

Formation and evidence of customary international law

"The Commission requests States to provide information, by 31 January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in

- (a) official statements before legislatures, courts and international organizations,*
- and*
- (b) decisions of national, regional and subregional courts "*

United Kingdom response

The UK set out its views on a number of questions relating to the types of evidence suitable for establishing customary international law in the attached *amicus curiae* brief in the case of *Esther Kiobel et al v Royal Dutch Petroleum Co et al*⁵

⁵ 133 S Ct 1659 (2013) http://www.supremecourt.gov/opinions/12pdf/10-1491_l6qn.pdf

The formation and evidence of customary international law was also raised by the UK in *amicus curiae* briefs it submitted before the courts of the United States in a number of death penalty cases; those briefs are enclosed. In *Richey v Mitchell* the UK's *amicus* brief stated that the fundamental principle, that the death penalty must be reserved for only the most serious of crimes, has attained the status of customary international law by reason of its inclusion in numerous international agreements as well as its universal acceptance by civilised nations (see, in particular page 6). In *Carty v Dretke*, the UK's *amicus* brief (see page 8) refers to customary international law of state responsibility as further authority for the remedy of review of Carty's conviction and sentence (in the context of the UK stating that there had been a breach of the Vienna Convention on Consular Relations by the failure to notify the UK of Carty's detention). In *Maharaj* it was argued that consular access is a right under customary international law (see page 11 of the attached brief). However this brief was submitted on behalf of the EU and members of the international community rather than the UK.

The UK's skeleton argument before the High Court of England and Wales in the case of *Khurts Bat*⁶ also considered types of evidence suitable for establishing customary international law, we enclose the UK's skeleton argument together with the court's judgment.

⁶ [2011] EWHC 2029 (Admin)

No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, *et al.*,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF THE GOVERNMENTS OF THE
UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND AND THE KINGDOM
OF THE NETHERLANDS AS *AMICI CURIAE*
IN SUPPORT OF THE RESPONDENTS**

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QUESTIONS PRESENTED

1. Whether the issue of corporate liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, is a merits question or a question of subject-matter jurisdiction.

2. In a federal common law action brought under the ATS, whether corporations are not liable for torts committed in violation of the “law of nations”, as the Court of Appeals decision provides, or whether they can be held liable under the normal U.S. rules for domestic tort cases.

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INTERESTS OF *AMICI CURIAE*

The Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands (“the Governments”) are committed to (i) the promotion of, and protection against violations of, human rights and (ii) the rule of law, domestically and internationally.¹

The Governments’ policy is that companies should behave with respect for the human rights of people in the countries where they do business.² They also believe that the most fair and effective way to achieve progress in this area is through multilateral agreement on standards, achieved through multilateral cooperation with other States, and then the effective national implementation of those standards. It is then for countries to regulate and control business operations in their territories to ensure they meet the implemented standards. The Governments also believe in the efficacy of engagement with corporations and have been leading supporters of, and participants in, multilateral initiatives to ensure better corporate engagement on human rights issues around the world.

¹ Pursuant to Supreme Court Rule 37.6, Amici Curiae state that no counsel for a party authored this brief in whole or in part and that no person or entity other than Amici Curiae, its members, and its counsel contributed monetarily to the preparation or submission of this brief. Both Petitioners and Respondents have granted their consent to the filing of all amicus briefs.

² See Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011) available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

The Governments have maintained over a long period of time their opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged activities in foreign jurisdictions that caused injury. This position is not one that has been lightly adopted by the Governments. It is based on their concern that such exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts. The Government of the United Kingdom ("U.K. Government") also submitted an amicus brief arguing against the exercise of U.S. extraterritorial jurisdiction in *Morrison v. National Australian Bank Ltd.*, 130 S.Ct. 2869 (2010) ("*Morrison*"), in which the Court unanimously rejected U.S. jurisdiction over the foreign investor-plaintiffs' claims against a foreign securities issuer, holding that the federal securities laws do not reach disputes involving only foreign issuers and investors.³ In addition, the Governments filed a joint amicus brief making a similar argument in *F. Hoffman-La Roche v. Empagran, Ltd.*, 542 U.S. 155 (2004) ("*Empagran*"), where this Court and, on remand, the D.C. Circuit, read the Foreign Trade Antitrust Improvements Act of 1982 as excluding most foreign purchasers' claims for foreign injuries. 417 F.3rd 1267 (D.C. Cir. 2005).⁴

³ *Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents, Morrison v. National Australian Bank Ltd.* (Brief filed February 26, 2010) (No. 08-1191), 2010 U.S. S. Ct. Briefs LEXIS 174.

⁴ *Brief of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, F. Hoffman-La Roche v. Empagran, Ltd.* (Brief filed February 3, 2004) (No. 03-724), 2004 U.S. S. Ct. Briefs LEXIS 104.

The Governments remain deeply concerned about the failure by some United States courts to take account of the jurisdictional constraints under international law when construing the ATS, which in turn has led those courts to entertain suits by foreign plaintiffs against foreign defendants for conduct that entirely took place in the territory of a foreign sovereign. In this regard, the U.K. Government recently filed, jointly with the Government of Australia, an amicus brief in support of the writ of certiorari being sought by the Petitioner in *Rio Tinto PLC v. Alexis Holyweek Sarei, et al., pet. for cert. filed*, (Nov. 23, 2011) (No. 11-649) (“*Rio Tinto*”).⁵ This is the same

⁵ *Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners on Certain Questions in their Petition for a Writ of Certiorari, Rio Tinto PLC and Rio Tinto Limited v. Alexis Holyweek Sarei, pet. for cert. filed*, (No. 11-649) (Brief filed December 28, 2011). The U.K. Government (jointly with the Government of Australia) had previously submitted two amicus briefs when the *Rio Tinto* case was still before the Ninth Circuit Court of Appeals. *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees’/Cross-Appellants’ Motion for Rehearing En Banc, Sarei v. Rio Tinto, PLC*, 550 F. 3d 822 (9th Cir. 2008) (Brief filed May 24, 2007) (Nos. 02-56256, 02-56390) and *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees’/Cross-Appellants, Sarei v. Rio Tinto, PLC*, 2011 U.S. App. LEXIS 21515 (9th Cir. Oct. 25, 2011) (Brief filed December 16, 2009). In both briefs, the two Governments urged the Court of Appeals to apply jurisdictional limitations recognized in international law and by this Court in *Sosa*. This position was ultimately rejected by a 6-5 vote of the en banc Court of Appeals. *Sarei v. Rio Tinto, PLC*, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (en banc), *pet. for cert. filed* (Nov. 23, 2011) (No. 11-649).

fundamental concern that the U.K. Government had first expressed (together with the Governments of Australia and Switzerland) in their joint amicus brief to this Court in *Sosa v. Alvarez – Machain*, 542 U.S. 692, 712 (2004) (“*Sosa*”)⁶, where this Court ruled that the ATS provided jurisdiction for only a “very limited category” of claims by alien plaintiffs for injuries suffered outside the United States.

The Governments consider that, when a domestic court in any country is trying to determine whether a norm of customary international law exists, it must do so in accordance with the established rules of international law – *i.e.*, it must analyze whether there is a widespread and consistent practice of States (State practice), and the belief that compliance is obligatory under a rule of law (*opinio juris*). Both State practice and *opinio juris* may be identified through international treaties, court decisions, and the writings of respected jurists.

The Governments are filing this joint amicus brief to (i) reemphasize the basic issues of international law raised by the Questions Presented in this case, and (ii) remind this Court of the need to clarify the principles of international law that should preclude U.S. courts from exercising jurisdiction in these extraterritorial ATS cases involving foreign plaintiffs’ claims against foreign defendants concerning foreign activities.

⁶ *Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner, Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Brief filed January 23, 2004) (No. 03-339), 2004 U.S. S. Ct. Briefs LEXIS 910.

STATEMENT OF THE CASE

This case (which is quite different from *Sosa* factually⁷) is typical of the ATS cases that have proliferated in the lower courts, particularly in the Second and Ninth Circuits, since 2004. U.S. class action counsel have assembled a class of foreign citizens or residents who have allegedly been injured by actions of a foreign government in its own territory; most of the defendants in these cases are foreign corporations that are alleged to have encouraged, assisted, or participated in the foreign government's activities.⁸ Generally, as here, the challenged conduct has no nexus with the United States. The corporations are the principal targets of these cases because claims against foreign states or governments would be dismissed on grounds of sovereign immunity.

SUMMARY OF ARGUMENT

Careful adherence to the established rules of international law is necessary to resolve many recurring questions arising in cases brought under the ATS.

⁷ *Sosa* was a suit by a single individual for mistreatment at the hands of Mexican individuals alleged to be acting on behalf of U.S. drug enforcement agents.

⁸ See, e.g., *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F. 3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010); *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011WL 5041927 (9th Cir. Oct. 25, 2011) (en banc), *pet. for cert. filed*, (Nov. 23, 2011) (No. 11-649); and for numerous other examples see footnotes 32 and 34 of the Petitioners' brief which appear on pages 40 and 41. A few of these class action ATS cases involve a U.S. company, rather than a foreign one, as the principal defendant. E.g., *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

These questions relate to both substantive liability and the jurisdiction of the U.S. courts over foreign injuries suffered abroad.

The present case, which is typical of most ATS class action cases, offers this Court the chance to resolve the basic question of whether a tort case based on an alleged violation of the “law of nations” can be brought against a corporation.

If the Court determines that the question of corporate liability should be resolved on the basis of international law, then the Governments submit that the answer is clear. Under contemporary international law, no liability exists for corporations. International law deals principally with relations between States, and does not impose duties directly on corporations. Most ATS claims are based on alleged violations of either international human rights law or international criminal law. However, international human rights law is based on obligations that are imposed on States, most often by treaties. While in certain circumstances, specific obligations may require States to regulate corporations in particular ways, this cannot be evidence that international law imposes liabilities on corporations.

Since World War II, States, through the use of international law instruments, have also imposed liabilities on individuals for war crimes. But none of the relevant treaties in the international criminal law field or decisions by international criminal tribunals impose any form of liability directly on corporations. It is also of particular significance that the creators of the International Criminal Court deliberately confined its jurisdiction to individuals. Thus, international criminal law provides no support for the assertion that corporations should directly be

subject to civil liability as a matter of international law for violations of the “law of nations.”

If the Court determines that the corporate liability question under the ATS is a question of U.S. domestic law, that would be a decision on U.S. law on which the Governments take no position. However, such a decision would then magnify the importance of the broader underlying question of whether international law bars these ATS cases involving foreign parties, foreign conduct and – often – foreign governments, from being brought in the U.S. courts. This Court has recently articulated a strong presumption against the extraterritorial application of U.S. statutes, as being part of the U.S. obligation to apply international law as part of its domestic law. The Governments see no reason why such an international law-based presumption should not be equally applicable to common law decision-making by U.S. judges.

ARGUMENT

I. CAREFUL ADHERENCE TO THE ESTABLISHED RULES OF INTERNATIONAL LAW IS NECESSARY TO RESOLVE MANY RECURRING QUESTIONS ARISING IN CASES BROUGHT UNDER THE ALIEN TORT STATUTE

This Court has long recognized that the sources of customary international law “may be ascertained by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).⁹ Such sources are

⁹ In 2004, when this Court had to deal with its first modern ATS case in *Sosa*, this Court recognized that: “[W]here there is

fundamental to determining the two constituent elements of customary international law: the widespread and consistent practice of States (State practice), and the belief that compliance is obligatory under a rule of law (*opinio juris*). The Governments submit that no less careful approach should be taken to the question that the Court may choose to consider in the current case: whether the liability of corporations has been generally recognized as a matter of international law.

