFA)", in: Max Planck Encyclopedia, see note 2.

15 As in *Khurts Bat* v. *The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin); [2011] All ER (D) 293 (Jul); *ILR* 147 (2012), 633, paras. 55-62 (Moses LJ); see R. O'Keefe, "Case-note", *BYIL* 82 (2011).

16 ICJ, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment of 3 February 2012, <http://www.icj-cij.org>.

17 Ibid., paras. 53, 55.

Germany/Netherlands), Judgment, I.C.J. Reports, 1969, p. 44, para. 77)."

Moreover, as the Court also observed,

"'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27.)'

In the present context, State practice of particular significance is to be found in the judgments of national Courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign Courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States."[18]

Section II below recalls two additional heads of immunity that may apply to official visitors: that of serving Heads of State, Heads of Government, Ministers for Foreign Affairs and certain other holders of high office; and "official act" immunity. Section III then looks at the *Convention on Special Missions*. Section IV considers the evidence for the

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[18] Ibid., para. 55. While the court was not concerned with the immunities of individual officials, its approach is relevant to the identification of the rules of customary international law in other cases where international immunities are governed by customary international law, including in the case of official visitors. See also Judge Keith, Separate Opinion, para. 4: "As appears from the Judgment in this case, the Court, for good reason, does give [decisions of national courts] a major role. In this area of the law it is such decisions, along with the reaction, or not, of the foreign State involved, which provide many instances of State practice. Further, the reasoning of the Judges by reference to principle is of real value."

rules of the customary international law on the immunities of official visitors. The emphasis is on State practice, including case-law. Reference is also made to such case-law of the ICJ as exists, and the literature. Section V seeks to restate the modern rules of customary international law in the field.

II. Immunity *ratione personae* of serving Heads of State and other High-Ranking Officials; and "Official Act" Immunity

The section briefly recalls two heads of immunity that sometimes apply in parallel with special mission/official visitor immunity.

1. Immunity *ratione personae* of serving Heads of State, Heads of Government, Ministers for Foreign Affairs and other High-Ranking Office Holders

The ICJ has held that, under customary international law, certain holders of high-ranking office, such as Heads of State,[19] Heads of Government[20] and Ministers for Foreign Affairs,[21] enjoy immunity *ratione per-*

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19 Kolodkin, Preliminary Report, see note 1, paras. 33-34. See also Doc. A/CN.4/650, para. 6 (summarising the 2011 Sixth Committee debate). Among recent cases where the immunity *ratione personae* of a serving Head of State has been recognized are *Affaire Ghaddafi*, Decision No. 1414, 13 March 2001, Cass. Crim.1; *President Yudhoyeno of Indonesia*, Rechtbanks Gravenhage, Sector civiel recht, 377038/KG ZA 10-1220, 6 October 2010. In English law, the immunity of Heads of State is now on a statutory basis: section 20 of the State Immunity Act 1978, which has been considered in a number of cases (*Halsbury's Laws of England*, 5th edition, Vol. 61, 178-179, para. 363). The leading case is *Pinochet (No. 3)* (2000) AC 147.

20 Belgian *Cour de Cassation*, *H.S.A et al.* v. *S.A et al.*, 12 February 2003, *ILM* 42 (2003), 596.

21 The ICJ's finding in respect of Ministers for Foreign Affairs has been criticized, but it reflects an emerging consensus in State practice, writings and case-law: Escobar Hernández, Preliminary Report, see note 1, paras. 33 and 63.

sonae while in office.[22] This includes inviolability of the person, and complete immunity from criminal jurisdiction.[23] After leaving office, such persons enjoy only immunity *ratione materiae*.[24]

In the *Arrest Warrant* case, the ICJ observed,

> "that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[25]

The three office holders listed by the Court – Heads of State, Heads of Government and Ministers for Foreign Affairs – are those who represent the State in its international relations by virtue of their office. They may, for example, sign treaties without having to produce Full Powers.[26] It is clear from the language used ("certain holders of high-ranking office in a State, such as ... .") that the list is not exhaustive, though it is confined to "a narrow circle of high-ranking State offi-

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22 Kolodkin, Preliminary Report, see note 1, paras. 109-121; Kolodkin, Second Report, see note 1, paras. 35-37; Kolodkin, Third Report, see note 1, paras. 23, 31; A. Watts, "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers", *RdC* 247 (1994), 9-130; Wickremasinghe, see note 2, 392-395; A. Borghi, *L'immunité des dirigeants politiques en droit international*, 2003; A. Watts/ J. Foakes, "Heads of State" and "Heads of Governments and Other Senior Officials", in: Max Planck Encyclopedia, see note 2.

23 While there is little practice, it would seem that Heads of State-elect should also benefit from such immunity: Kolodkin, Third Report, see note 1; the same would also apply to the Heir to the Throne in a Monarchy. For a reference by the ICJ to a Head of State-elect, in which it seems to have treated his statements more or less on a par with those of a serving Head of State, see ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Measures*, Judgment of 1 April 2011, <http://www.icj-cij.org/>, para. 77.

24 On the distinction between immunity *ratione personae* and immunity *ratione materiae*, see Kolodkin, Preliminary Report, see note 1, paras. 78-83.

25 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, ICJ Reports 2002, 3, 20-21, para. 51. See also *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti* v. *France)*, ICJ Reports 2008, 177, 236-237, para. 170.

26 Article 7, Vienna Convention on the Law of Treaties.

cials."[27] The same immunity *ratione personae* applies to certain other holders of high-ranking office to whom similar considerations apply,[28] such as others of Cabinet rank who similarly need to travel to represent their State at the highest levels.

In *Djibouti* v. *France*, the ICJ did not suggest that either the Djiboutian *Procureur de la République* or Head of National Security enjoyed immunity as persons occupying high-ranking offices in the State. Indeed, France considered that they "did not, given the essentially internal nature of their functions, enjoy absolute immunity from criminal jurisdiction or inviolability *ratione personae*."[29] And France pointed out that in the *Arrest Warrant* case, the ICJ had not suggested that the Minister of State charged with national education (which is what former Foreign Minister Yerodia had become since the proceedings commenced) fell within the class of high office holders enjoying immunity *ratione personae*.[30]

The immunity of this "narrow circle" of high office holders applies whether or not they are on a special mission, and in addition to any immunity they may enjoy when they are official visitors.[31] When they are on a visit, the immunity of members of their entourage or retinue may be that of persons on a special mission, but it may also be derivative of the status of the high official in question.[32] This could be rele-

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27 Kolodkin, Second Report, see note 1, para. 94(i). English courts have recognized that immunity *ratione personae* extends to a Defence Minister (*Re Mofaz*, Bow Street Magistrates' Court, 12 February 2004, *ILR* 128 (2006), 709; *ILDC* 97 (UK 2004); *Ehud Barak*, Westminster Magistrates' Court, 29 September 2009 (unreported, described in Franey, see note 2, 146-147); and to a Minister of Commerce (*Re Bo Xilai*, Bow Street Magistrates' Court, 8 November 2005, *ILR* 129 (2007), 713).

28 In modern times, other persons may exercise powers in the area of foreign relations: see *Armed Activities in the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility*, ICJ Reports 2006, 6, 27, para. 47.

29 *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti* v. *France)*, see note 25, 241-242, para. 186.

30 Ibid., French Counter-Memorial, paras. 4.31-4.35.

31 Article 21, Convention on Special Missions 1969; article 50, Convention on the Representation of States in Their Relations with International Organizations of a Universal Character 1975.

32 The ILC 1991 commentary on the draft articles on Jurisdictional Immunities of States and Their Property states that the draft articles "do not prejudice the extent of immunities granted by States to foreign sovereigns or

vant, for example, when they are travelling privately[33] and possibly in the case of certain close family members.[34]

The English High Court considered the immunity of high-ranking office holders in *Khurts Bat.*[35] The Court found that "there is no dispute but that in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office. They enjoy complete immunity from criminal jurisdiction."[36] The Court concluded that *Bat*, a mid-ranking official, was not entitled to immunity *ratione personae* as a holder of high-ranking office.[37]

2. "Official Act" Immunity

State officials and former officials have "official act" immunity (immunity *ratione materiae*) from the criminal jurisdiction of foreign States.[38] This includes immunity from criminal jurisdiction in respect of acts

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other heads of State, their families and household staff which may also, in practice, cover other members of their entourage", *ILCYB* 1991, Vol. II, Pt 2, 22 (draft article 3, commentary (7)). For a summary of discussions within the ILC, see Kolodkin, Preliminary Report, see note 1, paras. 13-44. There is little State practice or case-law on "entourage" or "retinue" immunity, though it is hinted at in the literature, and the considerations underlying the *Arrest Warrant* Judgment point would justify it: see M. Sørensen, *Manual of Public International* Law, 1968, 387; Watts, see note 22, 75-76; Jennings/ Watts, see note 2, para. 452.

33 Even when travelling privately, a Head of State or Head of Government may well be accompanied by staff. In today's circumstances, they are never really "off-duty".

34 See Kolodkin, Preliminary Report, see note 1, paras. 125-129.

35 *Khurts Bat*, see note 15, paras. 55-62 (Moses LJ).

36 Ibid., para. 55.

37 In reaching this conclusion, the Court rejected the District Judge's view that *Bat* was not entitled to immunity since he was not engaged on foreign affairs, the stated purpose of his visit being to discuss matters of mutual security concern, ibid., paras. 62 (*Moses* LJ) and 107 (*Foskett* J). The Court accepted that security matters could be the subject of a special mission, but found that there was no such special mission in this case.

38 C.A. Whomersley, "Some Reflections on the Immunity of Individuals for Official Acts", *ICLQ* 41 (1992), 848-858.

done in an official capacity, but not acts committed in a private capacity.[39] There may be exceptions:[40]

In *Pinochet (No.3)*,[41] the House of Lords held that there was an implied waiver of immunity from criminal jurisdiction by the parties to the UN Convention against Torture, since acts of torture within the meaning of the Convention could only be committed by persons acting in an official capacity. It is unclear how far this exception would apply to other "international crimes", such as war crimes.[42]

There is also authority to the effect that there is no immunity "where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime."[43] This exception was applied by the High Court in *Khurts Bat*.[44] The issue only became clear during the High Court hearing,[45] and the Court was not called upon to consider the need to

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39 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, see note 25, 25-26, para. 61; Secretariat Memorandum, see note 1, paras. 154-212; Kolodkin, Second Report, see note 1, paras. 21-34.

40 Kolodkin, Second Report, see note 1, paras. 54-93.

41 *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex p. Pinochet Ugarte (Amnesty International and others intervening)* (2000) 1 AC 147.

42 Kolodkin, Second Report, see note 1, paras. 180-212; Van Alebeek, see note 2; A. Bellal, *Immunités et violations graves des droits humains*, 2011.

43 Kolodkin, Second Report, see note 1, para. 94(p); see also paras. 81-86 and 90. The possible exception was evidently considered in *Pinochet (No. 3)*, see note 41, but the majority view does not deal with it explicitly. See, on the other hand, Lord Millett: "The plea of immunity *ratione materiae* is not available in respect of an offence committed in the forum state, whether this be England or Spain" (277C-D) and Lord Phillips, saying that he was "not aware of any custom which would have protected from criminal process a visiting official of a foreign state who was not a member of a special mission had he the temerity to commit a criminal offence in the pursuance of some official function ..." (283A-B). For practice, see Franey, see note 2, 244-281.

44 *Khurts Bat*, see note 15.

45 The claim to "official act" immunity had not been raised at first instance, and arguably should not therefore have been available on appeal. In the case of such a claim, "[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned": *Certain Questions of Mutual Judicial Assistance in Criminal Mat-*

exclude crimes committed during armed conflict from any territorial exception to immunity.[46] Moreover, it might have been more appropriate for the German Court, to consider the question of official act immunity for acts committed in the forum State in the light of all the facts before it.

III. The Convention on Special Missions

"Early codifications of the law of diplomatic immunity commonly included both permanent and temporary diplomatic agents."[47] The first official attempt to codify the law on *ad hoc* diplomacy was the *Havana Convention on Diplomatic Officers of 20 February 1928* (in force since 1929), which assimilates the status of "extra-ordinary diplomatic offi-

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ters (Djibouti v. *France)*, see note 25, 243-244, paras. 194-197, especially para. 196; Kolodkin, Third Report, see note 1, para. 61(f), which reads: "When an official who enjoys functional immunity is concerned, the burden of invoking immunity lies with the official's State. If the State of such an official wishes to protect him from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction that the person in question is its official and enjoys immunity since he performed the acts with which he is charged in an official capacity. If it does not do so, the State exercising jurisdiction is not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution." The Special Rapporteur's explanation of this conclusion is at paras. 14-31 of the Report. But see also his somewhat inconclusive consideration of the question whether the official's State can also declare the individual's immunity at a later stage of the criminal process. (ibid., paras. 17 and 57) – this raises the question as to when immunity must be deemed to have been waived, if criminal proceedings are not to be frustrated at a late stage. On the possibility of implied waiver of immunity from foreign criminal jurisdiction, see Kolodkin, Third Report, see note 1, paras. 53-55 and 61 (l) to (o).