International law also determines whether a national court may have extraterritorial jurisdiction to decide the kinds of offshore disputes that arise in nearly all post-*Sosa* ATS cases. It has been the Governments' consistent view that the U.S. courts should not be host to disputes among foreign citizens or corporations over alleged wrongs committed abroad, including those committed by (or at the behest of) a foreign government, where no factual nexus to the U.S. exists. This case is just such an example, as is *Rio Tinto*. Each involves a class of foreign residents suing a foreign corporation for allegedly assisting a foreign government in mistreating them in its own territory, and does not provide any recognizable basis for the exertion of jurisdiction by the U.S. courts under international law. In the present case, the

no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

Court of Appeals and now this Court have chosen to deal with the important question of corporate liability, while leaving to the side the far more fundamental threshold question of whether the dispute should even be in a U.S. court.

Good motives on human rights do not justify any government or any court ignoring basic international law requirements, including those related to the limits on national jurisdiction. It has been this Court's oft-repeated holding in *The Paquete Habana*, 175 U.S. 677 (1900), that "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700. Where customary international law has to be applied by the domestic courts of England and Wales, Blackstone's Commentary holds true: "the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be a part of the law of the land."¹⁰ Nevertheless, "any alleged rule of international law must be proved a valid rule, and not merely an uncorroborated proposition," before being applied by national courts.¹¹ The Governments consider that customary international law simply does not support a finding by this Court that corporations would be liable *as a matter of international law* when they engage in conduct that would be a violation of customary international law if done by a state. Moreover, international law rules on jurisdiction are generally well established and should be applied by

¹⁰ 4 William Blackstone, *Commentaries*, 67.

¹¹ Malcolm N. Shaw, *International Law*, 144 (6th ed. 2008).

this Court in matters concerning foreign parties and conduct, as they have been consistently applied by the domestic courts of other States.

The Governments respectfully and strongly urge that this Court give great deference to the underlying rules of international law as it decides the quite particularized issues generated in *Kiobel*, *Rio Tinto* and other individual ATS cases.

II. THE FOCUS OF CUSTOMARY INTERNATIONAL LAW IS ON OBLIGATIONS OF STATES AND, MORE RECENTLY, CRIMINAL LIABILITY OF INDIVIDUALS; INTERNATIONAL LAW DOES NOT IMPOSE DIRECT LIABILITY ON CORPORATIONS

The Governments do not express any view about how this Court should decide the choice of law question presented by this case of whether the ATS should be read as providing a domestic tort law remedy against corporations for conduct that breaches substantive international rules when done by a State. However, if this Court considers that the nature and scope of liability under the ATS must be determined by international law itself,¹² then the Governments respectfully urge that this Court look to the recognized international law rules to determine whether a rule of corporate liability exists under customary

¹² In 2004, when this Court dealt with ATS for the first time in modern history in *Sosa*, it suggested that the federal courts would have to consider “whether international law extends the scope of liability for violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Sosa*, 542 U.S. at 732, n. 20. Justice Breyer elaborated on the issue in his concurring opinion: “The norm [of international law] must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.” *Id.* at 760.

international law. The Governments' position is that neither of the constituent elements of customary international law – widespread State practice and *opinio juris* – can be identified to support such a finding. Instead, the Governments agree with the judgment by the Second Circuit Court of Appeals that “in the absence of sources of international law endorsing (or refuting) a norm, the norm cannot be applied in a suit *grounded on customary international law* under the ATS.” 621 F.3d at 121 (emphasis added).

A. Customary International Law Does Not Attribute Direct Liability to Corporations

Customary international law is founded on a broad international consensus, which is based on “evidence of a general practice accepted as law.”¹³ In an often-quoted passage, the International Court of Justice has stated that for a rule of customary international law to be created:

An indispensable requirement would be that... State practice, including that of the States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; –and should moreover have occurred in such way as to show a general recognition that a rule of law or legal obligation is involved.

North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20); *see also Restatement (Third) of the Foreign Relations Law of the United States*, § 102, cmt. 1 (1987) (“[C]ustomary

¹³ Statute of the International Court of Justice, Art. 38.

international law results from a general and consistent practice of states followed by them from a sense of legal obligation”).

The House of Lords made the same essential point in *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, [1990] 2 A.C. 418 (H.L.), when rejecting an asserted rule of international law that would have imposed on States – as members of an international organization – joint and several liability for payment of its debts when the organization had defaulted. As Lord Oliver explained:

A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is generally accepted by the body of civilised nations; and it is for those who assert the rule to demonstrate it . . . *It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.*

Id. at 513 (emphasis added).

As British jurist Lord Bingham has emphasized in another context, new rules of customary international law are deliberately made difficult to establish:

The means by which an obligation becomes binding on a state in international law seem to be quite as worthy of respect as a measure approved...by a national legislature. This is true of treaties to which, by signature and ratification, the state has formally and solemnly committed itself. It is true of “international custom as evidence of a general practice accepted by law”, since the threshold condition – very wide-

spread observance, as a matter of legal obligation – is not easily satisfied.¹⁴

Moreover, the International Court of Justice has cautioned, “[I]nstances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.” *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98, para. 186 (June 27). The methodology of determining what constitutes a new rule of international law is therefore – as this Court is well aware – no straightforward matter and requires painstaking analysis to establish whether the necessary elements of State practice and *opinio juris* are present. These statements apply both to the contents of the rule and the establishment of jurisdiction over causes of action based on the rule.

At present, it is well established that the focus of customary international law has been on the responsibility of States for internationally wrongful acts and, since World War II, on the criminal liability of individuals. There is no international law consensus about directly imposing liabilities on corporations as a matter of international law, and this is particularly the case in the two areas of international law that are most relevant to ATS claims: international criminal law and international human rights law. In international criminal law, where individuals can be subjected to criminal liability, States have never agreed, and no determination has ever been made, that corporations should be made similarly liable. None of the specialized war crimes tribunals have had the

¹⁴ Tom Bingham, *The Rule of Law* 112 (2010).

power to charge, let alone convict, a corporation of war crimes; and it is particularly significant that corporations were deliberately excluded from the jurisdiction of the International Criminal Court. In the area of international human rights, it is equally significant that treaties do not impose direct liability upon corporations. Instead, it is the party, i.e. States or, in some cases, international organizations,¹⁵ that must “respect”, “ensure” and “secure” the rights set out in those Conventions.

As the Oppenheim treatise explains,

International law is the body of rules which are legally binding on States in their intercourse with each other. These rules are primarily those which govern the relations of States, but States are not the only subjects of international law. International organizations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law.¹⁶

The Governments consider that a finding by a domestic court that companies are directly liable under customary international law for violations of the “law of nations”, even in a narrow category of circumstances, would be a novel and erroneous interpretation of international law in this area. Compared with the evidence that exists to support the rule that certain international organizations and, in some

¹⁵ See, e.g., the Convention on the Rights of Persons with Disabilities, *opened for signature* March 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008), to which the European Union is party.

¹⁶ *Oppenheim’s International Law* Vol. 1, 4 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992).

narrow cases, individuals, may be directly liable, there is no evidence that customary international law has developed to recognize the direct liability of a corporation.

The arguments to the contrary are not compelling. It is of course true that there are various examples of international treaties which impose obligations on States to create duties for corporations (such as the OECD Anti-Bribery Convention, the International Convention for the Suppression of Financing of Terrorism and many International Labour Organization conventions concerning employee rights and working conditions).¹⁷ However, (i) they are directed to States as parties, and (ii) the duty of a corporation is to obey whatever rule of law is enacted by a State with proper jurisdiction over the corporation. The fact that a treaty requires States to impose particular obligations on corporations cannot convert those entities into legal persons on the international plane. Equally, without an intervening act of domestic law, an obligation owed by the State cannot be converted into one owed by a private party. Such sector-specific treaties do not suddenly create some *general direct duty* of corporations to obey the rules of international law imposed on States.

¹⁷ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *adopted* Dec. 17, 1997, 37 ILM 1 (entered into force February 15, 1999); International Convention for the Suppression of the Financing of Terrorism, *adopted* Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force April 10, 2002); The Equal Remuneration Convention, *adopted* June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953); The Abolition of Forced Labour Convention, *adopted* June 25, 1957, 320 U.N.T.S. 291 (entered into force January 17, 1959).

Petitioners argue that the fact that domestic legal systems generally impose tort liability on corporations within their own domestic systems indicates that customary international law recognizes corporate liability for international human rights violations. Brief for Petitioners at 43-47. But Petitioners confuse domestic law and international law.¹⁸ When examining whether a legal principle has achieved international consensus through the practice of States and *opinio juris*, so as to have the status of a binding rule of international law, the Court should not be simply asking if different nations have imposed corporate liability for torts within their own borders. If there were evidence that it was common for States to impose liability on *foreign* corporations for torts committed *abroad* against *foreign* victims for human rights violations, believing that such corporate liability was required as a matter of international law, this could constitute evidence of customary international law. Instead, international reality is quite to the contrary.¹⁹

¹⁸ The point is well explained by Judge Friendly in *IIT v. Vencap Limited*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“we cannot subscribe to plaintiffs’ view that the Eighth Commandment ‘Thou shalt not steal’ is part of the law of nations” simply because “every civilized nation doubtless has this as a part of its legal system”). See also, Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 451 (2001) (“Domestic legal principles matter only to the extent they are shared by many different legal systems and even then, are subsidiary to treaties and customary law”).

¹⁹ Three judges of the International Court of Justice have recognized that the extraterritorial reach of the ATS “has not attracted the approbation of States generally.” Judges Higgins, Kooijmans and Buergenthal, *Case Concerning Arrest Warrant of 11 April 2000 (DRC v. Belg.)*, 2002 ICJ 121, at ¶ 48 (Feb. 15). The House of Lords has also noted that the ATS’ broad reach

B. International Criminal Law Recognizes the Liability of Natural, But Not Legal, Persons

Since World War II, the liability of individuals under international law has been established where they have engaged in the most serious crimes of concern to the international community. But such individual liability has been limited to criminal liability imposed on wrongdoing individuals by special tribunals beginning with the international military tribunals at Nuremberg and Tokyo. In fact, none of the specialized war crimes tribunals were given the power to charge, let alone convict, a corporation;²⁰ and corporations have been deliberately excluded from the jurisdiction of the International Criminal Court. See Rome Statute of the International Criminal Court, Art. 25(1), 2187 U.N.T.S. 90, 37 I.L.M. 1002 (July 17, 1998) (“Rome Statute”), Kai Ambos, *Commentary on the Rome Statute of the International*

does not generally express principles shared by other nations. *Jones v. Saudi Arabia*, [2006] UKHL 26, ¶20, available at: <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf>.

²⁰ Petitioners cite *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals 1132 (1948) (“the I.G. Farben case”) for the position that corporations may be held criminally liable under international law. Brief for Petitioners at 50. But the statements of the court were dicta, as the tribunal’s charter did not confer any jurisdiction over corporations, as Petitioners acknowledge. Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity* (Dec. 20, 1945). See also The Statutes for the International Criminal Tribunal of the Former Yugoslavia (Article 6) and the International Criminal Tribunal of Rwanda (Article 5) which provide only for jurisdiction over natural persons.

Criminal Court (O. Triffterer ed., 2008); Albin Eser, *Individual Criminal Responsibility*, in 1 *The Rome Statute of the International Criminal Court: A Commentary* 767, 778-79 (A. Cassese et al. eds., 2002).

The International Criminal Court Draft Statute of 1998 contained a proposal from France which would have subjected legal entities (and therefore, corporations) to the jurisdiction of the International Criminal Court “if the crimes were committed on behalf of such legal persons or by their agencies or representatives”. This inclusion was proposed in order to make it easier for victims of crime to sue for restitution and compensation. According to a participant, this proposal was ultimately rejected in part because of “serious and ultimately overwhelming problems of evidence” which would confront the Court and because “there are not yet universally recognized common standards for corporate liability.” Ambos, *supra*, p. 478. As University of Cambridge Law Professor James Crawford noted in an amicus brief in a similar case, “the episode is significant, concerning as it does the central international criminal law instrument of our time.”²¹

²¹ *Brief of Amicus Curiae Professor James Crawford in Support of Conditional Cross-Petitioner, Presbyterian Church of Sudan v. Talisman Energy, Inc., cert. denied*, 131 S.Ct. 79 (2010) (No. 09-1262) (Brief filed June 23, 2010). See also the additional briefs by other Professors of International Law for cogent summaries of the state of customary international law: *Brief of Amicus Curiae Professor Christopher Greenwood, CMG, QC, in Support of Defendant-Appellee, Presbyterian Church of Sudan v. Talisman Energy, Inc.* 582 F.3d 244 (2d Cir. 2009) (No. 07-0016) (Brief filed May 4, 2007); *Brief of Amicus Curiae Professor Malcolm N. Shaw in Support of Conditional Cross-Petitioner, Presbyterian Church of Sudan v. Talisman Energy,*

Furthermore, as Judge Leval explained in the Second Circuit, “[T]he whole notion of corporate criminal responsibility is simply ‘alien’ to many legal systems.”²² Thus, some major civil law countries (including Germany, Spain, Sweden, and Italy) employ administrative law remedies against corporations, even for serious wrongdoing that would be criminal if done by individuals.

In addition, several international law instruments that instruct States to exercise criminal jurisdiction for serious crimes of concern to the international community, establish such liability for individuals, and not corporations or other legal entities. Thus, Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides that persons committing genocide are to be punished “whether they are constitutionally responsible rulers, public officials, or private individuals.”²³ In respect to war crimes, the 1949 Geneva Conventions provide for effective penal sanctions “for persons committing, or ordering to be committed, any of the grave breaches” of the Conventions as defined by them.²⁴ In this

Inc., cert. denied, 131 S.Ct. 79 (2010) (No. 09-1262) (Brief filed June 23, 2010).

²² Pet. App. at 123 (2d Cir. 2008) (citation omitted) (Leval, J., concurring in judgment). *See also*, Report on “Corporate Culture as a Basis for the Criminal Liability of Corporations” for the Special Representative of the UN Secretary-General on Business and Human Rights, Feb. 2008, available at: <http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

²³ Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

²⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

context, the Governments consider that criminal responsibility is clearly ascribed to individual combatants, and not corporations. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides for the crime of torture as “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁵ The fact that some countries, when incorporating the Rome Statute into their domestic law, imposed criminal liability on legal persons for the group of crimes included in the Rome Statute, viz. genocide, crimes against humanity and war crimes, is, as such, not sufficient evidence to conclude that there is a positive rule of international law imposing direct criminal liability on legal persons, as opposed to individuals.

C. International Human Rights Law Grants Certain *Rights* to Individuals and Organizations, But It Only Imposes *Obligations* on States

While the law of international human rights confers rights upon individuals (and in some cases, corporations), it imposes obligations only on States.

Thus, Article 2 of the International Covenant on Civil and Political Rights requires each State Party to “respect and to ensure to all individuals within its territory, and subject to its jurisdiction” the rights set out in that treaty.²⁶ It is clear that UN human rights

²⁵ United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85.

²⁶ International Covenant on Civil and Political Rights, art. 2, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). In this respect, the Governments

conventions were not intended to have any effect on relationships between private parties.

Similarly, the American Convention on Human Rights requires the State Parties to “ensure to all persons subject to their jurisdiction, the free and full exercise of those rights,”²⁷ and the African Charter on Human and Peoples’ Rights requires Member States of the Organization of African Unity to “recognize the rights, duties and freedoms enshrined in this Charter and . . . undertake to adopt legislative or other measures to give effect to them.”²⁸ The

consider the Human Rights Committee was correct in its General Comment No. 31 which states that these “obligations are binding on States and do not, as such have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law.” Commentary to the UN Guiding Principles suggests that “the legal foundation of the State duty to protect against business-related human rights abuse is grounded in international human rights law”. The then Legal Adviser of the Foreign and Commonwealth Office wrote to the Special Representative of the UN Secretary General for Business and Human Rights on July 9, 2009, making clear the U.K. Government did not accept this premise, as many rights were not amenable to application between private persons (*see* <http://www.reports-and-materials.org/UK-Foreign-Office-letter-to-Ruggie-9-Jul-2009.pdf>). *See also* letter from FCO Minister Jeremy Browne to the Special Representative, dated January 31, 2011, reiterating this point (*see* <http://www.business-humanrights.org/media/documents/ruggie/browne-cover-ltr-to-ruggie-re-uk-govt-guiding-principles-comment-31-jan-2011.pdf>).

²⁷ American Convention on Human Rights, art. 1, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978).

²⁸ African Charter on Human and Peoples’ Rights, art. 1, *adopted* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

European Convention on Human Rights also requires its High Contracting Parties to “secure to everyone within their jurisdiction, the rights and freedoms . . . in this Convention.”²⁹ Accordingly, major international and regional human rights conventions clearly make responsibility for human rights a matter of State obligation.

The fact that international human rights law is predicated on the responsibility of States is underlined by the fact that the major dispute mechanisms for the enforcement of human rights have jurisdiction only over States. Although many allow claims to be brought by individuals and corporations, none provide for claims to be made against those entities.³⁰

It is also notable that most human rights obligations are not easily transposed to non-State actors. Olivier De Schutter notes that this appears clearly from any attempt to apply the classical conditions that apply to a State when it interferes with human rights to a non-State entity such as a corporation (*e.g.*, justifying interferences with human rights by reference to legitimate “public interest” objectives).³¹ Furthermore, many such rights simply have no application to non-State actors, such as those relating to the expulsion of aliens, equality before the courts,

²⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, *opened for signature* November 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

³⁰ *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, *supra* note 29; and the International Covenant on Civil and Political Rights, Optional Protocol, art. 2, *supra* note 26.

³¹ Olivier De Schutter, *International Human Rights Law* 399-403 (2010).

and the retroactive application of criminal law.³² Ultimately, international human rights law as it currently stands is clearly intended to apply to the vertical relationship between the State and the individual, in which the State bears sole legal responsibility to respect individual rights, even though some cases may include a positive obligation to penalize the behavior of non-State actors. As Prof. Malcolm Shaw sets out in his *Talisman* brief,³³ it is notable that the UN Special Representative for Business and Human Rights himself concluded in an analysis of human rights treaties that “it does not seem that the international human rights instruments discussed here currently impose direct liabilities on corporations.”³⁴

While recent years have seen a number of voluntary guidelines directed at corporations, these are non-binding and do not reflect the current state of customary international law. In fact, this is explicitly recognized in the two most well-known of these guidelines: (i) the commentary to the OECD Guidelines for Multinational Enterprises states: “The Guidelines . . . represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations

³² See letter from the then FCO Legal Adviser dated 9 July 2009, at footnote 26 above.

³³ *Supra*, note 21.

³⁴ Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 44, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007).

of these enterprises”;³⁵ and (ii) the commentary to the more recent UN Guiding Principles on Business and Human Rights states: “The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses.”³⁶ Accordingly, neither set of guidelines supports a contention that customary international law has now developed to recognize the liability of corporations for human rights breaches.

In conclusion, the Governments respectfully submit that the Second Circuit’s analysis of the non-liability of corporations under the “law of nations” is entirely correct and should be followed by this Court. Rules relevant to ATS claims that are embodied in international criminal law or international human rights law (the two areas on which ATS claims most often rest) currently do not impose direct obligations on corporations, but rather treat them as bodies created and regulated by national laws.

³⁵ *OECD Guidelines for Multinational Enterprises*, p. 39, (2008) Org. for Econ. Cooperation and Dev., <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

³⁶ John Ruggie, *Report of the Special Rep. of the S.G. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, p. 5, (March 21, 2011), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

D. Protection Against Human Rights Abuses Can Be More Fairly and Effectively Done by Seeking International Consensus and Encouraging States to Enact Domestic Legislation Implementing their Obligations Under International Human Rights Instruments within their Jurisdiction

The task for governments concerned about human rights violations or abuses is to develop effective tools and pressures to ameliorate or eliminate such situations where they exist. National laws, including their interpretation and application by courts, are an important part of the response, as is diplomacy. International cooperative efforts have taken a variety of forms, ranging from human rights treaties, to (in the field of corporate activity) multilateral initiatives resulting in guidelines that are not legally binding. Such multilateral tools require cooperation among States trying to bring about progress and change.

It has been the longstanding view of the Governments that it is States, not other actors, which owe human rights obligations to non-State actors within their jurisdiction or, exceptionally, control under international law. Therefore, States can be held liable for breaches of their obligations in accordance with the jurisdictional provisions of the applicable law. This is not just a legal technicality: the Governments are concerned that, by recognizing the direct liability of non-State actors for violations of international human rights law, as well as by undermining the principle of national sovereignty in prevention, and punishment of, and redress for abuses, States might be given reason to downplay or even ignore their own international human rights law obliga-

tions. They will also not come under pressure to provide a remedy, and indeed prevent abuses, if plaintiffs have recourse to redress elsewhere.

Companies should not be able to act with impunity vis-à-vis human rights issues. The Governments have continued to recognize that the operations of companies can have both beneficial and detrimental impacts on the enjoyment of human rights by those affected by their operations.³⁷ In that regard, the Governments fully engaged in, and gave important support to, the work of the Special Representative on Business and Human Rights, John Ruggie,³⁸ and to the UN endorsement of his work, the UN Guiding Principles on Business and Human Rights.³⁹ The

³⁷ For example, see *Business and Human Rights*, Foreign and Commonwealth Office, available at: <http://www.fco.gov.uk/en/global-issues/human-rights/international-framework/business/>; see also chapter on freedom and prosperity in Human Rights Memorandum of the Dutch Government 'Responsible for Freedom', available at: <http://www.minbuza.nl/en/key-topics/human-rights/dutch-human-rights-policy/human-rights-strategy-2011>.

³⁸ The Commission on Human Rights resolution 2005/69 endorsed by the Commission on Economic and Social Council on July 25, 2005. (Resolution 2005/273). John Ruggie was appointed by the Secretary-General on July 28, 2005.

³⁹ See, e.g., U.K. Minister Jeremy Browne's letter of January 31, 2011, "warmly" welcoming the Principles, but also making clear his country's view that the principles are "policy guidelines, not all of which necessarily reflect the current state of international law", available at <http://www.business-humanrights.org/media/documents/ruggie/browne-cover-ltr-to-ruggie-re-uk-govt-guiding-principles-comment-31-jan-2011.pdf>. The Dutch government also supported the Ruggie Framework and lobbied for the endorsement of the Principles by the Human Rights Council in June 2011, as mentioned in the Human Rights Memorandum 'Responsible for Freedom', available at: <http://www.minbuza.nl/>

Governments also support international standards, such as the OECD Guidelines for Multinational Enterprises, which they believe can play an important role in the promotion of a corporate culture consistent with human rights.⁴⁰ The Governments continue to be committed to this process of multi-lateral dialogue.