46 Kolodkin, Second Report, see note 1, para. 86, makes an important qualification: "the issue of the criminal prosecution and immunity of military personnel for crimes committed during military conflict in the territory of a State exercising jurisdiction would seem to be governed primarily by humanitarian law *[that is, the law of armed conflict]*, and be a special case and should not be considered within the framework of this topic."

47 Van Alebeek, see note 2, 168.

cers" to that of regular, permanent diplomatic agents.[48] The commentary to the definition of "mission" in the *Harvard Research Draft Convention on Diplomatic Privileges and Immunities of 1932* states that 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 missions."[49]

On 8 December 1969, the United Nations General Assembly adopted the *Convention on Special Missions*,[50] together with an *Optional Protocol on the Compulsory Settlement of Disputes*[51] and a reso-

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48 LNTS Vol. 155 No. 3581. See also the Vienna Règlement of 1815; the *Institut de Droit International*'s resolution of 1895; and the ILA's 1926 Vienna resolution.

49 *Harvard Draft Convention on Diplomatic Privileges and Immunities, Commentary, Harvard Research in International Law* (*AJIL* Supplement 26 (1932), 15 (42)).

50 UNTS Vol. 1400 No. 23431. The resolution adopting the Convention was adopted by a non-recorded vote of 98-0-1 (Malawi abstaining), A/RES/2530 (XXIV) of 8 December 1969. The Convention entered into force on 21 June 1985. As of August 2012, there were 38 States Parties: Argentina, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Estonia, Fiji, Georgia, Guatemala, Indonesia, Iran, Liberia, Liechtenstein, Lithuania, Macedonia, Mexico, Montenegro, Paraguay, People's Democratic Republic of Korea, Philippines, Poland, Rwanda, Serbia, Seychelles, Slovakia, Slovenia, Spain, Switzerland, Tonga, Tunisia, Ukraine and Uruguay. The Convention was open for signature until 31 December 1970. The States which signed the Convention but have not ratified are: El Salvador, Finland, Israel, Jamaica, Nicaragua and the United Kingdom. For the latest information about participation in the Convention, see the United Nations Treaty Collection website.

51 UNTS Vol. 1400 No. 23431. The Optional Protocol is modelled on the corresponding Optional Protocols to the Vienna Conventions on Diplomatic and Consular Relations of 1961 and 1963 respectively. It entered into force on 21 June 1985. As of August 2012, there were 17 States Parties: Austria, Bosnia and Herzegovina, Cyprus, Estonia, Guatemala, Iran, Liberia, Liechtenstein, Montenegro, Paraguay, Philippines, Serbia, Seychelles, Slovakia, Spain, Switzerland and Uruguay. The Optional Protocol was open for signature until 31 December 1970. El Salvador, Finland, Jamaica and the United Kingdom signed but have not ratified it. For the latest information about participation in the Optional Protocol, see the United Nations Treaty Collection website.

lution concerning civil claims.[52] The Convention is the applicable international law as between the parties thereto. But it has attracted limited participation, and there are few other treaties on the subject.[53] So, as between most States, and in most circumstances, the governing rules are those of customary international law.

While the Convention has influenced the customary rules, it should not be assumed that all or even most of its provisions are now reflected in customary law, given the circumstances of its adoption and the lack of support among States. In summary, as we shall see, while the range of official visitors who enjoy privileges and immunities under customary law is wider than under the Convention, the privileges and immunities accorded under customary law are less extensive.

The key provisions of the *Convention on Special Missions* are articles 1 (a), 2, 3, 29 and 31 (1).

Article 1. Use of terms

For the purposes of the present Convention:

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

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52 A/RES/2531(XXIV) of 8 December 1969 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 endeavours to bring about a just settlement of the claims."

53 Ipsen, see note 2, 592 says that the legal basis for special missions is set out in individual bilateral treaties, but does not give references. For a possible example, see the Exchange of Notes between Switzerland and the United States, signed at Bern on 23 February and 5 March 1973 (TIAS 7582; 24 UST 772), which provides that certain US delegations were "considered to be special missions convened by the Governments of the USA and of the USSR on the territory of the Swiss Confederation. The two delegations and the persons of which they are composed enjoy on the territory of the Swiss Confederation the status, privileges and immunities which are accorded to a special mission, to the representatives of the sending State in a special mission ...": Washington, D.C. International Law Institute (ed.), *Digest of United States Practice in International Law*, 1973, 166-167.

Article 2. Sending of a special mission

A State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel.

Article 3. Functions of a special mission

The functions of a special mission shall be determined by the mutual consent of the sending and the receiving State.

Article 29. Personal inviolability

The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

Article 31. Immunity from jurisdiction

1. The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

The negotiating history of the Special Missions Convention[54] sheds light on a number of points important not only for the interpretation of the Convention but also as evidence of the customary law on the immunity of official visitors. These include the extent to which, already in the 1950s and 1960s, States and the ILC considered there were rules of customary international law in the field.

Three related issues were prominent in the negotiations:

1. Was it possible to define a "special mission" by reference to its level and functions? On the assumption that not all official visitors would enjoy immunity under the future Convention, how was the line to be drawn?

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54 Paszkowski, see note 2; Whiteman, see note 2. The two main stages were the preparation of draft articles by the ILC and the negotiation of the Convention within the Sixth Committee. M. Bartoš was Special Rapporteur for the Commission and Expert Consultant for the Sixth Committee. M.K. Yasseen was Chairman of the Drafting Committee.

2. While it seemed clear that the consent of the receiving State to the sending of the special mission was essential, what was the nature of that consent? Consent to what? Was prior consent needed, and if so prior to what? Entry into the territory, or at least to the commencement to the mission? Did consent need to be express or given through certain channels?
3. What scale of privileges and immunities should apply to special missions and their members? Should they enjoy the same level of privileges and immunities as permanent diplomatic missions?

The ILC had first considered the question of "*ad hoc* diplomacy" in the course of its work in the 1950s on the topic of "Diplomatic intercourse and immunities." Already in 1957 the Commission considered that other forms of diplomacy, under the heading "*ad hoc* diplomacy", "should also be studied, in order to bring out the rules of law governing them."[55] When presenting its final draft articles to the General Assembly in 1958, the Commission noted that diplomatic relations also assumed other forms, such as itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes.

The Commission appointed A.E.F. Sandström, Special Rapporteur for Diplomatic Intercourse and Immunities, as Special Rapporteur for Special Missions. In 1960, Sandström presented a report in which he explained that "a special mission can be characterized as performing temporarily an act which ordinarily is taken care of by the permanent mission. The head of a special mission is also generally, but not always, a diplomatic officer by profession." Sandström went on to refer to "the similarity between a special mission's activities and aims and those of a permanent mission."[56] On the basis of this report, and without the usual in-depth study, the Commission adopted three draft articles,[57] which were then referred by the General Assembly to the UN Conference on Diplomatic Intercourse and Immunities of 1961, in Vienna.[58]

Draft article 1 (1) contained the following definition:

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55 *ILCYB* 1957, Vol. II, 132-133.

56 "Ad Hoc Diplomacy, Report by A.E.F. Sandström" (Doc. A/CN.4/129), paras. 5 and 6, in: *ILCYB* 1960, Vol. II, 108.

57 *ILCYB* 1960, Vol. II, 179-180.

58 For a summary of the Commission's consideration of special missions during its 1960 session, see "Special Missions: Working paper by the Secretariat", (Doc. A/CN.4/155), in: *ILCYB* 1963, Vol. II, 151-158, paras. 14-41.

> "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."[59]

The draft articles would have applied the rules developed for the privileges and immunities of permanent diplomatic missions to special missions.

At the 1961 Vienna Conference, the question of special missions was considered by a Sub-Committee of the Committee of the Whole.[60] Upon the unanimous recommendation of the Sub-Committee, the Conference adopted a resolution, recommending that the General Assembly refer the subject back to the Commission.[61] And by Resolution 1687 (XVI) of 18 December 1961, the Assembly requested the Commission to study further the subject of special missions and report thereon to the General Assembly.[62] In 1962 the Commission placed the topic "Special missions" on its agenda once again, and requested its Secretariat to prepare a working paper, which served as a basis for the discussions in 1963.[63] In 1963 the Commission appointed Bartoš as Special Rapporteur. It instructed him to prepare draft articles based on the *Vienna Convention on Diplomatic Relations*, but to keep in mind,

> " ... that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions."[64]

It further decided that the topic should include itinerant envoys, but not delegates to conferences and congresses, because the latter were re-

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59 Ibid., 179, para. 38. The term "itinerant envoy" refers to an envoy who visits several States successively.

60 *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. II (Doc. A/CONF.20/10), 45-46 and 89-90.

61 Ibid., Vol. II (Doc. A/CONF.20/10/Add.1), Resolution I.

62 For a summary of the work on special missions up to this point, see "Working paper prepared by the Secretariat", Doc. A/CN.4/147, in: *ILCYB* 1962, Vol. II, 155-156. For an account of developments in the Commission and at the Conference by an active participant see Bartoš, see note 2, 448-459.

63 "Special Missions: Working paper by the Secretariat", see note 58, 151-158. The paper dealt with (I) preliminary survey of the topic and of previous attempts to determine the law relating to special missions; (II) prior consideration by the ILC etc.; and (III) the scope of the topic, and the form of the draft.

64 *ILCYB* 1963, Vol. II, 225, para. 64.

lated to the topic of relations between States and inter-governmental organizations.[65]

In 1964 the Commission presented 16 draft articles with commentaries to the General Assembly.[66] These contained rules concerning the sending, functioning and duration of special missions, but not their immunities and privileges. They made it clear that the consent of the receiving State was essential to the sending of a special mission.

Draft article 1 (1) provided:

> "For the performance of specific tasks, States may send temporary special missions with the consent of the State to which they are to be sent."

The commentary emphasised the importance of consent: a special mission "must possess" certain characteristics, one of which is that "a State is not obliged to receive a special mission from another State unless it has undertaken in advance to do so" and "consent for it must have been given in advance for a specific purpose."[67]

In presenting its final set of 50 draft articles to the General Assembly in 1967, the Commission stated that,

> "In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law."[68]

Under the heading "General considerations" at the beginning of Part II (which became articles 21 to 46 of the Convention), before discussing the scale of facilities, privileges and immunities to be accorded (on which there were differing views), the Commission said,

> "Before the Second World War, the question whether the facilities, privileges and immunities of special missions have a basis in law or whether they are accorded merely as a matter of courtesy was discussed in the literature and raised in practice. Since the War, the view that there is a legal basis has prevailed. It is now generally recognized that States are under an obligation to accord the facilities,

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65 Ibid., para. 63.

66 *ILCYB* 1964, Vol. II, 210-226.

67 Ibid., 210 (para. (2)(c) of the commentary on draft article 1. Draft article 2 further required that "[t]he task of a special mission shall be specified by mutual consent of the sending State and of the receiving State" (ibid., 211).

68 *ILCYB* 1967, Vol. II, 346, para. 12.

privileges and immunities in question to special missions and their members. Such is also the opinion expressed by the Commission on several occasions between 1958 and 1965 and confirmed by it in 1967."[69]

Draft article 2 read,

"A State may, for the performance of a specific task, send a special mission to another State with the consent of the latter."[70]

The Commission's commentary read,

"(1) Article 2 makes it clear that a State is under no obligation to receive a special mission from another State unless it has undertaken in advance to do so. Here the draft follows the principle stated in article 2 of the Vienna Convention on Diplomatic Relations.

(2) In practice, there are differences in the form given to the consent required for the sending of a mission, according to whether it is a permanent diplomatic mission or a special mission. For a permanent diplomatic mission the consent is formal, whereas for special missions it takes extremely diverse forms, ranging from a formal treaty to tacit consent."[71]

The draft articles were generally welcomed by States. However, some considered that they were too generous to special missions if the Convention was to cover all kinds of missions sent by one State to another, whatever their level and the nature of their functions. The overwhelming majority, however, rejected attempts in the Sixth Committee of the General Assembly in 1968 to lower the scale of privileges and immunities. When work resumed in 1969, certain States, led by France and the United Kingdom, pursued an alternative approach, seeking to establish a scope of application for the Convention which was appropriate to the extensive privileges and immunities granted. They were thus concerned to ensure that the Convention applied only to certain high-level missions conducting specific diplomatic tasks.[72]

There was much debate in the Sixth Committee on three related matters concerning the scope and definition of "special missions". First,

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69 Ibid., 358, para. (1) (footnote omitted).