To summarize, the Governments respectfully submit that it would be both inappropriate and undesirable for a domestic court to make a unilateral ruling, identifying a new rule of corporate liability based on customary international law. This would be particularly unfortunate if done now, when the question of how best to reduce the negative impacts of corporate activity on peoples' human rights, while ensuring the primary role of States for corporate regulation in their territory is maintained, is subject to ongoing multilateral deliberation (including in the UN Human Rights Council).

en/key-topics/human-rights/dutch-human-rights-policy/human-rights-strategy-2011.

⁴⁰ See *Business and Human Rights Toolkit*, p. 5, Foreign and Commonwealth Office, available at: <http://www.fco.gov.uk/en/global-issues/human-rights/international-framework/business/>; and the *OECD Guidelines for Multinational Corporations*, Org. for Econ. Co-operation and Dev., available at: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>; see also the explicit endorsement of the OECD Guidelines after their revision in 2011 by the Dutch Government at: <http://www.rijksoverheid.nl/nieuws/2011/05/25/wereldwijde-richtlijnen-voor-verantwoordelijk-ondernemen.html>.

III. A STATE IS FREE TO CREATE DOMESTIC TORT REMEDIES AGAINST ORGANIZATIONS FOR HUMAN RIGHTS ABUSES THAT WOULD BE ILLEGAL UNDER INTERNATIONAL LAW IF DONE BY A STATE - SO LONG AS A SUFFICIENT FACTUAL NEXUS EXISTS TO SUSTAIN JURISDICTION UNDER INTERNATIONAL LAW

The Governments, recognizing that obligations may be imposed on corporations in domestic law, and subject to any obligations on States as a matter of treaty law, believe that it is for each individual State to decide whether and how to regulate corporate activity within its territory and/or otherwise subject to its jurisdiction. This can be done under a number of domestic law heads (including tort, consumer regulation, criminal prohibitions, health and safety rules). Thus, it is certainly open to a State to create legal rules that make companies liable to pay compensation to private parties injured by legally prohibited activities by a company, including compensation for individuals injured by reasonably specified human rights abuses (whether or not described as such). However, as the Governments have repeatedly emphasized in prior amicus briefs, the right of the United States or any other sovereign to create and enforce such a domestic civil remedy depends on it being able to satisfy the *proper jurisdictional limits recognized by international law*.

If this Court decides that common law judges are entitled to create such a domestic remedy against corporations, this would be sufficient to resolve the Questions Presented in this case, but it would not be sufficient to resolve the case itself. The Governments

believe that there is no basis under international law for a U.S. court to exercise jurisdiction against the Respondents for the conduct charged in the complaint.

IV. THESE NUMEROUS A.T.S. ACTIONS AGAINST FOREIGN CORPORATIONS FOR FOREIGN ACTIVITIES EMPHASIZE THE IMPORTANCE OF THIS COURT PROMPTLY MAKING CLEAR THAT THE LOWER COURTS SHOULD NOT ALLOW ANY A.T.S. CASE TO PROCEED UNLESS IT CAN SATISFY THE BASIC LIMITATIONS ON NATIONAL CIVIL JURISDICTION IMPOSED BY INTERNATIONAL LAW

In *Empagran* and *Morrison*, this Court enunciated a clear presumption against a cause of action created by a federal statute being construed to allow suit in the U.S. courts by foreign plaintiffs for injuries suffered abroad. It emphasized the “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Morrison*, 130 S.Ct. at 2877 (quoting *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 248 (1991)). This avoids the “serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.” *Empagran* 542 U.S. at 165 (2004). Thus, the question that needs resolution in the ATS area is whether the same presumption against exercise of extraterritorial jurisdiction on statutory claims applies equally to common law claims for “the modest number of international law violations with a potential for personal liability.” *Sosa*, 542 U.S. at 724. The Governments respectfully

suggest that there is no reason to assume that federal judges making common law decisions would be less concerned about the jurisdictional limits imposed by international law than the Congress has been, or that judges should be less anxious “to avoid unreasonable interference with the sovereign authority of other nations.” *Empagran*, 542 U.S. at 164. *See also The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (“No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another.”).

This Court has taken a careful approach to issues of civil jurisdiction. The traditional basis of jurisdiction under international law, as recognized by this Court, is territorial. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). Thus, each State may regulate activity that occurs within its own territory (the “territorial principle”). *Id.* This Court has also recognized that international law permits the exercise of prescriptive jurisdiction in relation to the conduct of its citizens, wherever located (the “nationality principle”). *See e.g. Blackmer v. United States*, 284 U.S. 421, 437 (1932). This Court has also allowed for exercise of U.S. extraterritorial jurisdiction under the sometimes controversial “effects doctrine,” where overseas activities have had or were intended to have substantial effect within the United States. *See Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993); *see also, Empagran*, 542 U.S. at 164-165.⁴¹ These “are parts of a single broad principle ac-

⁴¹ The Court relied on among other things, RESTATEMENT § 403(2) (jurisdiction based on “the extent to which the activity...has substantial, direct, effect upon or in the territory”).

ording to which the right to exercise jurisdiction depends on there being *between the subject matter and the state exercising jurisdiction a sufficiently close connection* to justify that state in regulating the matter and perhaps also to override any competing rights of other states.”⁴² Despite this guidance, the lower courts appear to have gone further than the established jurisprudence allows. As this Court held in *Sosa*, the ATS only allows federal law claims for a narrow category of international law norms with no less “definite content and acceptance among civilized nations than the 18th-century paradigms” familiar when that statute was enacted. Nevertheless, the lower courts have both asserted jurisdiction with regard to a wider category of such violations, and in relation to facts in which a “sufficiently close connection” to the U.S. is entirely absent.

None of these jurisdictional principles supports the *Kiobel* case (or the *Rio Tinto* case). The alleged wrongs occurred entirely within a foreign territory and involved only foreign governments and nationals.

This is why the Government of the United Kingdom, along with the Government of Australia, urged this Court to grant certiorari in *Rio Tinto*, as that petition asks this Court to review two questions fun-

The U.K. Government opposed the exercise of the “effects doctrine” jurisdiction in the *Hartford Fire* case. *Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, Hartford Fire Ins. Co. v. California*, (Brief filed November 19, 1992) (Nos. 91-1111, 91-1128), 1992 U.S. S.Ct. Briefs LEXIS 774.

⁴² *Oppenheim’s International Law* Vol. I, 457-8 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992) (emphasis added).

damental to the proper resolution of the typical ATS claim.⁴³ These questions ask the Court to (i) make clear the jurisdictional limits under international law that apply to a dispute among alien parties concerning non-U.S. activities under the ATS, and (ii) determine whether the international law doctrine of “exhaustion of local remedies” should be applied even where there would be sufficient factual nexus to sustain U.S. jurisdiction under international law. The Governments of the Kingdom of the Netherlands and the United Kingdom urge the Court to provide guidance on both issues by granting certiorari in that case.

⁴³ See *Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners on Certain Questions Raised in the Petition for Certiorari, Rio Tinto PLC v. Alexis Holyweek Sarei*, (No. 11-649) (Brief filed December 28, 2011). In this brief, the U.K. Government also dealt with “the basic principles of international law requir[ing] that . . . the claimant must have exhausted any remedies available in the domestic legal system” which this Court anticipated in *Sosa* and confirmed that “would consider this requirement in an appropriate [ATS] case.” 733 at n. 21. See *Brief* at 16-18. The Governments’ position is that this “well-established rule of customary international law,” (*Switzerland v. U.S.*, 1959 ICJ Rep. 6, 27 (Mar. 21)), should be complied with. Moreover, as explained in the brief, the application of the “exhaustion of local remedies” principle only becomes relevant (as an additional threshold requirement) where the District Court has found that an ATS claim both (i) has sufficient factual nexus to the U.S. to satisfy the minimum public international law limits on the exercise of domestic jurisdiction by U.S. courts and (ii) falls within the narrow class of international wrongs foreseen by this Court in *Sosa*. *Brief* at 17. In the Governments’ view, taking such an approach would further reduce the risk of jurisdictional overreaching in ATS cases, while implementing this Court’s broader concerns about comity and international law in *Empagran*, *Sosa* and *Morrison*.

These questions are pertinent, as the attractiveness of the United States as a forum for foreign plaintiffs is well known and may, in part, be traced to decisions by the United States to accord private plaintiffs a set of advantages that most other countries have not accepted. Those advantages are very familiar to this Court. First, the so-called “American rule” on litigation costs requires each side to bear its own costs – rather than requiring the losing plaintiff to reimburse some or all of the successful defendant’s costs; and generally broader discovery available to plaintiffs in the United States will tend to drive up the non-reimbursable litigation costs that defendants will have to bear. Secondly, the right to a jury trial in a civil case, guaranteed by the Seventh Amendment to the U.S. Constitution, is generally not available elsewhere. Thirdly, the “opt out” class action system, provided for in the United States under Rule 23 and its state law counterparts, has not been accepted by most other countries. Fourthly, punitive damages are available in the United States, but generally are not allowed elsewhere.

In sum, the international law jurisdictional question is an even broader and more fundamental issue in ATS cases than the “corporate liability” issues present in the present case, and it will remain a key issue until resolved, however the Court decides the present case. The issue would become especially urgent should the Court decide there is corporate liability in the present case, as Petitioners urge.

Respectfully submitted,

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February 3, 2012

01-3477 -- DEATH PENALTY CASE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**KENNETH T. RICHEY,
Petitioner-Appellant,**

v.

**BETTY MITCHELL, Warden,
Respondent-Appellee.**

**BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM
OF GREAT BRITAIN AND NORTHERN IRELAND
AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER-APPELLANT KENNETH T. RICHEY'S APPEAL OF THE
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO'S
DENIAL OF HIS PETITION FOR A WRIT OF *HABEAS CORPUS***

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Statement of Interest

The Government of the United Kingdom of Great Britain and Northern Ireland (the “United Kingdom”) respectfully submits this brief *amicus curiae* in support of the appeal of Petitioner-Appellant Kenneth T. Richey from a denial of his petition for a writ of *habeas corpus*.

The United Kingdom has an interest in this appeal because it involves the imposition of the death penalty on a dual British/U.S. national. Mr. Richey was born outside the UK to a UK-born mother, but lived in Scotland from the age of three months to seventeen years. At the time of his birth there was no transmission of British nationality through the female line. However, the Nationality, Immigration and Asylum Act of 2002 changed UK law to entitle individuals like Mr. Richey to register as British citizens. Mr. Richey was so registered and is now a British national with full right of abode in the UK. Because this appeal will address whether a British national is executed, the United Kingdom has an interest in bringing to the Court’s attention important international and common law authorities that may affect the outcome of the appeal.

The international and common law authorities relevant to this appeal include binding international treaties to which the United States and the United Kingdom are signatories, such as the International Covenant on Civil and Political Rights. *See, e.g.*, U.S. Const. art. VI, cl. 2 (“all Treaties made . . . under the

Authority of the United States, shall be the supreme Law of the Land”). They include customary international law and *jus cogens* that govern the conduct of both nations and inform their interpretations of domestic laws. *See, e.g.,* Vienna Convention on the Law of Treaties 1969, Art. 53, 1155 U.N.T.S. 331 (*jus cogens* consists of legal principles that are “accepted and recognized by the international community as a whole as a norm from which no derogation is permitted”). And they include the shared common law heritage from which the Constitutional and statutory laws of both nations arise. *See, e.g., Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-73 (1989) (examining the English Bill of Rights of 1689 and English common law as a means of understanding the intent of the Excessive Fines clause of the Eighth Amendment to the U.S. Constitution); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (considering the views of “other nations that share our Anglo-American heritage” in concluding that the execution of a person who was less than 16 years old “would offend civilized standards of decency”).

Summary of Argument

The United Kingdom submits that Mr. Richey’s sentence of death for felony murder in this case violates Article 6 of the International Covenant on Civil and Political Rights, which prohibits imposition of the death penalty except for “the most serious crimes in accordance with the law in force at the time of the

commission of the crime.” Int’l Covenant on Civil and Political Rights, art. 6(2), 1976, 999 U.N.T.S. 171. The United States Supreme Court has repeatedly confirmed that a respect for human dignity at bottom requires that the death penalty must be reserved, if at all, only for the most morally culpable murderers. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (capital punishment is reserved for “extreme cases” where the crime is “so grievous an affront to humanity that the only adequate response may be the penalty of death”); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (“Death is a unique punishment in the United States” and is reserved for “the most heinous crimes”). In this case, the unintended consequences of a fire, namely, the death of an unintended victim, is in no way equivalent to the type of intentional murder that falls within the category of “the most serious crimes.”

Imposition of the death penalty for felony murder under these circumstances violates the prohibition of the death penalty except for “the most serious crimes.” This is a principle accepted by all civilized nations. For example, a 1953 Report of the Royal Commission on Capital Punishment observed “in the United States . . . a widespread desire to see the application of the death penalty limited to the very worst cases.” Royal Commission on Capital Punishment, Report Presented to Parliament by Command of Her Majesty ¶ 594 (Sept. 1953); *id.* ¶ 22 (concluding that the death penalty “should be reserved for the more

heinous cases of murder”). These views are in accord with those of the U.S. Supreme Court, which has held that not every intentional murder will support imposition of the death penalty. *See, e.g., Tison v. Arizona*, 481 U.S. 137, 157 (1987) (citing homicide resulting from provocation as an example of criminal homicide “often felt undeserving of the death penalty”); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (“an aggravating circumstance” must “reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder”). This development in the common law tradition has been incorporated in international treaties ratified by every civilized nation. Thus, the International Covenant on Civil and Political Rights provides in Article 6 that the death penalty may not be imposed except “for the most serious crimes in accordance with the law in force at the time of the commission of the crime.” Int’l Covenant on Civil and Political Rights, art. 6(2), 1976, 999 U.N.T.S. 171.

Arson resulting in the death of a person whom the defendant did not intend to kill is not materially more depraved than ordinary murder. To the contrary, by many accounts, involving no intent to kill the victim, no direct confrontation with or lethal act on or toward the victim, ordinarily it is a lot less heinous, resembling more a tragic, unintended accident than a cruel murder. As demonstrated more fully below, imposing or carrying out a death sentence for an unintentional killing

is anathema to both Anglo-American common law principles and customary international law as evidenced by, *inter alia*, the International Covenant.

Argument

Imposition of the Death Penalty for “Felony Murder” in this Case Violates International Treaties and Customary International Law That Prohibit A Sentence of Death Except for “the Most Serious Crimes”

International law is relevant to the interpretation of domestic laws in several ways. According to Article VI, clause 2 of the U.S. Constitution -- “the supremacy clause” -- all treaties signed by the U.S. President and ratified by the Senate, while international law, also become part of the supreme law of the land. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 434 (1920) (treaties ratified by the Senate “are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States”) (citations and quotations omitted). Even without the formality of a treaty, the U.S. Supreme Court has held that customary international law is part of the domestic law of the United States. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (“It is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is part of the law of the land”) (citation and quotation omitted). In addition, to the extent an international legal principle is “accepted and recognized by the international community of states as a whole as a norm from

which no derogation is permitted,” international law achieves the status of *jus cogens* which every civilized nation is bound to apply. Vienna Convention on the Law of Treaties, art. 53, 1969, 1155 U.N.T.S. 331.

Article 6 of the International Covenant on Civil and Political Rights prohibits the imposition of the death penalty except “for the most serious crimes in accordance with the law in force at the time of the commission of the crime” Int’l Covenant on Civil and Political Rights, art. 6(2), 1976, 999 U.N.T.S. 171. The United Nations Human Rights Committee has interpreted this Article “restrictively to mean that the death penalty should be quite an exceptional measure.” *Id.*, gen. cmt. 6.

This fundamental principle of international law -- that the death penalty must be reserved for only “the most serious of crimes” -- has attained the status of customary international law by reason of its inclusion in numerous international agreements, including the International Covenant, as well as its universal acceptance by civilized nations including both the United Kingdom and the United States. *See, e.g.*, Royal Commission on Capital Punishment, Report Presented to Parliament by Command of Her Majesty ¶ 594 (Sept. 1953) (noting “a widespread desire to see the application of the death penalty limited to the very worst cases”). Independently, the U.S. Supreme Court has embraced a constitutional bedrock principle that the death penalty may not be reserved even

for all first degree murders. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (“North Carolina’s mandatory death penalty statute for first-degree murder . . . cannot be applied consistently with the Eighth and Fourteenth Amendments”); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (“A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.”) (citations and quotations omitted); *Zant v. Stephens*, 462 U.S. 862, 877 (1982) (“an aggravating circumstance” must “reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder”).

At early common law, most felonies were punishable by death. *See, e.g., Model Penal Code* § 210.2, cmt. at 31 n.74 (Off. Draft and Rev. Comments 1980); George P. Fletcher, *Rethinking Criminal Law* (1978) (“The common law of criminal homicide began with the principle that all people who cause death, whether intentionally or accidentally, are liable for murder.”). The concept of felony murder took root in this tradition, and in the theory that one who kills accidentally during the commission of a felony should not be entitled to the excuse of accident. *Id.* (“excuse of accident was not available to someone whose hands were soiled by the accident’s occurring during an unlawful act The doctrine of unlawful acts as a formal criterion of liability [for murder] took hold in Foster’s

Discourse of Homicide published in 1762. . . . Thus was born the doctrine of felony murder. . . [with] his rationale of transferred felonious intent.”).

Modern jurists and legislators have rejected this ancient theory on the ground that the punishment of death is disproportionate to the crime when the death occurs unintentionally. In the early stages of this development, dating back as far as the 16th Century, English courts focused on “malice aforethought” as a means of distinguishing between those who deserved death and those who would suffer some other form of punishment. 23 Hen. 8, ch. 1, §§ 3, 4 (1531); 1 Edw. 6, ch. 12, § 10 (1547). Continuing this development into the modern era, many nations have eliminated felony murder as a capital offense. The concept of felony murder has been abolished entirely in the United Kingdom and India, and is not known in continental Europe. *See* Model Penal Code § 210.2 at 39-40 (Off. Draft and Rev. Comments 1980).

This definite trend towards limiting the death penalty based on the accused’s mental state continued in modern times, as legislators limited the sentence of death in felony murder cases to circumstances where the accused acted with an intent to kill. Based on this developing trend, the U.S. Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty on one who neither intended nor participated in the killing. *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *see also* Fletcher, Rethinking Criminal Law (“There is no

authority whatever for the principle that any felonious intent is sufficient to constitute malice aforethought. Indeed, the principle is incoherent.”).

Today, in U.S. practice, the primary distinguishing factor between capital and non-capital crimes is the nature of the accused’s intent. “It is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’” *Enmund*, 458 U.S. at 798; *see also Gregg*, 428 U.S. at 184 (critical issue is whether the crime is “so grievous an affront to humanity that the only adequate response may be the penalty of death”); *Godfrey*, 446 U.S. at 433 (vacating death sentence because crime did not involve “a consciousness materially more ‘depraved’ than that of any person guilty of murder”).

Tison v. Arizona, 481 U.S. 137 (1987), which allows a felony murderer to die even absent a specific intent to kill, nevertheless requires a state of mind of “reckless indifference to human life.” *Id.* at 158. In that case, the necessary reckless indifference was found in the connection between the defendant’s act of providing guns to those who killed with the knowledge that they would use the guns to kill. *Id.* at 151-52. Thus, the Supreme Court found both intent and conduct directly assisting the killing. *Id.* at 152.

In this case, however, even if it is assumed, which is not conceded, that Kenneth Richey did in fact commit arson, the uncontroverted proof from five

witnesses, including two firefighters, was that he twice risked his life to save the victim who died. Thus, he can hardly be said to be callously *indifferent* toward the life of the victim, the only mental state which can even arguably substitute for the intent to kill. Again, because, as the state concedes, there is no proof he intended to cause the death of the person killed, and as his actions prove beyond any doubt he was not indifferent as to whether the child lived or died, Kenneth Richey clearly lacked the *mens rea* required even by the bare majority of the U.S. Supreme Court who supported a death penalty in some instances where there was no intent to kill the victim. Thus, according to both international and domestic U.S. standards, the death penalty is not appropriate in the case of Kenneth Richey.

The United Kingdom has abolished the death penalty. Her Majesty's Government acknowledges that in the United States it remains in force, but notes that, increasingly, contemporary proponents of the death penalty would confine it only to the "worst of the worst." For example, calling upon the New York legislature to "refine" that state's death penalty "so that we may more nearly impose [it] on all, but only those who truly deserve to die," death penalty proponents urged the state to abolish capital felony murder: "There is nothing about a robbery [or arson] alone, that makes an intentional killing that accompanies it even worse. Where the felony-murderer truly deserves to die, other aggravating circumstances such as rape -- properly understood as torture -- should make that

murderer death eligible. But ‘intentional felony murder’ as a capital offense should be abolished.” R. Blecker, “Who Deserves to Die? A Time to Reconsider,” *New York Law Journal*, vol. 231, July 22, 2004, at 2. In this case, where the alleged arson was the sole statutory aggravator, and there was no intent to kill the victim, the death penalty is considered inappropriate even by supporters of the death penalty.

When they affirmed Mr. Richey’s death sentence, a bare majority of the Ohio Supreme Court purportedly conducted a “proportionality review,” as the U.S. Supreme Court has required, to determine whether the death penalty is “appropriate and proportionate when compared with similar felony murder cases.” With no analysis, the majority simply listed several other Ohio felony murder cases which resulted in a death penalty. But, as the dissent pointed out, “it is obvious that not one is remotely similar to this one.” *State v. Richey*, 64 Ohio St. 3d 353, 376 (1992) (Brown, J., dissenting). In one case, “the defendant shot the victim at close range and then beat him”; in another, “the victim was directly doused with lamp oil and set on fire”; in another, the “victim refused to lie down when ordered, and defendant shot him in the back.” *Id.* (citations omitted). In one supposedly analogous case, also involving the death of a child, “the defendant kidnapped a seven-year-old girl intending to rape her. He partially asphyxiated her and threw her out a fourth-story window.” *Id.* (citations omitted). In another, listed without

comment by the majority, which affirmed the death sentence as proportional to the defendant's moral culpability, "a twelve-year-old boy was savagely beaten to death in revenge for something his brother had done." *Id.* at 377 (citations omitted). In yet another, "the victim had been kidnapped, sexually assaulted and strangled." *Id.* (citations omitted). "In each case," declared the dissent, "the defendant had clear animus toward the victim, or harmed the victim in a direct, face-to-face encounter, or both." *Id.* In short, "[t]here is a stunning difference between this case and those cited as comparable by the majority." *Id.*

"Nothing in the nature and circumstances of the offense offers any mitigating features," the bare majority of the Ohio Supreme Court declared, completely dismissing Mr. Richey's demonstrated concern for the victim, coupled with the absence of any affirmative evidence that he intended to kill anyone, much less the particular victim he repeatedly attempted to save. *Id.* at 371. This statement alone, the linchpin of the Ohio Supreme Court's affirmance, on which the federal courts have thus far so heavily relied in sustaining Richey's death sentence, violated basic cultural and international norms. The three dissenting high court judges declared their colleagues' moral pronouncement "shocking" and characterized Richey's death penalty as "stunning," "disproportionate," "inappropriate," and "not warranted." *Id.* at 373-78 (Brown, J., dissenting) (Sweeney, J. and Wright, J., concurring in dissent).