70 Ibid., 348.

71 Ibid., 349.

72 The negotiation of the Convention in the UN General Assembly is well described in Paszkowski, see note 2, 273-284.

the expression used by the Commission "of a representative character" proved controversial, and was replaced by the more neutral "representing the State."[73] Second, efforts expressly to limit the missions concerned to "high-level" missions were not successful.[74] On one point, and this was crucial, there was general agreement: the essential requirement of consent, both to the sending of the mission and to its functions. In the Sixth Committee, States were not fully satisfied with the Commission's approach to consent; hence the amendment requiring that consent be previously obtained through appropriate channels. In voting for the adoption of article 1 (a) of the Convention by the Sixth Committee on 20 October 1969, the United Kingdom said, in explanation of the vote (also on behalf of France),

> "[a] Special Mission is a temporary, *ad hoc* Mission. The existence of a particular Special Mission derives from an *ad hoc* expression of mutual consent by the sending and receiving States. A special Mission represents the sending State in the same sense of the word 'represents' as a permanent diplomatic mission represents the sending State. It represents the sending State in the external, international sense, in an aspect or aspects of its international relations. The normal task which a Special Mission will perform is a task which would ordinarily be performed by a permanent diplomatic mission of the sending State if one exists in the receiving State or if it had not been decided on the particular occasion that an ad hoc mission was called for."[75]

In fact, even if it were possible to interpret the Convention as adopted as applying only to those special missions that performed diplomatic tasks, there remained grave misgivings about the transposition to special missions, which by definition are temporary and limited in their functions, of virtually all of the rules in the *Vienna Convention on Diplomatic Relations.* This was controversial both within the Commission and the Assembly. A number of the provisions, such as the inviolability of the premises of the special mission (which may be a hotel

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73 Paszkowski, see note 2, 276-278. In the French text of the Convention the term is "*ayant caractère représentatif de l'État*". See also the seventh preambular paragraph ("as missions representing the State").

74 Paszkowski, see note 2, 278-279.

75 Extract from the verbatim text of the statement made by Philip Allott, United Kingdom representative, in the Sixth Committee on 20 October 1969, cited in Roberts, see note 2, 190. For the summary record, see Doc. A/C.6/SR.1129, paras. 25-26.

room), were scarcely appropriate for a temporary mission.[76] It was probably for this reason that relatively few States became party to the Convention. Writing in 1987, Sinclair said,

> "[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."[77]

Another concern may have been that "the definition of a special mission is not entirely clear."[78] While the United Kingdom and some others sought to clarify the essence of a special mission, their views may not have been widely shared by others.

IV. Evidence of the Customary International Law on Official Visitors

State practice is sufficient to establish rules of customary international law governing official visitors, in particular as regards their inviolability and immunity from criminal jurisdiction. Such inviolability and immunity are required by the nature of official visits, which often perform

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76 For extensive citation of the views of States during the negotiation, see Donnarumma (1972), see note 2, 47-49, who mentions an attempt to coordinate an approach within Council of Europe Member States.

77 I. Sinclair, *The International Law Commission*, 1987, 61. Ten years later Watts wrote: "Reasons for this relatively modest appraisal by States of the Convention's worth are varied, but may include the view that special missions are so varied in their nature, scope and importance that any attempt to provide a single scale of treatment for all possible kinds of missions is bound to produce unacceptable results in relation to some kinds of missions. There are also serious political problems about the provision of extensive privileges and immunities to missions whose presence in a State is by definition temporary, and perhaps little more than transient. It cannot be denied that special missions need, and are entitled to, a degree of special protection and treatment when in the territory of another State on the official business of their sending State, but States have been reluctant to accept that missions always *need* the full range of privileged treatment which the Convention would require", Watts (1999), see note 2, 344-345. See also Salmon, see note 2, 546, and Daillier/ Forteau/ Pellet, see note 2, para. 458.

78 Wickremasinghe, see note 2, 391.

similar functions and have similar needs to those of permanent diplomatic missions. The considerations underlying the immunity of permanent diplomatic missions are no less relevant to *ad hoc* diplomacy.

The issues that dominated the preparation of the Convention in the ILC and the General Assembly continued to be important after 1969. These included (i) whether it was possible to define which official visitors enjoyed immunity *ratione personae* by reference to their level and functions; (ii) the nature of the consent required from the receiving State; and (iii) the scale of immunities that should apply.

On many issues there is now widespread agreement. First, most States and courts that have opined on the matter are clear that there are rules of customary international law governing official visits.[79] Second, it is agreed that the consent of the receiving State is essential; such consent needs to be clear, and is normally given in advance of the visit. Finally, Heads of State, Heads of Government, Ministers for Foreign Affairs and certain other high office holders, when on official visits, continue to enjoy the facilities, privileges and immunities accorded by international law, including inviolability and immunity from criminal jurisdiction.

In considering the materials that evidence the rules of customary international law concerning the immunity of official visitors, it is convenient to consider (1) how far the provisions of the *Convention on Special Missions* now reflect rules of customary international law; (2) State practice, including in connection with cases before the domestic courts; and (3) the case-law of the ICJ, and (4) the writings of jurists.

1. The Special Missions Convention and Customary International Law

The elaboration of the Convention had a major impact on the development of rules of customary international law; it was a focus for State practice. As already noted, the Commission was of the opinion that its

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79 During its 2011 session, attention was drawn within the ILC to "the relevance of the law of special missions, both conventional and customary international law" for the consideration of the topic "Immunity of State officials from foreign criminal jurisdiction", *ILC Report*, 2011, 220, para. 119 *in fine*. The concluding preambular paragraph of the 1969 Convention affirms that "the rules of customary international law continue to govern questions not regulated by the provisions of the present Convention".

draft reflected, at least in some measure, the rules of customary international law, and this does not seem to have been contested by States. While it cannot be said that all – or even most – of the provisions of the Convention reflected customary international law at the time of its adoption, it is widely accepted that certain basic principles, including in particular the requirement of consent, and the inviolability and immunity from criminal jurisdiction of persons on special missions, do now reflect customary law.

At the time of its adoption, the United Kingdom's view was that the Convention was not declaratory of international law in the same way as the *Vienna Convention on Diplomatic Relations*, since there was not enough evidence of State practice for it to be said that existing international law was clear and settled in the matter. But the Convention was thought to be generally declaratory of what an international tribunal would probably have held international law to be, or what international law would have come to be in practice had the Convention not been concluded.[80]

The privileges and immunities enjoyed by special missions and their members have been afforded recognition in agreements adopted subsequent to the *Convention on Special Missions*. For example, article 3 (1) of the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property[81] provides that that Convention "is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of (*a*) its ... special missions ...; and (*b*) persons connected with them."[82] Commentary (1) to the final draft article 3 of 1991 (which on this point was identical to article 3 of the Convention as adopted) says of article 3 (1) and (2), that "[b]oth paragraphs are intended to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the

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80 Many official UK documents relating to the negotiation of the Convention, and the consideration given to signing and ratifying it, are available in the National Archives at Kew.

81 See also Commentary (8) to article 1 of the Draft Articles on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons, *ILCYB* 1972, Vol. II, 314.

82 The Convention was adopted by the General Assembly, without a vote, on 2 December 2004, A/RES/59/38.

present articles."[83] Commentary (3) says that "[t]he extent of privileges and immunities enjoyed by a State in relation to the exercise of the functions of the entities referred to in subparagraph 1(*a*) is determined by the provisions of the international conventions ..., where applicable, or by general international law."[84]

2. State Practice

State practice is clear and consistent as to the main lines of the customary international law concerning official visitors. In this field, as with other heads of immunity (such as State and diplomatic immunity), much of the relevant State practice is to be found in or in connection with cases before the domestic courts of the various States.[85]

Domestic cases may contribute to the development of customary international law in this field in a number of ways. *First*, they may be the occasion for the sending or receiving State, or both, to indicate their position on the rules of customary international law. In other words, they may be the occasion for State practice in the form of expressions of the position of the executive branch. *Second*, the decisions of domestic courts may themselves amount to State practice and thus contribute to the development of rules of international law, since they indicate the

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83 *ILCYB* 1991, Vol. II, Part Two, 21.

84 A Swiss speech in the Sixth Committee as circulated on 1 November 2011 stated "[f]or our part, we are of the view that certain principles of the [Convention on Special Missions] constitute a codification of international customary law, ..." "La pratique suisse en matière de droit international public 2011", No. 7.3, *SZIER/RSDIE* 22 (2012). At the same meeting, Austria referred to cases where "... immunity based on a special treaty regime, such as the Convention on Special Missions, or on a comparable rule of customary law, as in the case of an explicit invitation for an official visit ...", Doc. A/C.6/66/SR.26, 16, para. 80. See also Hungary, Doc. A/C.6/66/SR.19, 10, para. 56.

85 As Rosalyn Higgins has written, "[i]n the related fields of jurisdiction and immunity – as in almost no other field of international law – the role of national courts and legislation has a very particular significance.": R. Higgins, "After Pinochet: Developments on Head of State and Ministerial Immunities", in: R. Higgins, *Themes and Theories. Selected Essays, Speeches, and Writings in International Law*, 2009, 409-423 (410). See also the passage from the ICJ's Judgment in *Germany* v. *Italy*, see notes 16, 18.

position of the judicial branch on the matter.[86] And *third*, depending on the care with which the court has approached the matter, domestic case-law may itself be valuable authority on the state of customary international law, insofar as it reflects the conclusion of the court on the matter, reached after thorough argument. Materials on State practice, in particular those connected with domestic cases in various jurisdictions, are summarized in the Annex below.

3. ICJ Case-Law

The ICJ has not had occasion to consider the law on official visits in any depth. In the *Arrest Warrant* case, the Court mentioned the *Convention on Special Missions* as providing "useful guidance on certain aspects of the question of immunities,"[87] but the point concerned holders of high-ranking offices, not special missions. The Court also mentioned the 1969 Convention in *Djibouti* v. *France:*

> "The Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case."[88]

The concluding words "not being applicable in this case" are not entirely clear. But there is no suggestion that the Court considered (and rejected) the customary international law on special missions; it seems that the question of the officials concerned being on an official visit simply did not arise on the facts.[89]

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86 M. Wood, "State Practice", in: Max Planck Encyclopedia, see note 2.

87 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, see note 25, 21, para. 52.

88 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, see note 25, 243-244, para. 194.

89 For an analysis of *Djibouti* v. *France*, see Buzzini, see note 2. At an early stage in the proceedings, Djibouti had claimed special mission immunity for two of its officials, the *Procureur de la République* and the Head of National Security (Memorial of the Republic of Djibouti, at paras. 137-138), but it later amended its claim so as not to claim immunity *ratione personae* for officials other than the Head of State.

4. Writings

Some of the limited writings that touch on the customary international law regarding official visitors are dated and tentative. To a large extent they were written by those directly involved in developing the 1969 Convention, and focus on the Convention rather than on customary law. The writers are divided as to their conclusions (if any). But most recent contributions support the existence of some customary international law on official visitors, though usually not as detailed and precise as the rules set forth in the *Convention on Special Missions*.

Writing in 2011, in the *Max Planck Encyclopedia of Public International Law*, Kalb concludes that,

> "[t]he better view seems to be that under customary international law persons on special missions accepted as such by the receiving State are at least entitled to immunity from suit and freedom from arrest for the duration of the mission."[90]

The earlier *Encyclopedia of Public International Law* had an entry by Herdegen (writing in 1986, some 25 years before Kalb), concluding that,

> "[a] survey of State practice seems to support the conclusion that special agents, with the possible exception of members of government and other envoys on a high political level, are not (yet) entitled to privileges and immunities similar to those accorded to permanent diplomatic agents under customary international law (as opposed to mere comity)."

But Herdegen immediately added the caveat, "[t]his controversial inference calls for some caution, because it relies essentially on material prior to the adoption of the UN Convention on Special Missions of 1969". He goes on to say that "[w]ith respect to missions charged with negotiations on a high political level, the Convention may be regarded as an expression of the prevailing *opinio juris*."[91]

Oppenheim's International Law, published in 1991, is somewhat tentative: "The general recognition of the public and official character of these missions has not been accompanied by the development of

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90 Kalb, see note 2.