By comparison to the other cases cited in the Ohio Supreme Court's decision, the conduct at issue in Mr. Richey's case does not rise to the level of the "most serious crimes." An act of arson without the intent to cause the death of the only person killed, coupled with a risky attempt to save the victim herself, cannot even arguably be considered at the same level of depravity as one who acts with the specific intent to kill. The prosecutors themselves may well have shared this view because, very unusually for a capital case, they offered Mr. Richey a plea of guilty to arson alone, dropping the murder charge entirely, with a maximum sentence of twelve years in prison. On appeal to this Court, the prosecutor admitted in oral argument that there was no evidence that Mr. Richey had any intent to kill Cynthia. Chief of Police Miller testified that Mr. Richey was concerned about Cynthia, and special agent Chandler testified that Mr. Richey repeatedly asked about Cynthia while the fire was being put out. Mr. Richey's rescue attempt and the fact that the victim's death was unintended are strong mitigating factors that should have been considered in this case. When these factors are considered, the death penalty is entirely inappropriate in this case, because the conduct at issue -- even assuming guilt of arson, which is disputed -- falls far outside "the most serious crimes" clause in the International Covenant. An arson resulting in unintended death -- supported by an admission of the prosecutor that there is no evidence of an intent to cause the death of the person

killed-- simply does not fall within the same category as the types of brutal, intentional murders described in the Ohio Supreme Court's decision and for which the death penalty is properly reserved.

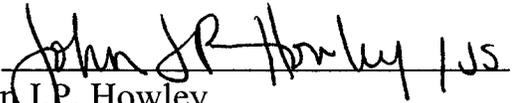
Carrying out the death sentence in Mr. Richey's case violates the "most serious crimes" clause in the International Covenant for the additional reason that it has been imposed for a crime for which the death penalty did not apply at the time of the offense. The Ohio Legislature, by enacting Section 2903.01(D), eliminated the sentence of death for crimes in which the defendant lacked a specific intent to cause the death of the person killed. Ohio Rev. Code. Ann. § 2903.01(D). Having taken that step to eliminate the death penalty for less serious crimes lacking that element of intent, international law prohibits the State of Ohio from reestablishing the death penalty for unintentional "felony murder."

Conclusion

For all the foregoing reasons, the Government of the United Kingdom of Great Britain and Northern Ireland submits that Mr. Richey's conviction for felony murder and sentence of death should be vacated on the ground that imposition of the death penalty for felony murder under these circumstances would violate both the International Covenant and the customary international law prohibition on imposing the death penalty except for the "most serious crimes."

Respectfully submitted,

Kaye Scholer LLP

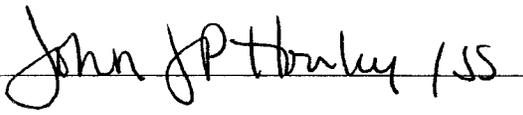
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Dated: January 20, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LINDA ANITA CARTY,

§

§

Petitioner,

§

§

v.

§

Civil Action No. 06-614

§

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

§

§

§

§

Respondent.

§

THIS IS A DEATH PENALTY CASE

**BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER
LINDA ANITA CARTY'S PETITION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254**

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The Government of the United Kingdom of Great Britain and Northern Ireland (the “United Kingdom”) respectfully submits this brief as *amicus curiae* in support of the petition for a writ of habeas corpus filed by Linda Anita Carty.

The Petition filed by Ms. Carty seeks relief for, *inter alia*, violations of the *Consular Convention between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and the President of the United States of America*, dated June 6, 1951, 3 U.S.T. 3426 (the “Bilateral Treaty”).¹ The Bilateral Treaty was signed by the President of the United States of America on September 8, 1952 and was ratified by the United States Senate on June 13, 1952. *See* Treaties and Other International Acts series 2494, Department of State Publication 4729. It became effective as of September 7, 1952. *Id.*; *see also Samad v. The Etivebank*, 134 F. Supp. 530, 546 n.1 (E.D. Va. 1955). As a Treaty signed by the President and ratified by the U.S. Senate, the Bilateral Treaty is part of the Supreme Law of the United States. *See* U.S. Constitution, Art. VI (“all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”). Officials of individual state governments are, therefore, bound to enforce and comply with such treaties. *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31 (1942).

As a State Party to the Bilateral Treaty, the United Kingdom submits this *amicus* brief to provide the Court with an understanding of the rights and obligations under the treaty, precedent relevant to the implementation and interpretation of the treaty, the origins and effects of the treaty in the context of customary international law, and the remedies provided for breach

¹ For ease of reference, copies of the Bilateral Treaty and all other international law references cited in this brief are annexed to the accompanying Declaration of John J.P. Howley.

of this treaty. *Amicus curiae* submissions by foreign governments serve the important purposes of informing courts and of allowing the State Party to a treaty an opportunity to be heard, especially in judicial proceedings involving one of its nationals. Accordingly, federal and state courts traditionally accept and consider *amicus curiae* submissions from foreign governments on issues of international law in U.S. criminal cases. See, e.g., *Saldano v. Cockrell*, 267 F. Supp. 2d 635, 640 (E.D. Tex. 2003) (considering *amicus* brief of Argentina in connection with petition for writ of habeas corpus); *Valdez v. State*, 46 P.3d 703, 708-10 (Okla. Crim. App. 2002) (considering *amicus* brief of Mexico concerning International Court of Justice decision in connection with petition for post-conviction relief).

A. The Consular Notification Rights and Obligations in the Bilateral Treaty Are Mandatory and Unequivocal.

Article 16 of the Bilateral Treaty states, in unequivocal and mandatory terms, that: “A consular officer *shall* be informed *immediately* by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer *shall* be permitted to visit without delay, to converse privately with and arrange legal representation for, any national of the sending state who is so confined or detained.” (Howley Decl., Exhibit A; emphasis added).

The United Kingdom considers that the international treaty obligations relating to consular notification and access are of vital importance for both the protection of individuals and the maintenance of good interstate relations. Consular notification is required as it enables a representative of the government of a detained national to provide consular assistance to that national. While a state is unaware of the detention of one of its nationals, due to the failure of the

detaining state to provide the requisite consular notification, both the detained foreign national and the State Party to the treaty effectively lose all rights provided by the treaty. Accordingly, the United Kingdom considers compliance with the consular notification provisions of the Bilateral Treaty to be mandatory and of the utmost importance.

The U.S. government shares this view of the Bilateral Treaty as evidenced by its “Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them.” (Howley Decl., Exhibit B). Page 5 of this U.S. State Department document lists the United Kingdom under the heading “Mandatory Notification Countries and Jurisdictions.” The instructions to Federal and State law enforcement authorities state, on page 4, “if the foreign national’s country is on the list of mandatory notification countries on the next page” then the law enforcement authorities must “[n]otify that country’s nearest consular officials, without delay, of the arrest/detention.” The instructions also provide a statement that must be read to the foreign national which further illustrates the U.S. government’s understanding of the mandatory nature of the consular notification requirement. On page 7 of the U.S. State Department’s instructions, law enforcement authorities are directed to advise detained British nationals as follows: “Because of your nationality, *we are required to notify your country’s consular representatives* here in the United States that you have been arrested or detained.” (emphasis added). The United Kingdom has adopted similar procedures in The Police and Criminal Evidence Act 1984, Code of Practice C, § 7 (Howley Decl., Exhibit C).

Thus, it is plain that both signatories to the Bilateral Treaty -- the United States *and* the United Kingdom -- consider the consular notification provisions to be mandatory, *not*

subject to waiver by the detained foreign national, and *not* dependent on any assessment of need or desirability of such notification.

B. The Consular Notification Requirements of the Bilateral Treaty Were Violated in the Case of Ms. Carty.

Ms. Carty is a British national. In her case, there was a clear breach of the requirement in Article 16 of the Bilateral Treaty to notify immediately the relevant United Kingdom consular official of Ms. Carty's arrest and detention. Indeed, it is undisputed that United States and Texas authorities failed to notify British consular officers of the arrest, detention, and trial of Ms. Carty.

Ms. Carty was arrested on May 16, 2001, and charged with murder. Her trial for murder took place in February 2002, and she was convicted and sentenced to death. No official of either the State of Texas or the United States of America ever informed any official of the United Kingdom of Ms. Carty's arrest, detention, prosecution or conviction. The consular staff at the UK Consulate-General in Houston (the consular district in which Ms. Carty was arrested and detained) only became aware of Ms. Carty's situation in August 2002. *See* Affidavit of Linda Kelly (Howley Decl., Exhibit D).

As described in the Kelly Affidavit, “[i]t is the policy and practice of the United Kingdom to respond to such notifications by seeking to make contact with its detained nationals, either by letter or in person, to offer consular assistance.” Kelly Aff. ¶ 4. If the State of Texas or the Government of the United States had provided consular notification in Ms. Carty's case, the Consulate of the United Kingdom “would have helped to ensure that Ms. Carty had appropriate legal representation. The Consulate would have been in contact with Ms. Carty's attorney

throughout the case and would have provided any appropriate assistance. This could have included the assistance of pro bono lawyers and investigators.” *Id.* ¶ 8. In addition, as explained in the Kelly Affidavit, “[t]he Consulate would have approached the District Attorney’s office to register the United Kingdom’s opposition to the death penalty and to request that this penalty not be sought in the case of a British national. This is our practice in all cases involving British nationals in the US where the death penalty may be applied.” *Id.* ¶ 7.

None of these actions were possible because the mandatory consular notification requirements were violated in this case.

C. The Appropriate Remedy for this Clear Violation of the Bilateral Treaty is Review and Reconsideration.

Under the international law of treaties and the international law of state responsibility, the appropriate remedy for violation of consular notification obligations in a treaty is review and reconsideration of any resulting conviction and sentence.

The importance of review and reconsideration under international law is evident from the International Court of Justice’s decision in the *LaGrand Case (Germany v. United States)*, 40 I.L.M. 1069 (2001) (Howley Decl., Exhibit E). In *LaGrand*, the United States “acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification” under a multilateral treaty, the Vienna Convention on Consular Relations (1963), to which Germany was a State Party. *Id.* ¶ 123. In a proceeding brought by Germany against the United States, the International Court of Justice determined that this failure to provide consular notification constituted a breach of the multilateral treaty. *Id.* ¶ 125. The International Court of Justice further determined that two remedies were warranted. First, the

Court rejected the notion that an apology would be sufficient and looked to whether the United States had taken “specific measures” to ensure performance of its obligations under the treaty in the future. *Id.* ¶ 124. Second, the Court determined that, “in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking into account the violation of the rights set forth in the Convention.” *Id.* ¶ 125.

The International Court of Justice confirmed the requirement of review and reconsideration as a remedy for violations of consular notification obligations in the *Avena Case (Mexico v. United States)*, 43 I.L.M. 581 (2004) (Howley Decl., Exhibit F). In *Avena*, the International Court of Justice emphasized that review and reconsideration should include both sentence and conviction. *Id.* ¶ 138.²

The International Court of Justice’s decisions in the *LaGrand* case and the *Avena* case are evidence of international law which is incorporated and made part of U.S. domestic law. The U.S. Supreme Court has long held that such authorities "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900). As “trustworthy evidence” on the international law of remedies for treaty violations, the

² The Bilateral Treaty between the United Kingdom and the United States contains the same rights and obligations regarding consular notification and access as the Vienna Convention at issue in *LaGrand* and *Avena*. The mandatory language in the Bilateral Treaty is even stronger than in the Vienna Convention. Accordingly, the remedy of review and reconsideration, as required for breach of the Vienna Convention, is equally applicable for a violation of the Bilateral Treaty.

International Court of Justice’s decisions in the *LaGrand* case and the *Avena* case are part of the domestic law of the United States when it comes to determining the appropriate remedy for a clear violation of an international treaty which, pursuant to the U.S. Constitution’s Supremacy Clause, is the supreme law of the United States.

Further authority for the remedy of review and reconsideration of Ms. Carty’s conviction and sentence is found in the customary international law of state responsibility as evidenced, *inter alia*, by the United Nation’s International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts together with their Commentaries. *See* Annex to UN General Assembly Resolution A/RES/56/83, December 21, 2001 (Howley Decl., Exhibit G). Article 35 of these Articles provides: “A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed”³ This fundamental principle of international law is also incorporated into U.S. law. *See The Paquete Habana*, 175 U.S. at 700 (customary international law “is part of our law”).

The remedies provided by international law for treaty violations are also completely consistent with the U.S. legal principle that where there is a right created, the courts must recognize a meaningful remedy. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) (“federal courts may use any available remedy to make good the wrong done”); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 624 (1838) (“[T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous

³ Two provisos to this obligation are then set out, neither of which are applicable in this case.

absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.”); *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”).

The United States Supreme Court has repeatedly reaffirmed this long-standing legal principle, applying it to statutory rights for which Congress has not expressly provided a right of action or remedy. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (holding that all appropriate remedies are available to enforce an implied private right of action under a statute, unless Congress has explicitly indicated otherwise); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (holding that the “existence of a statutory right implies the existence of all necessary and appropriate remedies”); *Dooley v. United States*, 182 U.S. 222, 229 (1901) (holding that “a liability created by statute without a remedy may be enforced by a common-law action”).

The same power and obligation to remedy violations of statutory rights should therefore apply to the enforcement of rights arising under international treaties, which carry the same authority as congressional legislation. *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (holding that a bilateral treaty with Japan “stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.”); *see also United States v. Benitez*, 28 F. Supp. 2d 1361, 1363 (S.D. Fla. 1998) (holding that “a properly ratified treaty is the supreme law of the land”).

In the context of its decisions providing remedies for violations of the Vienna Convention, the International Court of Justice declined to impose a presumption that “partial or

total annulment of the conviction or sentence provides the necessary and sole remedy.” *See Avena* ¶ 123. Rather, the Court determined that the United States must provide review and reconsideration of the convictions and sentences “by means of its own choosing.” *Id.* ¶ 131. The Court emphasized, however, that the “means” selected must be meaningful taking into account both the nature of the rights violated and the legal consequences of the violation:

“It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as [the *LaGrand Case*] makes abundantly clear, such review and reconsideration has to be carried out ‘by taking account of the violation of the rights set forth in the [treaty]’ (*I.C.I. Reports 2001*, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.”

Avena ¶ 131.

In determining the means for review and reconsideration, therefore, the United Kingdom submits that the nature of the rights and the violation in question must be considered. In this case, “the situation which existed before the wrongful act was committed” is the situation when Ms. Carty was arrested and detained. At that point in time, the United States and the State of Texas had a clear and unambiguous obligation to inform United Kingdom consular officials “immediately” of Ms. Carty’s arrest and detention. *See* Bilateral Treaty, Art. 16. Such clear and unequivocal language in a treaty requires a remedy that is equally clear and unequivocal. Therefore, the United Kingdom invites the Court to consider that, in this case, review and reconsideration should be accomplished by ordering a new trial.

Conclusion

For all the foregoing reasons, this Court should find a violation of the Bilateral Treaty, order review and reconsideration of Ms. Carty's conviction and sentence, consider granting her a new trial, and grant such other and further relief as this Court deems appropriate.

Dated: New York, New York
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No. 05-1555

In The Supreme Court of the United States

KRISHNA MAHARAJ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS
FOR THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF OF *AMICI CURIAE* THE EUROPEAN
UNION AND MEMBERS OF THE INTERNATIONAL
COMMUNITY IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).² Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.³

¹ In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Consent letters from all parties for all *amicus curiae* briefs are on file with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director, and Matthew Cross, legal intern, International Justice Project.

² *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

³ Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty*, at <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases>. See, also European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (June 3, 1998), Part III(v) at <http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm>.

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in compliance with international instruments, particularly when the rights of a Member State's national may be in the balance. In the instant case, Petitioner is a national of the United Kingdom, an EU Member State.

The European Union acknowledges that the VCCR anticipates the co-existence of other relevant international agreements in the field of consular relations. As provided by VCCR Article 73, "The provisions of the present Convention shall not affect other international agreements in force as between States parties to them." The Member States of the European Union take note of the Consular Convention between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and the President of the United States of America dated June 6, 1951, 3 U.S.T. 3426. Article 16 of that Convention requires notification in every instance of a detention of a national of the sending state. In addition to their interest in compliance with the Vienna Convention on Consular Relations, the Member States of the European Union also assign value to compliance with bilateral consular treaty obligations. With respect to Petitioner, the United States, as the receiving state, is required to comply with its obligations under both the VCCR and the bilateral consular treaty.

Violation of obligations under both the bilateral treaty and the VCCR can be resolved only by review and reconsideration of the conviction and sentence.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article 36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been affirmed by the International Court of Justice (ICJ).⁴ Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

⁴ *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 169 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations.⁵ Its conclusion is regarded as "the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention".⁶

The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol) provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".⁷

⁵ United Nations, *Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations*, at, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/II/treaty31.asp>.

⁶ LUKE LEE, *CONSULAR LAW AND PRACTICE* at 26 (2d. ed. 1991).

⁷ Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261.

The ICJ is “the principal judicial organ of the United Nations” (U.N.).⁸ The Court’s statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.⁹

The United States¹⁰ and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party”.

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 “establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are assured access to consular officers and through them to others.”¹¹

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign

⁸ U.N. Charter, *opened for signature* June 26, 1945, 59 Stat. 1031, T.S. No. 993, Article 92; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

⁹ U.N. Charter, Article 93, para.1.

¹⁰ The United States ratified the U.N. Charter on August 8, 1945. United Nations, *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations*, at, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp>

¹¹ U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

nationals and consuls of the Sending State. In addition, Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. Further, it establishes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."¹² The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".¹³

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded

¹² *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).

¹³ *Id.* para 123.

by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence.

II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*¹⁴ that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned

¹⁴ *Breard v. Greene*, 523 U.S. 371, 376 (1998).

without delay of his rights under this subparagraph.” The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and “[m]oreover, under Article 36, paragraph 1 (c), the sending State’s right to provide consular assistance to the detained person may not be exercised ‘if he expressly opposed such action.’ The clarity of these provisions, viewed in their context, admits of no doubt.”¹⁵

III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".¹⁶

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals*. In Article 36, paragraph 2, the ICJ found an obligation to allow a foreign national to seek a remedy: "The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the

¹⁵ *LaGrand*, para 77.

¹⁶ VCCR, Article 36, para. 2.

sending State and not also to those of the detained individual".¹⁷

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".¹⁸

The ICJ subsequently affirmed in *Avena* the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is suited to this task".¹⁹ Contrary to the argument of the US, the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".²⁰

¹⁷ LaGrand, para. 89.

¹⁸ *Id.* para. 125.

¹⁹ *Avena*, para. 140.

²⁰ *Id.*, para. 143.

IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention".²¹

V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent

²¹ *Id.*, para. 122.

national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State".²² The ICJ concluded on the facts of the *LaGrand* case, "Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36".²³

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution".²⁴

VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation..."²⁵

²² *LaGrand*, para. 90.

²³ *Id.* para. 91.

²⁴ *Avena*, para. 134.

²⁵ DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

While the VCCR is the foundational treaty that regulates consular relations, additional treaties, including a number ratified by the United States, incorporate the principle. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to punish those who commit torture. A torture suspect who is a foreign national “shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national”.²⁶

Furthermore, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.²⁷

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolutions on *The Human Rights Of All Migrant Workers And Their Families*.²⁸

²⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

²⁷ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Article 6, 28 U.S.T 1977 (1973).

²⁸ *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.²⁹ In addition, the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.³⁰

The U.N. General Assembly has “reaffirm[ed] emphatically the duty of States parties to ensure full respect for the observance of the Vienna Convention on Consular Relations of 1963, in particular with regard to the right of all foreign nationals, regardless of their immigration status, to communicate with a consular official of the sending State in the case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform without delay

session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2027 (XXXIV-O/04), (Resolution adopted at the fourth plenary session, held on June 8, 2004); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2130 (XXXV-O/05), (Resolution adopted at the fourth plenary session, held on June 7, 2005).

²⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

³⁰ Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. General Assembly Resolution 40/144 (1985).

the foreign national of his or her rights under the Convention”.³¹

Both the U.N. Rules for the Protection of Juveniles Deprived of their Liberty³² and the U.N. Standard Minimum Rules for the Treatment of Prisoners³³ provide that if a foreign national is arrested, the right of consular access must be respected.

VII. CONCLUSION

The EU considers the implementation of the right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present cases. When notification is omitted and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, “the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts.”³⁴

³¹ Protection of Migrants, U.N. General Assembly Resolution, A/RES/60/169 (Mar. 7, 2006), para. 9 footnote omitted, see also, Protection of Migrants, U.N. General Assembly Resolution, A/RES/58/190 (Mar. 22, 2004), para. 10.

³² U.N. General Assembly. A/RES/45/113, Annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

³³ Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders and approved by the Economic and Social Council (Res. 663C (XXIV) of 31 July 1957, and 2076 (LXII) of 14 May 1977), U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

³⁴ *Avena*, para. 121.

In light of the international law norms articulated above, the EU, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioner.

Respectfully Submitted,

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

CO/1655/2011

CO/3672/2011

**In the matter of an appeal under the Extradition Act 2003 and
An application for a writ of Habeas Corpus**

KHURTS BAT

Appellant

- v -

THE INVESTIGATING JUDGE OF THE GERMAN FEDERAL COURT

Defendant

- and -

THE GOVERNMENT OF MONGOLIA

First Interested Party

- and -

**THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH
AFFAIRS**

Second Interested Party

**SKELETON ARGUMENT ON BEHALF OF THE SECRETARY OF STATE FOR
FOREIGN AND COMMONWEALTH AFFAIRS**

All references in square brackets are to the Appellant's appeal bundle.