91 Herdegen, see note 2.

clear and comprehensive rules of customary international law concerning their privileges and immunities."[92]

Wickremasinghe, writing in 2010, says that "there is authority for the proposition that some special missions, and in particular high-level missions, enjoy immunities as a matter of customary international law."[93]

Shaw (2008) cites *Tabatabai* to the effect that,

> "it was clear that there was a customary rule of international law which provided that an ad hoc envoy, charged with a special political mission by the sending state, may be granted immunity by individual agreement with the host state and its associated status and that therefore such envoys could be placed on a par with members of the permanent missions of states."[94]

An extended and recent treatment of the English case-law is given by Franey,[95] who is of the view that the *Convention on Special Missions*,

> "is now considered to be declaratory of customary international law having been quoted with approval both in the *Pinochet* case, and in the *Arrest Warrant* case as providing, *'useful guidance on certain aspects of the question of immunities.'*"[96]

As we have seen, this is true for only some central principles in the Convention.

The latest edition of *Brownlie* (2012) states that,

> "[t]he [Special Missions] Convention has influenced the customary rules concerning persons on official visits (special missions), which have developed largely through domestic case-law. The Convention

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92 Jennings/ Watts, *Oppenheim's International Law*, see note 2, para. 533.

93 See note 2, 390, citing *Tabatabai*, and United States and United Kingdom decisions. It is no longer really the case that there are "relatively few decisions from national courts on the point". For *Tabatabai* see text at note 137 below.

94 Shaw, see note 2, 775. *Satow's Diplomatic Practice*, see note 2, describes the uncertainty of the law before the Convention on Special Missions, and goes on to state that "the [Special Missions] Convention, unlike the Vienna Convention on Diplomatic Relations, has not acquired the status of customary international law" (para. 13.12). That, of course, is true up to a point; *Satow* does not seem to take a position on what the rules of customary international law actually are.

95 Franey, see note 2, 135-149.

96 Ibid., 136.

confers a higher scale of privileges and immunities upon a narrower range of missions than the extant customary law, which focus on the immunities necessary for the proper conduct of the mission, principally inviolability and immunity from criminal jurisdiction."[97]

V. The Customary International Law on the Immunity of Official Visitors

As with other areas of immunity, much of the most interesting State practice on official visitors consists of domestic case-law and the actions of Governments in the face of domestic cases and incidents. The rules of customary international law in the field of official visitors are supported by analogy with permanent diplomatic missions. It would be strange if members of permanent diplomatic missions enjoyed immunity while similar persons on official visits/special missions did not, since both are essential in today's world and the functional needs are similar.

It is inherent in the nature of a special mission that its duration is temporary. The mission ends when the specific questions have been dealt with or the specific task performed. This distinguishes a special mission from what is in principle a permanent but specialized mission, separate from the permanent diplomatic mission, such as the trade mission at issue in the *Krassin* case.[98] The status of such missions will usually be governed by specific agreements.[99]

At the time of the adoption of the *Convention on Special Missions* in 1969, it was uncertain how far the new Convention reflected existing customary international law. Since 1969, the rules of customary international law have crystallized around certain central principles to be found in the Convention. On other respects, the provisions of the Convention are not apt for transformation into customary law. The text of the Convention is both very detailed and regarded by many as confer-

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97 *Brownlie's Principles*, see note 2, 414 (footnotes omitted).

98 See note 160 below.

99 See Bartoš, see note 2, on the distinction between special missions of limited duration and "permanent" missions established for a specific task of indefinite duration (for which special agreements are usually reached), such as those dealing with border issues. In addition to special agreements, obligations may flow from unilateral promises: see the Dutch Minister of Defence's 1994 Declaration, *ILCYB* 2000, Vol. II, Part 1, 267.

ring excessive privileges, and immunities, beyond those required by functional necessity. In addition, some of the bureaucratic requirements of the Convention hardly reflect State practice. The rules of customary international law are inevitably less technical than those in the Convention.

In light of Sections III and IV above, and the State practice described in the Annex (much of it comparatively recent), the broad outlines of the rules of customary international law concerning the inviolability and immunity of official visitors now seem well established. There are two key requirements: that the official visitor represents the sending State; and that the receiving State has consented to the visit as a visit attracting immunity.

1. Minimum Requirements for an Official Visit Attracting Immunity

Official visits form an important part of exchanges between States, the importance of which cannot be overestimated. Yet given the immunity *ratione personae* that may be enjoyed by persons on such visits, including inviolability of the person and complete immunity from criminal jurisdiction for the duration of the visit, not every official visitor (of whom there must be large numbers) will be accepted by the receiving State as entitled to immunity, even assuming (as will usually be the case) that the visit has been agreed and meetings arranged. Only certain visitors, principally those on high-level missions, are likely to be accepted as entitled to immunity *ratione personae*.

a. The Need for the Visitor to Represent the Sending State

The first key requirement is that the visitor, whoever he or she may be, "represents" the State. This is a matter of fact, and depends primarily on the attitude of the sending and receiving States. As is reflected in the terms of article 1 (a) of the 1969 Convention ("for the purpose of dealing with it on specific questions or of performing in relation to it a specific task"), the visitor may represent the State in a wide variety of capacities, not only to conduct Government-to-Government business.[100]

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[100] The Convention on Special Missions contains no equivalent of article 3 of the Vienna Convention on Diplomatic Relations or article 5 of the Vienna

He or she may be present in a purely representational capacity, such as on "major ceremonial occasions, such as coronations or royal weddings."[101] Such seem to have been the primary occasions for special missions in the past. The same would apply to the representatives of a State present in the receiving State in order to attend a Presidential inauguration or a State funeral, or in any other capacity "as the representative of the Government of [the State] in the performance of official functions."[102] And nowadays, this might, for example, include high officials representing the Government at major international trade expositions, cultural festivals and sports events.

The range of official visitors enjoying immunity under customary international law is nowhere defined. For example, the precise meaning of the term "special mission", for the purposes of customary international law, is not defined. This is not a problem in practice, given the requirement described under b. below of mutual consent of the sending and receiving States to the visit as such and its functions. In practice, special missions are usually confined to high-level missions that represent the State in the same way as permanent diplomatic missions. This is perhaps why another term, commonly used in the United States, is "special diplomatic missions".

Official visitors enjoying personal immunity need not be members of the Government or Government officials or employees.[103] It is not

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Convention on Consular Relations setting out the functions of diplomatic missions and consular posts respectively, see Paszkowski, see note 2, 270.

101 "Special Missions. Working paper prepared by the Secretariat", see note 5; see also Bartoš, quoted at note 6; and the FCO statement at note 151 below.

102 *Philippines* v. *Marcos*, see note 185 below.

103 "Under the Convention on Special Missions participation in official missions is not limited to state officials. This broad interpretation makes it possible under the Convention to include, for example, family members who accompany state officials on special missions (such as state visits) or persons (such as a family member of a high-ranking dignitary or a former state official) who admittedly do not have or no longer have an official position, but who perform on behalf of their state a task in another state that meets the condition for full immunity, namely the smooth conduct of interstate relations, and should therefore enjoy full immunity during their visit", Advisory Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*, CAVV), *Advisory Report on the Immunity of Foreign State Officials, Advisory Report No. 20*, The Hague, May 2011, 34. The Dutch Government agreed with the main conclusions and recommendations in the report, see note 146 below.

uncommon for others to be received as such visitors, for example, personal or special envoys or representatives.[104] In the modern world, relations between States are not confined to those between members of the executive branch. Parliamentarians and members of the judiciary may on appropriate occasions represent their State. A State may be represented in its bilateral or multilateral relations by politicians or individuals who are not members of the Government or of the governing party/parties. These may include, for example, the leader of an opposition party (who, particularly in a democracy, may hold a special position recognized by law). Cross-party or *ad hoc* representation may, for example, occur in times of national or international crisis. In such circumstances, the function of the visitor may be to ensure that the receiving State is informed of the various currents of political or public opinion on matters of important bilateral or multilateral interest.

It has also been suggested that a mission representing an opposition faction in an internal conflict visiting the territory of another State to conduct peace negotiations could be a special mission.[105] The *Convention on Special Missions* also covers meetings of the representatives of two or more States in a third State.[106] There is no reason why such meetings should not equally be within the rules of customary international law.

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104 Special mission immunity was accorded, for example, to W., who was of Indonesian nationality and, as a former minister of foreign affairs, enjoyed only functional immunity, but who, as an adviser to the Indonesian president, paid an official visit to the Netherlands. See Judgment of The Hague District Court (*Rechtbank*) of 24 November 2010, LJN: 380820/ KG ZA 10-1453; <www.rechtspraak.nl>.

105 "The Convention on Special Missions also allows scope for immunity to be granted to a mission that does not belong to the government of the sending state. An example would be where a mission representing an opposition faction in an internal conflict visits the territory of another state to conduct peace negotiations. However, the sending state must then notify the receiving state that members of the opposition belong to the special mission": Advisory Committee on Issues of Public International Law, see note 103, 34-35.

106 Article 18, Donnarumma (1972), see note 2, 45-46.

b. The Need for the Receiving State to Consent to the Visit as one Attracting Immunity

The potentially broad scope of official visitors benefitting from immunity *ratione personae* is in practice limited by the second key requirement, that of the consent of the receiving State to the visit as one attracting such immunity. This requirement does not seem to have been clearly spelt out during the negotiation of the Convention, or in the text itself. But the better view is that, even under the Convention, the consent that has to be given is consent to the mission as a special mission.

The High Court in *Khurts Bat* considered the nature of the consent that was required before an official visitor would be entitled to immunity *ratione personae*. According to Moses LJ, "[t]he essential requirement for recognition of a Special Mission is that the receiving State consents to the mission, as a Special Mission."[107] And, he went on to say,

> "It is vital to bear in mind that the consent which must be previously obtained is consent to a Special Mission. A State which gives such consent recognises the special nature of the mission and the status of inviolability and immunity which participation in that Special Mission confers on the visitors. Not every official visit is a Special Mission. Not everyone representing their State on a visit of mutual interest is entitled to the inviolability and immunity afforded to participants in a Special Mission."[108]

As we have seen, the importance of such consent was clear during the negotiation of the *Convention on Special Missions* in the Sixth Committee of the General Assembly in 1968 and 1969, in the course of which the role of consent was enhanced. In the definition in article 1 the words "with the consent of the latter" [the receiving State] were added during the negotiations in the UN General Assembly. The ILC had added a commentary to its draft which contemplated tacit consent. That was clearly of concern to States, so in article 2 the words "with the consent of the latter" were expanded to read "with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel."[109]

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107 *Khurts Bat*, see note 15, para. 27 (Moses LJ).

108 Ibid., para. 29.

109 In doing so, States were following the rules for the establishment of permanent diplomatic missions – article 2 of the Vienna Convention on Diplomatic Relations. See also article 4 (*agrément*).

What does "consent" mean in practice? It means, at a minimum, that the receiving State has agreed with the sending State that the sending State shall send the person to the receiving State as an official visitor entitled to immunity. It is not normally sufficient, to establish "consent", that the immigration authorities have permitted the person to enter, or that a visa has been issued. Even the issue of a diplomatic or official visa does not necessarily amount to consent to a special mission. Practice varies from State to State, and the visa-issuing authorities are not necessarily thinking in terms of immunities. Such visas may be issued simply as a courtesy. Consent must be consent to the special mission itself, not simply to a visit by the individual concerned. It is not, however, necessary that the sending and receiving States use the term "special mission": such niceties are not to be expected, and customary law addresses official visitors in general. The necessary consent may be implied from all the surrounding circumstances.[110] For example, if the visit is led by one of the so-called "troika" (Head of State, Head of Government, Minister for Foreign Affairs) or other holders of high office to whom similar considerations apply (such as the Minister of Defence or a Minister for Foreign Trade) then it may be presumed that any consent to the visit is consent to a visit or special mission entailing immunity.

Although it seems to be generally agreed to be a requirement that the sending and receiving States have agreed on the specific questions to be dealt with by a special mission or the specific task to be performed, such agreement does not need to be detailed. Indeed, *Tabatabai* is authority for the proposition that it can be quite general in nature. As for the nature of the questions or tasks, it seems unlikely that a mission purely to conclude commercial contracts on behalf of the Government would be accepted as a special mission.[111]

That, at least under customary international law, there is flexibility as regards the requirement that consent be given in advance is illustrated by the *Tabatabai* case.[112] There is no strict requirement that consent must be given prior to the arrival of the members of the special mission in the territory of the receiving State.

How is it to be ascertained that consent has been given? Domestic courts will usually accept the word of the Executive on this matter. That is the case, for example, in the United Kingdom when a Foreign

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110 See the letter from the FCO's Director for Protocol in the *Khurts Bat* case, see note 176 below.

111 See, for example, Parker LJ's remarks in the *Teja* Case, see note 162 below.

112 See note 137 below.

Office certificate is issued; the position seems to be essentially the same in the United States, and probably in other countries too. In any event, domestic practice in this regard is likely to be quite flexible.

c. Whether Consent is given is a Matter of Policy

Whether a receiving State is actually willing to consent to a particular official visit as a visit attracting immunity is essentially a matter of policy. It is not a matter regulated by international law, though at least in the case of a visit led by a Head of State, Head of Government or Minister for Foreign Affairs (and those holders of high office in the State equated with them) it may well be that consent to the mission automatically includes consent to the visit as one attracting immunity.

States may wish to develop policy criteria, as well as procedures, for the cases in which they are prepared to give their consent, or they may prefer to decide case-by-case. If policy guidelines are developed, they may include, for example, that the visit should be "high-level" (a term which may or may not be defined) and/or that its functions should be of the kind that would normally be conducted by a permanent diplomatic mission (nowadays a very broad category of functions). States may also wish to develop procedures which they would normally expect to be followed in certain cases.

d. The Status of Persons on High-Level Official Visits

The scale of immunities to which official visitors are entitled is governed by the principle of functional necessity. They enjoy such immunities as are necessary for the efficient conduct of their functions.[113] In particular, they enjoy, for the duration of the visit, the like inviolability of the person and immunity from criminal jurisdiction as persons of equivalent rank accredited to a permanent diplomatic mission.[114] 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 persons,

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[113] Convention on Special Missions, preamble.

[114] *Khurts Bat*, see note 15, para. 26 (Moses LJ). However, there may be differences, e.g. as regards traffic cases, inviolability of the premises of the mission.

freedom or dignity.[115] It also includes immunity from service of legal process.[116]

As regards other privileges and immunities, including immunity from civil jurisdiction, the position under customary international law is less clear. During the elaboration of the *Convention on Special Missions* there were two broad approaches: that the members of a special mission should in all respects enjoy the same immunities and privileges as the corresponding members of a permanent diplomatic mission; and that, as regards immunity from civil jurisdiction they should only enjoy "official act" immunity.[117] One of the main reasons for the limited participation in the Convention is what is seen as an excessive immunity from civil jurisdiction, going beyond what is required by functional necessity.[118] Given this, it seems difficult to argue that under customary law the immunity of members of special missions from civil or administrative jurisdiction extends beyond official acts and any measures that might involve an element of constraint (such as the serving of a subpoena to produce evidence or any other demand to appear as a witness). As regards other matters, such as the inviolability of archives and papers, and the right of free communication, these are to be granted so far as practical (though if the sending State has a permanent diplomatic mission in the State concerned such facilities and privileges may not in practice be needed).

VI. Conclusion

We have seen that at least three separate heads of immunity may come into play in the case of any particular official visit: (i) the immunity *ratione personae* of holders of high-ranking office; (ii) "official act" immunity; and (iii) the immunity of official visitors, including those on special missions. As regards the third head, the rules of customary international law are both wider and narrower than the provisions of the *Convention on Special Missions.* They are wider in that the class of official visitors who may be entitled to immunity is broader than that foreseen in the Convention. They are narrower in that the range of privi-

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115 Article 29, Vienna Convention on Diplomatic Relations; article 29, Convention on Special Missions.

116 E. Denza, *Diplomatic Law*, 3rd edition, 2008, 268-269.

117 Przetacznik, see note 2, 594, 599-600; Donnarumma (1972), see note 2, 46.

118 See notes 76-78.

leges and immunities is more limited, being essentially confined to immunity from criminal jurisdiction and inviolability of the person.

There now seems to be a "settled answer"[119] to the question of the customary law on the immunity of official visitors. This is to be welcomed. The law in this field is an important part of what the ICJ has described as "the whole corpus of the international rules of which diplomatic and consular law is comprised", rules the "fundamental character" of which it strongly affirmed.[120] Emphasising the "extreme importance" of these rules, the International Court has referred 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."[121]

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119 See note 3.

120 *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, 3 et seq. (42, para. 91).

121 Ibid., 43 (para. 92).

Annex

State Practice

The State practice set out in this Annex covers Austria, Belgium, Finland, France, Germany, the Netherlands, the United Kingdom, and the United States of America. It does not pretend to be exhaustive. Indeed, there is no doubt a good deal of practice in this as in other fields which does not receive much if any publicity.

Austria

Austria is a party to the *Convention on Special Missions*. Nevertheless, *vis-à-vis* most States it is the rules of customary international law that apply. The leading case is the *Syrian National Immunity* case.[122] This decision of the Austrian Supreme Court is important for its references to the customary international law on immunity. The case is an impressive statement of the central importance of consent, and applies the rules of the *Convention on Special Missions* by analogy in a wider context.

The lower Court (Oberlandesgericht) had held that Dr. S. was entitled to immunity both as a representative of a Member State on a visit to UNIDO, and because he was on an *ad hoc* mission to UNIDO. The Supreme Court overturned the decision on both grounds. As to the second ground, the Supreme Court considered *inter alia* the analogy with special missions within the meaning of the *Convention on Special Missions*, holding that an *ad hoc* mission to UNIDO could not come into existence without the consent of that organization. The Judgment of the Supreme Court contains the following passage,

> "An ad-hoc mission means a legation, limited in duration, which represents a State and is sent by that State to another State, with the latter's consent, for the purpose of dealing with specific issues with that State or to fulfil a specific task in relation to it ... the position of such ad hoc State representatives ... is determined primarily by the relevant agreement on the official headquarters of that organization, secondarily by customary international law."

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[122] *Oberster Gerichtshof*, 120s3/98, Judgment of 12 February 1998, *ILR* 127 (2005), 88-93.

The Court concluded,

> "None of these legal sources can support the assumption that an ad hoc mission to UNIDO may come into being without the consent of that organisation. In the case in point, UNIDO would be comparable to the recipient State of an ad hoc legation; that State has the right to cooperate, through its consent, in the despatch to it of such a mission, so that unwanted missions cannot arise ... the prior agreement of UNIDO is required in order to cause a visit by a State representative to become an ad hoc legation. If that requirement is not satisfied, a special mission does not exist."

Belgium

In the *Arrest Warrant* case, Belgium stressed that it was not claiming to enforce arrest warrants against "representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium."[123]

Belgium's Law of 1993 on crimes under international humanitarian law, amended in 1999, was highly controversial. It introduced wide universal jurisdiction and removed immunity in respect of many crimes.[124] When it was amended in 2003 a new provision was included as article 1 *bis* of the Preliminary Title of the Code of Criminal Procedure, as amended in 2003, paragraph 2 of which provides,

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

This provision confers immunity from execution in criminal matters upon any person officially invited by a Belgian authority or certain in-

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123 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, see note 25, 28, para. 65. See also Belgium's Counter-Memorial, para. 1.12.

124 S. Ratner, "Belgium's War Crimes Statute: A Postmortem", *AJIL* 97 (2003), 888-897.

ternational organizations, whether or not that person is a representative of a State or an international organization.[125]

Finland

Finland signed the *Convention on Special Missions* in 1970, but has not ratified it. In 1973, it enacted legislation in part modelled on the Convention. The Act applies "to special missions of foreign States sent here with the consent of the Government of Finland and with functions mutually agreed upon by the respective States." It provides, *inter alia*, that "[t]he person of members of ... the special mission and their family shall be inviolable", and that "[t]he members of ... the special mission shall enjoy the same immunity from criminal, civil and administrative jurisdiction and executive power as the members of diplomatic missions in Finland ..."[126]

France

The *French Property Commission in Egypt* case (1961-1962)[127] concerned the arrest and trial in Egypt of three members of the French Property Commission in Cairo, a body established by agreement between Egypt and France to handle property rights of French nationals in Egypt which had been sequestered following Suez (1956). The three were accused, principally, of espionage, plotting against the State and planning to assassinate President Nasser. The trial took place in secret and it is not known what arguments were made in Court. After the

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125 Law of 17 April 1878 concerning the Preliminary Title of the Code of Criminal Procedure, Art. 1 *bis*, para. 2: "Conformément au droit international, un acte de contrainte relatif à l'exercice de l'action publique ne peut être posé pendant la durée de leur séjour, à l'encontre de toute personne ayant été officiellement invitée à sojourner sur le territoire du Royaume par les autorités belges ou par une organisation internationale établie en Belgique et avec laquelle la Belgique a conclu un accord."

126 Act on the Privileges and Immunities of International Conferences and Special Missions, enacted on 15 June 1973 (572/73) and amended on 20 December 1991 (1649/91) (referred to as the Privilege Act), Sections 1, 9 and 10. The Act applies also to delegations to conferences and certain intergovernmental organizations.

127 Watts (1963), see note 2; *The State* v. *Mattei and others*, in: *ILR* 34 (1967), 175-179, *A.F.D.I.* 8 (1962), 1064; Ch. Rousseau, "Egypte et France", *RGDIP* 66 (1962), 601-617; Louis, see note 2.

hearing but before the Court's decision, the trial was suspended "for high reasons of State" and the accused were immediately released. In the course of these events, the French Government issued a press release saying *inter alia* that,

> "[t]he French Foreign Ministry officials who were arrested were members of an official mission accredited by the French Government, in accord with the Egyptian Government, for the purpose of implementing an international agreement; they were entitled to certain privileges and immunities, in accordance with the general principles of international law, under which special missions enjoy a status similar to that of regular diplomatic missions ...
>
> As regards the argument that the persons involved enjoyed a special status, that of special missions (a term used to designate official missions of one State to another State, charged with diplomatic functions of a special and temporary nature) – this argument does not hold, for this status is no different from that of the permanent diplomatic missions, in particular as concerns judicial immunity."[128]

A more recent statement on the matter by the French Government is to be found in its Counter-Memorial in *Djibouti* v. *France.*[129]

On 1 April 2004, Jean-François H. (N'Dengue), Director-General of Police of the Republic of the Congo, was arrested in France in connection with allegations of crimes against humanity, torture and acts of barbary and kidnapping committed in 1999 at the river port of Brazzaville known as "le Beach". Later that day, the Director of the Cabinet of the French Minister for Foreign Affairs sent to the Procureur de la République of Meaux a note from the Protocol Service, reading:

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[128] Watts (1963), see note 2, 1389-1390 (Press release of 6 December 1961, issued by the French Permanent Mission to the United Nations).

[129] *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti* v. *France),* see note 25, Counter-Memorial of France, para 4.34 "Lorsque des personnes ont, comme en l'espèce, des fonctions essentiellement internes, il n'est pas nécessaire qu'elles soient protégées par des immunités en tout temps et en toutes circonstances; il suffit qu'elles puissent bénéficier d'immunités lorsqu'elles se rendent à l'étranger, pour le compte de leur Etat, dans le cadre d'une mission officielle. Tel est l'objet des immunités reconnues aux membres des missions spéciales, qui constituent une garantie suffisante pour des personnes exerçant une fonction, telle que celle de procureur de la République ou de chef de la sécurité nationale, qui n'implique pas de fréquents déplacements à l'étranger."

"The Ministry of Foreign Affairs confirms that the Ambassador of the Congo in France has certified that Jean-François H., holder of a document signed by the President of the Republic of the Congo, is on official mission in France since 19 March 2004; that in this capacity, and by virtue of customary international law, he benefits from immunities from jurisdiction and execution."[130]

Based on this note, the Procureur de la République requested that the proceedings against Jean-François H. be stopped, and this was done.[131] Subsequently, in a Judgment dated 20 June 2007, the *Court of Appeal of Versailles* found that this 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", and held "that Jean-François H., at the time of his arrest, benefited from immunity from jurisdiction and execution, which applied whatever the nature of the crimes."[132]

In another French case, *Hubert X*, a dual French-Burkinabé national, claimed immunity on the ground that he was on a diplomatic mission on behalf of Burkina Faso. In its decision of 23 September 2009,[133] the Criminal Chamber of the *Cour de Cassation* noted that the French Foreign Ministry had indicated by a note dated 28 May 2009 that,

"– a diplomatic passport is simply a travel document which does not confer on its holder any diplomatic immunity; – Hubert X is not accredited in France; – that the presence of Hubert X in France is not within the framework of a special mission; – that in consequence

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130 "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 international coutumier, il bénéficie d'immunités de juridiction et d'exécution." (reproduced in the Judgment of 9 April 2008 of the Criminal Chamber of the *Cour de Cassation* – No. de pourvoi: 07-86412).

131 For the facts, see the Judgment of 20 June 2007 of the *Cour d'Appel de Versailles*, Chambre de l'Instruction, 10ème chamber-section A.

132 The relevant part of the *Cour d'Appel*'s Judgment is set out in the Judgment of 9 April 2008, see note 130. 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.

133 No. de pourvoi: 09-84759.

Hubert X is subject to common law and cannot claim any immunity."[134]

The *Cour de Cassation* upheld the lower Court, finding that *Hubert X* had no immunity since he was not accredited in France, and "his presence in France was not within the framework of a special mission." The Chamber stressed the need for the sending State to ensure that it had received *agrément* and that it was for the sending state to prove prior accreditation, not the receiving State.

Thus French practice, particularly as evidenced by statements of the Executive, tends to support the view that under customary international law official visitors to France enjoy immunity from criminal jurisdiction.

Germany

Section 20 of the German Law on the Constitution of the Courts (Gerichtsverfassungsgesetz – GVG) provides that,

> "German jurisdiction also shall not apply to representatives of other states and persons accompanying them who are staying in territory of application of this Act at the official invitation of the Federal Republic of Germany.
>
> Moreover, German jurisdiction also shall not apply to persons other than those designated in subsection (1) and in sections 18 [*diplomatic missions*] and 19 [*consular posts*] insofar as they are exempt therefrom pursuant to the general rules of international law or on the basis of international agreements or other legislation."

Section 20 (1), sometimes known as the *lex Honecker*, was enacted to protect the German Democratic Republic leader when he made an official visit to the Federal Republic of Germany. But it has wider application, covering all representatives of other States, and persons accompanying them, who are in Germany pursuant to an official invitation of the Federal Republic of Germany. It covers, for example, not only Heads of State and members of Governments but also other persons who are present at the invitation of the Government and who are there-

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134 "– un passeport diplomatique est un simple titre de voyage qui ne confère à son titulaire aucune immunité diplomatique; – Hubert X n'est pas accrédité en France: – que la présence d'Hubert X en France ne s'inscrit pas dans le cadre d'une mission spéciale; – qu'en conséquence Hubert X relève du droit commun et ne peut se prévaloir d'aucune immunité".

fore immune from jurisdiction according to the general rules of inter-State intercourse, such as military observers under OSCE-agreements.[135] An invitation may be extended by any federal constitutional organ (President, Government, the Bundestag, and the Bundesrat). As the Minister of State in the German Chancellery put it, the Government wanted to set out in a law an exception from criminal jurisdiction for "guests of the Federal Republic."[136]

The leading German case on official visitors, one of the leading cases worldwide, is *Tabatabai*.[137] This case, which eventually reached the Criminal Chamber of the Federal Supreme Court, concerned a member of the political leadership in Iran who was arrested at Düsseldorf airport when opium was found in his luggage. He claimed to be on a secret mission to Germany and other Western countries. The various German courts that considered the matter between 1983 and 1986 (Regional Court, Higher Regional Court, Federal Supreme Court), in some cases more than once, were essentially in agreement as to the customary international law status of the law on special missions and its main outlines. But they disagreed on the application of the law to the facts, particularly on whether the Foreign Ministries of the Federal Republic of Germany and Iran had agreed upon a sufficiently specific mission to be performed by *Tabatabai*, and on whether they had not in fact agreed on the special mission in order to shield *Tabatabai* personally from the jurisdiction of the German criminal courts rather than to protect the mission.[138]

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135 Deutscher Bundestag – 10. Wahlperiode – 74. Sitzung. Bonn, den 7. Juni 1984, 5386 (State Secretary in the Federal Ministry of Justice).

136 In an interview in the *Spiegel* 1984, the Minister of State in the German Chancellery, Philipp Jenninger, denied that the law was especially passed for Honecker: "Wir haben nicht die Absicht, eine Lex Honecker zu machen. Aber es ist in der Tat dafür ein allgemeines Bedürfnis vorhanden. Und da kann man auch diese Situation miteinbeziehen. Wir wollen für Gäste der Bundesrepublik eine Ausnahme von der Strafverfolgung im Gesetz festlegen. Dies haben wir vor, aber – wie gesagt – nicht ausgerichtet auf den Besuch von Honecker", <http://www.spiegel.de>.

137 BGHSt 32 (1984), 275; *NJW* 37 (1984), 2048; *ILR* 80 (1989) 388-424 (411); K. Bockslaff/ M. Koch, "The Tabatabai Case: The Immunity of Special Envoys and the Limits of Judicial Review", *GYIL* 25 (1982), 539-584; Wolf, see note 2; Herdegen, see note 2, 576; Franey, see note 2, 139-143.

138 The Iranian Foreign Ministry's letter of 31 January 1983, and the German Foreign Office's reaction thereto, are reproduced in the Judgment of 27 February 1984: *ILR*, see note 137, 413.

In its Judgment of 27 February 1984, the Federal Supreme Court said,

> "It is contentious amongst scholars of international law whether its provisions [*the provisions of the Convention on Special Missions*] are already now the basis of State practice as customary international law. ... However, the question of the customary validity of the Convention is not the decisive issue ... It is in any case established that, irrespective of the draft Convention, there is a customary rule of international law, based on State practice and opinio juris which makes it possible for an ad hoc envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys to be on a par with members of the permanent missions of States protected by international treaty law ..."[139]

Since *Tabatabai*, the customary law status of provisions of the *Convention on Special Missions* has been confirmed in a further German case. The *Vietnamese National* case concerned the arrest of a Vietnamese national who had failed to comply with an order to attend an identity parade (to determine his nationality) before Vietnamese officials in the offices of a German authority in Germany. (The procedure took place under a bilateral Germany-Vietnam Re-admission Agreement.) The question before the Court was whether the identity parade was an action of the German authorities (and thus governed by German administrative law) or not. The Higher Administrative Court explained that its conclusion that the identity parade was not governed by German administrative law was,

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

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139 Ibid., 418-419.

munity for their official acts and personal inviolability (arts. 29, 31 and 41 of the Convention)."[140]

In 2006, a French Judge (Judge Bruguière) had indicted Mrs. Rose Kabuye, Chief of State Protocol in the Office of President Kagame of Rwanda, in connection with allegations of aiding and abetting the assassination of former President Habyarimana of Rwanda. France sought her extradition from Germany on a European arrest warrant. In April 2008, the German authorities declined to arrest her on the ground that she had immunity since she was accompanying the Rwandan President on an official visit to Germany. Some months later, on 9 November 2008, the German police arrested her at Frankfurt and extradited her to France, saying that on this occasion she was present in Germany on a private visit.[141]

In summary, the German authorities and courts clearly accept that there are customary international law rules concerning official visitors, and in particular 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."[142]

Netherlands

The Dutch International Crimes Act[143] provides, in section 16, that,

"Criminal prosecution for one of the crimes referred to in this Act is excluded with respect to:

foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons insofar as their immunity is recognised under international law;

persons who have immunity under any convention applicable to the Netherlands within the Kingdom."

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140 *Oberverwaltungsgericht* of Berlin-Brandenburg, Judgment of 15 June 2006: OVG 8 S 39.06 (overturning a decision of the Administrative Court Berlin).

141 V. Thalmann, "French Justice's Endeavours to Substitute for the ICTR", *Journal of International Criminal Justice* 6 (2008), 995-1002; Akande/ Shah, see note 2, 822.

142 See note 139 above.

143 *Wet internationale misdrijven* (WIM), Act of 19 June 2003, Bulletin of Acts and Decrees 2003, 270.

In a report published in May 2011, prepared at the request of the Foreign Minister, the Dutch Advisory Committee on Issues of Public International Law (CAVV) said,

> " ... the CAVV recognises that the smooth conduct of international relations requires that persons other than the threesome discussed above should, when the occasion arises, be able to rely on being able to perform their duties on behalf of the state without interference and, where necessary, claim full immunity. If a representative of a state pays an official visit to another state, this person should, in the opinion of the CAVV, be able to claim full immunity, even in cases concerning international crimes. In this context, the CAVV would prefer to employ the term 'full immunity' rather than 'personal immunity' since the immunity is not linked to the position of the person claiming immunity but to his duties at a given moment. The CAVV bases the granting of immunity in such cases on customary international law."[144]

In its response to this report,[145] the Dutch Government agreed with the main conclusions and recommendations. The Government stated its belief "that the rule on immunity set out in section 16 of the International Crimes Act can continue to function as a good guiding principle" and agreed "that section 16 of the International Crimes Act adequately reflects the current state of international law." The Government continued,

> "The rule set out in section 16 (a) is not limited to the three categories of representatives specified, but extends to 'other persons insofar as their immunity is recognised under international law'. In the CAVV's opinion, all members of official missions may be entitled to full immunity under customary international law. The government endorses this. Members of official missions can be seen as 'temporary diplomats'. They, like diplomats, require this immunity so they can carry out their mission for the sending state without interference. However, unlike diplomats, members of official missions only

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144 Advisory Committee on Issues of Public International Law (CAVV), Advisory Report on the Immunity of Foreign State Officials, see note 103, 31.

145 Letter from the Minister of Foreign Affairs to the President of the House of Representatives of the States General, dated 19 October 2011, enclosure (TK 2011-2012, 33000 V, nr. 9).

require this immunity for a limited period, namely the duration of the mission to the receiving state."[146]

United Kingdom

In the law of England and Wales, the position as regards the customary international law on official visitors is the same as in the case of State and diplomatic immunity before they were placed on a statutory footing. In fact, the main area of customary law that has been consistently applied by English courts – that is, recognised as a part or a source of English law – is that of international immunities. The underlying position was explained by Moses LJ in *Khurts Bat* as follows,

"whilst not all the rules of customary international law are what might loosely be described as part of the law of England, English courts should apply the rules of customary law relating to immunities and recognise that those rules are a part of or one of the sources of English law."[147]

On 26 April 2011 the Government responded to a Parliamentary Question as follows,

"The Government signed the Special Missions Convention on 17 December 1970, but have not yet ratified it. The Government have kept the question of ratification under review, though ratification would entail the passage of primary legislation. However developments in customary international law regarding special missions and certain high-level official visitors that have been recognised by our

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146 The Government also explained that it was of the opinion "that it would be preferable to clarify that all members of official missions are entitled to full immunity in a letter to the States General. Developments within relevant areas of international law have not yet fully crystallised; accordingly, it would be better not to amend section 16 of the International Crimes Act for the time being. The government will therefore draft a letter to the States General in the near future, setting out in greater detail that members of official missions are entitled to full immunity and therefore belong in the category 'other persons insofar as their immunity is recognised under international law' as referred to in section 16 (a) of the International Crimes Act. The letter will also state the conditions that need to be met before official missions can claim immunity."

147 *Khurts Bat*, see note 15, para. 22 (Moses LJ). The Administrative Court found that the rules of customary international law on the inviolability and immunity of persons on a "special mission" were part of the law of England, and were to be applied as such by the English courts.

courts require that appropriate privileges and immunities are extended to visitors on special missions and other high-level visitors."[148]

There was an intention to ratify the Convention at the time of signature in 1970, and steps were taken between 1970 and 1979 to enact the necessary legislation to enable effect to be given to the Convention, including the preparations of a draft Bill. But this did not happen; presumably other Bills were accorded higher priority.[149] Two things were of particular interest during this process. First, the Foreign and Commonwealth Office noted the uncertainty of the then rules of customary international law, and even more so the rules that the English courts would apply. The latest reiteration of this assessment dates from December 1974.[150] Second, the Foreign and Commonwealth Office, still no doubt concerned at the excessive scale of privileges and immunities under the Convention, repeatedly stated its understanding of the lim-

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148 Hansard Commons, 26 April 2011: Column 404W.

149 According to papers available at The National Archives, signature was agreed by the Cabinet's Home Affairs Committee in November 1970 (Foreign and Commonwealth Office, Convention on Special Missions, Memorandum by the Parliamentary Under Secretary of State, HA(70)35 of 13 October 1970; HA(70) 7th Mtg, 20 November 1970). In May 1973, and again (after a change of Government) in December 1974, the Minister of State for Foreign and Commonwealth Affairs proposed to the Cabinet's Home (and Social) Affairs Committee that a Bill should be introduced to enable the United Kingdom to ratify and implement the Convention (Convention on Special Missions, Memorandum by the Minister of State for Foreign and Commonwealth Affairs, HS(73)73 of 2 May 1973; Convention on Special Missions, Memorandum by the Minister of State for Foreign and Commonwealth Affairs, H(74)88 of 17 December 1974). Policy approval was given both in 1973 and in 1975 (H(75) 3rd Mtg, 7 March 1975). A series of draft Bills was prepared by Parliamentary Counsel, the last of which was dated 28 April 1976. But it would seem that Parliamentary time was not found to take it forward. A further effort to revive the Bill was made in 1979, but to no avail (E. Wilmshurst, *Letter to the Office of the Parliamentary Counsel*, 9 March 1979).

150 Convention on Special Missions, Memorandum by the Minister of State for Foreign and Commonwealth Affairs, Annex B (The Convention on Special Missions and existing law): H(74)88 of 17 December 1974. Earlier versions of this paper were similar: see HA(70)35 of 13 October 1970, Annex B; HS(73)73 of 2 May 1973, Annex B; letter from Sir Vincent Evans to Parliamentary Counsel of 10 August 1973, Annex I.

ited scope of the term "special mission" as used in the Convention. In 1970, the Foreign and Commonwealth Office said the following,

> "[The Convention] governs the sending and reception and the status, privileges and immunities of special missions, that is to say temporary ad hoc missions sent by one State to another to carry out functions essentially similar to those of permanent diplomatic missions. Examples of missions that would be covered are: official ministerial visits to foreign countries; negotiating teams sent to conclude a commercial treaty or a frontier agreement; official representatives sent to a coronation or a state funeral [or ...]; members of bilateral intergovernmental economic commissions etc."[151]

The draft Bill's 1 (2) provided that, in the articles of the Convention that were to have the force of law in the United Kingdom,

> "'special mission' shall be construed as including a mission falling within the definition in Article 1 if, and only if, Her Majesty's Government have consented to the mission's being treated as a special mission for the purposes of those Articles; ... "

This definition, with its requirement that a mission would only be a special mission for the purposes of the Act if it was accepted as such by the United Kingdom Government, was crucial and would have resolved in domestic law the difficulty of defining the term that had not been fully overcome during the negotiation of the Convention. It was evidently considered to be consistent with the Convention,[152] and the approach was accepted as valid under customary international law in *Khurts Bat*,[153] though the intention was, for the avoidance of doubt, to make an interpretative declaration to this effect upon ratification of the convention.[154]

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151 Convention on Special Missions, Memorandum by the Parliamentary Under Secretary of State, Foreign and Commonwealth Office, HA(70)35 of 13 October 1970, para. 2.

152 For a contrary view, see Donnarumma (1972), see note 2, 38, n. 22.

153 Para. 29 (Moses LJ), cited at note 108 above.

154 The draft Bill contained a Clause 3, modelled on Section 4 of the Diplomatic Privileges Act 1964, providing for a conclusive certificate as to fact, reading: "If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact." A positive certificate under this Clause would have followed the lines of those issued

As the British Government said in Parliament on 18 October 2011, "[i]n Foreign and Commonwealth Office (FCO) practice, there are no prescribed formalities for consenting to a special mission, but such consent may be inferred from the circumstances of any given visit",[155] and that "each visit is treated on its own merits."[156]

The United Kingdom Government has recently had occasion to state its view generally on the law of special missions in response to Parliamentary Questions. On 13 December 2010, the Minister of State at the FCO answered a question as follows,

> "There are various forms of immunity that may operate in proceedings before UK courts, including, State immunity, diplomatic immunity and special missions immunity. State and diplomatic immunity are addressed in legislation; special missions immunity derives from customary international law. Each of these aspects of immunity have been addressed in UK court judgments, to which reference must be made when determining whether immunity applies in any given case.
>
> Whether a visiting Minister of a foreign Government is entitled to immunity from arrest in the UK will depend on the status of the person concerned, whether they are travelling on official Government business, as well as on other considerations. By virtue of their office, immunities will attach to visiting Heads of State, Heads of Government and Ministers of Foreign Affairs, as well as, by extension, other Ministers who travel by virtue of their office. The extent to which such immunities may attach to other visiting senior officials will fall to be determined case-by-case depending on their status and the reasons for their visit to the UK."[157]

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under the Diplomatic Privileges Act 1964, and would have no doubt been similar to that issued in respect of Ms Tzipi Livni (at note 178 below).

155 Hansard, HC Deb, 18 October 2011, Column 896W.

156 Hansard, HC Deb, 18 October 2011, Column 897W. See also the letter from the Director of Protocol cited at note 176 below.

157 The first paragraph of the reply was omitted in error when the question was first answered on 11 November 2010: 11 November 2010, Vol. 518 Column 435W. The answer set out above is the answer that should have been given, as explained on 13 December 2010 in a Parliamentary Written Question (Correction): Hansard, HC Deb, 13 December 2010, Column 72WS.

There have been a number of cases in the English courts concerning official visitors. Some are relatively old. The more recent ones reflect an awareness of the current importance of *ad hoc* diplomacy.

In *Service* v. *Castaneda*,[158] Knight-Bruce VC accepted that Castaneda was in England as an envoy on a special mission for the Spanish Queen (to settle claims arising out of the services of the British Auxiliary Legion of Spain). The Vice-Chancellor considered it unnecessary to establish whether Castaneda brought himself strictly within the wording of the Statute of Anne (concerning Ambassadors) as "on the language of his affidavit (which as yet has received no contradiction) ... he brings himself within that common law which exists equally with the statute, to protect him from that particular process."[159] The action for an injunction was accordingly dissolved.

Several decades later, in *Fenton Textile Association* v. *Krassin*,[160] Scrutton LJ expressed the opinion that a representative attracted immunity even though not formally accredited to His Majesty as a diplomat if the Government was negotiating with that person "as representing a recognised foreign state, about matters of concern between nation and nation without further definition of his position."[161] However, Krassin's immunity was in fact governed by the Trade Agreement between the United Kingdom and the Russian Soviet Federative Socialist Republic, which did not extend to immunities from civil suit and so his claim for immunity failed.

In *R.* v. *Governor of Pentonville Prison, ex parte Teja*,[162] the Divisional Court seems to have accepted in principle that Teja might be on a special mission and thus entitled to immunity. But this was not established on the facts. Costa Rica had issued Teja with a letter of credence stating it had appointed him as an economic advisor to be established in Switzerland where he would soon be accredited to undertake a study on the possible development of an integral steel industry; accordingly, he ought to be accorded diplomatic immunity under the Diplomatic Privileges Act 1964. He was arrested while passing through England for two days. Lord Parker rejected Costa Rica's contention in forthright terms,

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158 (1845) 1 Holt Equity Reports 159.

159 Ibid., 170.

160 (1921) 38 TLR 259.

161 Ibid., 170.

162 (1971) 2 Q.B. 274.

> "I confess that at the very outset this argument ... seemed to me to produce a frightening result in that any foreign country could claim immunity for representatives sent to this country unilaterally whether this country agreed or not. As I see it, it is fundamental to the claiming of immunity by reason of being a diplomatic agent that the diplomatic agent should have been in some form accepted or received by this country."[163]

Lord Parker did accept that Costa Rica intended Mr. Teja to go on a special mission covered by the *Convention on Special Missions*, not in force in the United Kingdom, not the 1961 Vienna Convention on Diplomatic Relations. Even then, he considered,

> "it is almost impossible to say that a man who is employed by a government to go to foreign countries to conclude purely commercial agreements, and not to negotiate in any way or have contact with the other government, can be said to be engaged on a diplomatic mission at all. He was there merely as a commercial agent of the government for the purposes of concluding a commercial contract. He was not there representing his state to deal with other states. For all these reasons I am quite satisfied that this man could not claim under article 39 diplomatic privileges and immunities from the moment he landed in this country."[164]

The District Judge at Central London/City of Westminster Magistrates' Court has recognized the immunity of official visitors under cus-

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[163] Ibid., 282B-C.

[164] Ibid., 283F-H. In *R* v. *Governor of Pentonville Prison, ex parte Osman (No. 2)*, *ILR* 88 (1992), 378, a Foreign Office official had submitted an affidavit in this case saying that "Her Majesty's Government has not ratified the New York Convention on Special Missions and does not regard it as being declaratory of international customary law" (385). The Divisional Court said, *obiter*: "What is the effect of these documents [letters of Full Powers etc.]? One possibility might have been to suggest that the applicant was head of a special mission. This suggestion has rightly been 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 or any other government. If it had been, the applicant's status would not have been recognized in English law, since the United Kingdom has nor enacted legislation pursuant to the Convention on Special Missions of 1969. ... " (393). There does not seem to have been argument about the rules of customary law in this case, decided in 1988, and the *obiter dictum* is in any event overtaken by the decision in *Khurts Bat*, see note 15.

tomary international law/English law in a number of cases.[165] In *Re Bo Xilai*,[166] Judge Workman held that Mr. Bo was entitled to immunity under customary international law both *ratione personae* in light of his high office and because he was in the United Kingdom performing official duties as Minister for Commerce and International Trade of the People's Republic of China, as part of an official delegation for the State visit of the President of the People's Republic of China. He was "a member of a Special Mission and as such has immunity under customary international law."

In *Court of Appeal Paris, France* v. *Durbar*,[167] the Paris Court of Appeal sought Durbar's surrender following his conviction, *in absentia*, for embezzlement. In holding that the defendant did not enjoy immunity, Judge Evans accepted the existence in principle of special mission immunity under customary international law. But on the facts he rejected Durbar's assertion that at the time of his arrest in France he had been on a special mission sent by the Central African Republic; there was no evidence whatsoever to support it, and it would in any event not have subsisted in relation to the present proceedings.[168]

In *Re Ehud Barak*,[169] Judge Wickham was satisfied that, in addition to enjoying immunity *ratione personae* by virtue of his office, Mr. Barak, the Israeli Defence Minister, was entitled to special mission immunity under customary international law. Her decision was based on information from the Foreign and Commonwealth Office that he was,

> "in the United Kingdom both for the purposes of attending the Labour Party Conference and to attend official meetings with the Foreign Secretary (arranged prior to Mr. Barak's arrival in the UK) and with the Prime Minister and the Defence Secretary (requested by the Israeli Embassy prior to Mr. Barak's arrival in the UK but confirmed subsequently). These bilateral meetings are to discuss official high-

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165 Franey, see note 2, 135-149.

166 8 November 2005, *ILR* 128 (2006), 713-715; *BYIL* 76 (2005), 601-603.

167 City of Westminster Magistrates' Court, 16 June 2008 (unreported): Franey, see note 2, 147-149.

168 In a subsequent decision, dated 7 November 2008, District Judge *Evans* rejected, on the facts, Mr. Durbar's claim that, having since been appointed Minister by the Central African Republic, he was entitled to immunity as the holder of high office in the State (under the *Arrest Warrant* principle).

169 29 September 2009 (unreported), Franey, see note 2, 146-147.

level engagement between the UK and Israel, including the Middle East Peace Process."[170]

In *Re Mikhael Gorbachev*,[171] Judge Wickham was told by the Foreign and Commonwealth Office, in response to her request for information, that the former Head of State of the USSR was "in the United Kingdom both for the purpose of attending a fundraising event this evening and to attend an official meeting with the Prime Minister." The Judge was "satisfied that Mr Gorbachev is entitled to immunity under customary international law as a member of a Special Mission. This immunity is in accordance with article 31 of the Convention on Special Missions ... " The Judge referred in addition to immunity *ratione materiae*, adding that she was not satisfied that the elements of the offence alleged (torture) had been made out.

In *Khurts Bat*,[172] the appellant had been arrested on the basis of a European arrest warrant alleging that he kidnapped and seriously mistreated a Mongolian national in Germany (and France). In the City of Westminster Magistrates' Court, Judge Purdy rejected the two immunity grounds then put forward by Khurts Bat to resist extradition to Germany: that he was entitled to immunity on the ground that he was visiting the United Kingdom on a special mission; and that he was entitled to immunity *ratione personae* as the holder of high-ranking office within the State. The Judge accepted the principle of special mission immunity, but found that in the case before him there could not be said to be a special mission, which "requires mutual consent in clear terms."[173] Khurts Bat appealed to the High Court, asserting *inter alia* that he was entitled to inviolability of the person and immunity from suit in respect of extradition proceedings because, at the time of his arrest at Heathrow on a European arrest warrant, he was a member of a special mission sent by the Republic of Mongolia to the United Kingdom with the consent of the latter.[174] The claim to immunity was re-

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170 Franey, see note 2, 146-147.

171 City of Westminster Magistrates' Court, 30 March 2011 (unreported, text on file with the author). See the Westminster News, <http://www.sketchnews.co.uk>.

172 *Khurts Bat*, see note 15.

173 City of Westminster Magistrates' Court, 18 February 2011 (unreported, text on file with the author).

174 The Appellant, and the Republic of Mongolia (which intervened as an interested party), also claimed in the Administrative Court that he was entitled to inviolability of the person and immunity from suit as a high-ranking

jected by the Administrative Court.[175] Neither of the requirements referred to at page 32 above was met, as was conclusively established by a letter to the District Court from the Director of Protocol and Vice-Marshal of the Diplomatic Corps.[176]

On 6 October 2011, the Director of Public Prosecutions (DPP), acting under section 1(4A)(1) of the Magistrates' Courts Act 1980,[177] de-

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official enjoying immunity *ratione personae*, as well as immunity *ratione materiae* in respect of the offences charged in the European arrest warrant. Each of these claims was rejected.

175 The Appellant did not appeal further to the Supreme Court, and was returned to Germany in August 2011 pursuant to the European Arrest Warrant. He was released in September 2011.

176 The letter from the Director of Protocol read as follows: "Ultimately the question of whether Mr Khurts Bat came to the UK on 18 September 2010 on a Special Mission is a question of law for the court to determine. However there are relevant facts within the knowledge of Her Majesty's Government, which may assist the court in reaching conclusions on the law. In the view of Her Majesty's Government a Special Mission is a means to conduct ad hoc diplomacy in relation to specific international business, beyond the framework of permanent diplomatic relations that is now set out in [the Vienna Convention on Diplomatic Relations]. As is the case for permanent diplomatic relations, the fundamental aspect of a Special Mission is the mutuality of consent of both the sending and the receiving States to the Special Mission. Whilst in FCO practice there are no prescribed formalities, such consent would normally be demonstrated by, for example, an invitation by the receiving State and an acceptance by the sending State, an agreed programme of meetings, an agreed agenda of business and so on. In the case of Mr Khurts Bat, the FCO did not consent to his visit as a Special Mission, no invitation was issued, no meeting was arranged, no subjects of business were agreed or prepared. The FCO therefore did not consider that Mr Khurts Bat came to the UK on 18 September on a Special Mission."

177 Section 1(4A)(1) of the Magistrates' Courts Act 1980 (c. 43), inserted by section 153 of the Police Reform and Social Responsibility Act 2011 (c. 13), provides that where a person who is not a public prosecutor lays an information before a justice of the peace in respect of certain offences (including grave breaches of the Geneva Conventions and torture) alleged to have been committed outside the United Kingdom, no warrant shall be issued under the section without the consent of the Director of Public Prosecutions. In response to a Parliamentary Question, a Home Office Minister explained that "Section 153 of the Police Reform and Social Responsibility Act 2011, which came into force on 15 September 2011, requires the consent of the Director of Public Prosecutions to be given before an arrest warrant can be issued in a private prosecution for offences of universal ju-

clined to give his consent to a private prosecutor for the issue of a warrant to arrest Ms. Tzipi Livni, the Israeli opposition leader, who was visiting London. The private prosecutor had sought a warrant to arrest Ms. Livni in relation to war crimes alleged to have been committed when she was Foreign Minister of Israel. At the request of the DPP, the Foreign and Commonwealth Office certified that "the Foreign and Commonwealth Office has consented to the visit to the United Kingdom of Ms Tzipi Livni on 05-06 October 2011 as a special mission, and she has been received as such."[178] On the same day, the Crown Prosecution Service issued a statement explaining the basis on which he had refused to give consent.[179]

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risdiction. These are offences – including certain war crimes, torture, and hostage-taking – which can be prosecuted here even if committed outside the UK by someone who is not a British national. The Director of Public Prosecutions is well aware that speed is important in dealing with applications of this kind, and he has made clear that it is open to anyone who wants to pursue a crime of universal jurisdiction to engage with the Crown Prosecution Service as early as possible." (Hansard, HC Deb, 17 Oct 2011, Column 653W).

178 The certificate read in full: "Under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs conferred on me, I, Simon Martin, Director of Protocol, hereby certify that the Foreign and Commonwealth Office has consented to the visit to the United Kingdom of Ms Tzipi Livni on 05-06 October 2011 as a special mission, and she has been received as such." See also the Parliamentary Answers at Hansard, HC Deb, 18 October 2011, Column 896W-Column 897W.

179 *CPS Statement in relation to Ms Tzipi Livni's visit to the UK* (CPS News Brief, 6 October 2011). The statement included the following: "On a previous occasion the High Court of England and Wales has considered the legal effect of such a certificate. In Bat v German Federal Court and The Government of Mongolia and The Secretary of State for Foreign and Commonwealth Affairs [2011] EWCH 2029 (Admin), the High Court ruled that a 'special mission' performs temporarily those functions ordinarily taken care of by a permanent diplomatic mission and that accordingly a 'special mission' is afforded immunity from suit and legal process for the duration of the mission. The High Court also ruled that it is not open to a court to call into question the classification of a mission as a 'special mission' by the Foreign and Commonwealth Office. The immunity attracted by those on special missions has also been recognised in a number of decisions made by District Judges. The ruling of the High Court is binding on all magistrates' courts. Accordingly the Director of Public Prosecutions has concluded that a Magistrates' Court would be bound to refuse any application for the arrest of Ms Livni for the duration of this visit. In those cir-

In summary, in the United Kingdom there is extensive practice of the executive and of the courts, based on and supporting the existence of rules of customary international law on the immunity and inviolability of official visitors, including persons on special missions. These customary rules form part of the law of England, and are applied directly by the courts.

United States of America

The United States view of the customary international law on official visitors was explained in 2008, by the then State Department Legal Adviser, John B. Bellinger III, in the following terms:

> "Another immunity that may be accorded to foreign officials is special mission immunity, which is also grounded in customary international law and federal common law (Like most countries, the United States has not joined the Special Missions Convention). The doctrine of special mission immunity, like diplomatic immunity, is necessary to facilitate high level contacts between governments through invitational visits. The Executive Branch has made suggestions of special mission immunity in cases such as one filed against Prince Charles in 1978 while he was here on an official visit. *Kilroy* v. *Charles Windsor, Prince of Wales, Civ. No. C-78-291 (N.D. Ohio, 1978).* This past summer, in response to a request for views by the federal district court for the D.C. Circuit, the Executive Branch submitted a suggestion of special mission immunity on behalf of a Chinese Minister of Commerce who was served while attending bilateral trade talks hosted by the United States, in *Li Weixum* v. *Bo Xilai,* D.C.C.Civ. No. 04-0649 (RJL)."[180]
>
> The US Restatement of 1987 includes the following:
>
> "*Immunity for high officials and special missions.*
>
> High officials of a foreign state and their staffs on an official visit or in transit, including those attending international conferences as of-

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cumstances, the Director of Public Prosecutions has refused to give his consent to the private prosecutor to make an application to the court for an arrest warrant."

180 J.B. Bellinger III, *Immunities*, *Opinio Juris* blog (18 January 2007), see under <http://opiniojuris.org/2007/01/18/immunities>. See also id., "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", *Vand. J. Transnat'l L.* 44 (2011), 819 (831-832).

> ficial representatives of their country, enjoy immunities like those of diplomatic agents when the effect of exercising jurisdiction against the official would be to violate the immunity of the foreign state. Many such officials would enjoy immunity equivalent in all instances to that enjoyed by diplomatic agents under the Convention on Special Missions, Reporters' Note 13, if that Convention were to come into effect."[181]

In a number of cases, United States courts have accepted the view of the US Government, conveyed to the Court, as to the status of persons on what are often referred to in the United States as "special diplomatic missions." The starting point for the law of international immunities in the United States is the early Supreme Court case of *The Schooner Exchange* v. *McFaddon*, in which Marshall CJ held that whenever a sovereign, a representative of a foreign State or a foreign army is present within the territory by consent, it is to be implied that the local sovereign confers immunity from local jurisdiction. The importance of consent is evident in this early decision.[182]

In *Chong Boon Kim* v. *Kim Yong Shik*, the US Attorney submitted a suggestion of immunity to the Circuit Court of the First Circuit, State of Hawaii, saying that,

> "Under customary rules of international law, recognized and applied by the United States, the head of a foreign government, its foreign minister, and those designated by him as members of his official party are immune from the jurisdiction of United States federal and state courts."

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[181] *Restatement (Third) of Foreign Relations Law of the United States*, 1987, Vol. 1, para. 464 cmt. *i*. Reporters' Note 13 includes the following: "Although the law as to 'itinerant envoys,' special representatives, representatives to international conferences, and other participants in diplomacy remains uncertain, the Convention on Special Missions reflects what is increasingly practiced and in many respects may emerge as customary international law."

[182] 11 US 116 (1812): "A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain – privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." (139).

The Court dismissed the action as to *Kim Yong Shik*, Foreign Minister of the Republic of Korea, on the basis of lack of jurisdiction.[183]

Kilroy v. *Charles Windsor, Prince of Wales*[184] concerned a suit brought against the Heir to the British Throne for alleged deprivation of plaintiff's rights under the Constitution and laws of the United States. (The plaintiff had been removed from an event at Cleveland State University by US Department of State officials, after putting forward a question to the Prince, alleging that the British Government tortured prisoners in Northern Ireland.) The Department of Justice filed a Suggestion of Immunity before the Court, arguing that "[u]nder customary rules of international law ... other diplomatic representatives, including senior officials on special diplomatic missions, are immune from the jurisdiction of United States." A letter to the Department of Justice stated that "[t]he Department of State regards the visit of Prince Charles as a special diplomatic mission and considers the Prince to have been an official diplomatic envoy while present in the United States on that mission." The Court held that the Prince of Wales enjoyed immunity.

In *Philippines* v. *Marcos*, a subpoena was served on the Solicitor General of the Philippines, who was in the United States to give a speech. The State Department's Suggestion of Immunity stated that "Solicitor General Ordinez is present in San Francisco as the representative of the Government of the Philippines in the performance of official functions of that Government. Under these circumstances the Department believes that it would be appropriate to recognize and allow the immunity of Solicitor General Ordonez from service of process ..." The Court accepted that the Solicitor General was entitled to "diplomatic immunity" even though the Suggestion of Immunity had issued after he had arrived in the United States and been served with the subpoena.[185]

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183 Civ. No. C12565 (Cir. Ct 1st Dir. Haw. 1963), *AJIL* 68 (1964), 186-187; see also Whiteman, see note 2, 41-42.

184 *Kilroy* v. *Windsor (Prince Charles, Prince of Wales)*, Civ. No. C-78-291 (N.D. Ohio, 1978); Washington, D.C. International Law Institute (ed.), *Digest of United States Practice in International Law*, 1978, 641; *ILR* 81 (1990), 605.

185 United States District Court, N.D. California, *Republic of Philippines by the Central Bank of the Philippines* v. *Ferdinand E. Marcos, et al.*, 665 F.Supp.793 (N.D. Cal. 1987). The Statement of Interest and Suggestion of Immunity in *Bo Xilai* (*Li Weixum et al.* v. *Bo Xilai*, 568 F.Supp.2d 35) states (at 8) that "court granted Philippine Solicitor General diplomatic immu-

Li Weixum v. *Bo Xilai*,[186] concerned a suit brought against the Minister of Commerce of the People's Republic of China by Falun Gong members, for alleged human rights violations committed while he served as governor of Liaoning Province from 2001 to 2004. The Minister was in the United States pursuant to an invitation of the Executive Branch to participate in an annual meeting of the U.S.-China Joint Commission on Commerce and Trade. The Department of Justice filed a Statement of Interest and Suggestion of Immunity, asserting that "upon an Executive Branch determination, senior foreign officials on special diplomatic missions are immune from personal jurisdiction where jurisdiction is based solely on their presence in the United States during their mission."[187] The Court deferred to the views of the Executive that Minister Bo Xilai was on a "special diplomatic mission" and found it lacked jurisdiction to try him.[188]

In summary, it is clear from United States practice and case-law that the US Government considers that official visitors, accepted as such by the Executive, are entitled to immunity for the duration of their visit. US practice thus supports the existence of customary rules regarding the immunity of official visitors. It also demonstrates that the applicability of this immunity is dependent on the consent and recognition, accorded by the receiving State's Executive, of the official visit as such. As can be seen from the case-law, where the Executive expressed its con-

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nity, misunderstanding U.S. position that he was entitled to special missions immunity."

186 See *Bo Xilai*, above.

187 *Li Weixum et al.* v. *Bo Xilai*, Department of Justice Statement of Interest and Suggestion of Immunity, 568 F.Supp.2d 35 (D.D.C 2006) (No. 1:04-cv-00649), 5.

188 In *USA* v. *Sissoko* (995 F.Supp. 1469, 1997), *ILR* 121 (2002), 599, Counsel on behalf of The Gambia filed a motion to dismiss charges of paying a gratuity against Foutanga Sissoko, designated as a "Special Adviser to a Special Mission", a designation accepted by the United States (ibid., 1470). The court rejected the motion, finding that the UN Convention on Special Missions was not customary law. In doing so, it based itself on the fact that neither the United States, The Gambia nor any member of the UN Security Council had signed the Convention. (The United Kingdom had in fact signed the Convention). The court appears not to have considered the possible existence of rules of customary international law independent of the Convention on Special Missions. And it distinguished the case from others, as there was no Suggestion of Immunity and the only recognition of the United States of Sissoko was the visa he was issued, without the expression of any other form of consent.

sent via a statement of interest asserting immunity from jurisdiction, based on customary international law, the judiciary accepts the position of the Executive Branch.