Pre reading:

- Witness statement of Julia Longbottom of May 2011;

- *Halsbury's Laws of England, 5th edition, volume 61 (International Relations Law), paragraphs 14-16, 264.*
- *Franey, Immunity, Individuals and International Law (2011), pp. 135-149.*

INTRODUCTION

1. The Secretary of State for Foreign and Commonwealth Affairs ("the FCO") has been permitted to intervene in these proceedings so as to address four points:
 - (i) Whether the Appellant is entitled to inviolability of the person and immunity from criminal proceedings in the United Kingdom because he was on a special mission at the time of his arrest on 17 September 2010 ("special mission immunity" - immunity *ratione personae*).
 - (ii) Whether the Appellant is entitled to inviolability of the person and immunity from criminal proceedings in the United Kingdom because of the office which he held at time of his entry into the United Kingdom ("high-ranking State office immunity" – immunity *ratione personae*).
 - (iii) If Mongolia were now to assert, before the Divisional Court, that the Appellant is immune from criminal proceedings in the United Kingdom in respect of the alleged acts committed in the Federal Republic of Germany because they were official acts of Mongolia, how should the Court react ("official act immunity" – immunity *ratione materiae*)?
 - (iv) Whether the extradition proceedings against the Appellant constitute an abuse of process.
2. The Appellant entered the United Kingdom on 17 September 2010 having been granted a visa by the UK Border Agency (not the FCO) on 16 April 2010. The type of visa which he had been granted was an ordinary "Business Visa".

3. He was arrested, on 17 September 2010, pursuant to a European Arrest Warrant which had been issued on 30 January 2006 by the German Federal Court. The Warrant alleges that the Appellant was in charge of a mission carried out by the Mongolian secret service which involved the kidnap (in France) of a Mongolian national who was forcibly transported to the Mongolian Embassy in Berlin, drugged and then flown out of Germany using a diplomatic passport. It is said that the Appellant worked at Mongolian Embassy in Budapest at the relevant time [page 49].
4. On 29 September 2010, at the request of the Crown Prosecution Service, the FCO issued a certificate, pursuant to the provisions of section 4 of the Diplomatic Privileges Act 1964¹, which certified that the Appellant had not been notified to the FCO as being a member of the Embassy of Mongolia to the United Kingdom and that he had not been received as such [page 103].
5. It is important to note at the outset that the FCO was not a party to the proceedings below². No submissions were made on behalf of the FCO at the proceedings (on any point) and no witnesses were examined on its behalf. The role which it played in the proceedings was a limited one. The FCO provided a witness statement³ to the parties which set out a response to the allegations made in the abuse of process application. That witness statement was given to the District Judge only when the other parties consented to that course. The point of that witness statement was to make plain that the FCO did not accept the allegation that it had lured the Appellant

¹ Section 4 reads:

“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.”

² Under the European Arrest Warrant scheme (as given effect by Part 1 of the Extradition Act 2003) extradition proceedings are conducted between judicial authorities of the respective European Union members and not governments.

³ Witness statement of Ms Longbottom [at page 76].

into the United Kingdom. Counsel attended the Court below, on behalf of the FCO, in order to respond to any application which might be made to summons an officer of the FCO to court to give oral evidence. That eventuality did not arise as no such application was made.

6. Separately the FCO provided, *at the request of the District Judge*, its view, in writing⁴, as to whether the Appellant was (a) on a “special mission” when he entered the UK and (b) the criteria by which Her Majesty’s Government determines that a visit by a foreign official amounts to a ‘special mission’. That letter stated, on behalf of the Secretary of State, that the FCO had not consented to the Appellant’s visit as a special mission. As is set out below (see paragraph 77), it the submission of the FCO that this letter should be treated as conclusive of the facts stated therein.
7. The primary concern of the FCO, in this appeal, is (i) the proper application of the law on the inviolability and/or immunity from criminal proceedings of certain persons acting on behalf of another State; and (ii) to rebut the unfounded assertions of improper conduct on the part of the FCO. Following a short note on two procedural points, this skeleton argument is divided into two further sections and an appendix:

Section A: The appellant’s immunity (i) as a member of a special mission and/or (ii) as a holder of high-ranking office and/or (iii) (if and to the extent this is asserted) in respect of official acts.

Section B: Abuse of process.

Appendix: Submissions on jurisdiction to issue a writ of habeas corpus.

PROCEDURE

⁴ The Director of Protocol and Vice-Marshal of the Diplomatic Corps provided this view by way of a letter to District Judge Purdy which can be found at page 84.

8. The Appellant has lodged both a statutory appeal under section 26 of the Extradition Act 2003 and an application for a writ of habeas corpus. The question of whether there is any jurisdiction, on the part of this Court, to consider the application for the writ (given the provisions of section 134 of the 2003 Act and the extensive case law in respect of it) is not a matter for the FCO. Further to the indication (given in the course of the directions hearing on 13 May 2011), if it becomes necessary, submissions will be made on behalf of the Secretary of State for the Home Department on the limited point of whether there is jurisdiction to issue a writ of habeas corpus in this case. Written submissions on this point are contained in the Appendix to this Skeleton.

9. Reference is made in this Skeleton to three Opinions of Sir Elihu Lauterpacht, CBE, QC, LL.D, which appear to have been submitted to the Court on behalf of the Republic of Mongolia: an Opinion dated 5 May 2011, a Supplementary Opinion dated 11 May 2011, and a Second Supplementary Opinion dated 20 May 2011. It is assumed that these three Opinions are intended to be treated as skeleton argument: they are treated as such in the present Skeleton. It would not be appropriate for the Appellant to produce the Opinions as *evidence* of the rules of public international law, which are properly the subject of argument, not expert evidence: see *Halsbury's Laws of England*, Fifth Edition, volume 61 (International Relations Law), pp. 12-13, para. 14.

A: THE APPELLANT'S INVIOLABILITY AND/OR IMMUNITY

10. It is now asserted by the Appellant and/or Mongolia that, at the time of his arrest, Mr. Khurts was entitled to inviolability of the person and immunity from suit in respect of the present proceedings on two - or possibly three - three bases:
 - (i) as a member of a special mission sent by Mongolia to the United Kingdom with the consent of the latter;

(ii) as the holder of a high-ranking office in Mongolia;

(iii) (possibly) because of the official nature of the acts of which he is accused.

11. These bases for immunity are distinct. They are considered separately below, following a summary of the position on immunity and a brief passage on the place of the rules of customary international law in English law.

(1) SUMMARY OF THE POSITION AS REGARDS THE APPELLANT'S INVIOABILITY AND/OR IMMUNITY

12. There is ample authority for the inviolability and/or immunity under customary international law (and hence under English law) of persons on special missions. Such inviolability and/or immunity should be given effect by the English courts. But to qualify as a special mission two requirements are essential: (i) the special mission must represent the sending State vis-à-vis the receiving State, and (ii) the special mission must be sent with the prior consent of the latter State. Neither condition was met in the present case, as is conclusively established by the letter of the Director of Protocol and Vice-Marshal of the Diplomatic Corps of 12 January 2011.

13. The class of “holders of high-ranking office in the State” who, under customary international law, enjoy inviolability and immunity *ratione personae* is very limited, and does not include the Appellant.

14. From a very recent submission to the Court, dated 20 May 2011, it seems that the Republic of Mongolia may now seek to assert that the acts of which Mr. Khurts is accused (as set out in the European Arrest Warrant) are official acts of Mongolia, and that therefore the Appellant enjoys immunity from prosecution in Germany in respect of them. The FCO points out that, in circumstances such as these, it is for the State seeking immunity for one of its officials in respect of official acts to notify

the other State or States concerned (here, in the first place, Germany). The FCO is not aware that Mongolia has made any such claim to the German authorities, notwithstanding that the Arrest Warrant states that “The accused does not benefit from immunity in the Federal Republic of Germany.”

(2) CUSTOMARY INTERNATIONAL LAW AS “PART OF THE LAW OF ENGLAND” IN THE PRESENT CONTEXT

15. The rules of customary international law on the inviolability and immunity from criminal proceedings of persons on a “special mission” are correctly to be seen as part of the law of England, and are to be applied as such by the English courts. The same is true in respect of the inviolability and immunity from criminal proceedings of the holders of certain high-ranking offices in the (foreign) State, and the immunity from criminal proceedings that may be enjoyed by persons in respect of official acts.
16. The position as regards these areas of customary international law is the same as in the case of State and diplomatic immunity prior to the time when those areas of law were placed on a statutory footing (by the State Immunity Act 1978 and the Diplomatic Privileges Act 1964 respectively). These immunities were among the traditional areas in which it was said that “international law is part of the law of England”.
17. The expression ‘part of the law of England’ is no more than convenient shorthand. It can be misleading, and should not be taken to imply that all the rules of customary international law automatically form part of or are incorporated into English law and can be applied directly by the courts. There is no such generalised principle of automatic incorporation. The issue of incorporation has come under close scrutiny in recent decisions and academic commentary, which have sought a more nuanced explanation as to how specific rules of customary international law

come to be received into English law.⁵ Thus, Lord Bingham hesitated to embrace the proposition that customary international law forms part of the law of England “in quite the unqualified terms in which it has often been stated”, and sympathised with the view that customary international law “is not a part, but one of the sources of English law”: *R. v. Jones (Margaret)* [2007] 1 AC 136, 155, para. 11.⁶

18. That said, it is accepted that the main area⁷ of customary law that has been consistently applied by English courts – that is, recognised as a part of or a source of English law – is that of immunities.⁸ The existence and content of the particular customary rule alleged must, however, still be established to the satisfaction of the court: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 512-513 (per Lord Oliver).

(3) THE APPELLANT’S CLAIM OF INVIOABILITY AND IMMUNITY AS A MEMBER OF A SPECIAL MISSION

(a) **Summary**

19. There is no treaty in force between the United Kingdom and Mongolia on the subject of special missions. Any obligation not to defeat the object and purpose of the Special Missions Convention, which the United Kingdom has signed but not ratified, has no application in relations between the United Kingdom and Mongolia

⁵ It is also an issue pending before the English courts in other cases.

⁶ Lords Hoffman and Mance, for their part, avoided any general statement “about the reception into English law of rules of international law which may affect rights and duties in civil law”: para 59 (Lord Hoffman) and para 100 (Lord Mance).

See also *R (on the application of Al Haq v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), at [60] per Cranston J. See, generally, *Halsbury’s Laws of England*, Fifth Edition, vol. 61 (International Relations Law), pp. 15-16, para. 16; Roger O’Keefe, “The Doctrine of Incorporation Revisited”, LXXIX *British Year Book of International Law* 2008, pp. 7-85, esp 58-59; Philip Sales and Joanne Clement, “International law in domestic courts: the developing framework” (2008) LQR 388, 413-421 (advocating a presumption against incorporation of custom unless certain “filtering” criteria are met); cf Pat Capps, “The court as gatekeeper: customary international law in English courts” (2007) 70 MLR 458.

⁷ Apart from the law of prize and certain cases concerning angary.

⁸ O’Keefe, at note 6 above, pp. 23-24, 64-65.

since Mongolia has not signed the Special Missions Convention. The matter is governed by customary international law, under which persons on special missions are entitled to inviolability and immunity from criminal proceedings. But the Appellant was not on a special mission since the United Kingdom had not consented to any such mission, as is required by customary international law. The FCO letter sent to the District Court at its request (Mr. Simon Martin's letter of 12 January 2011) is conclusive in this regard [page 84].

(b) There is no treaty binding on the United Kingdom governing the inviolability and immunity of persons on special missions

20. There is no treaty in force between the United Kingdom and Mongolia governing the inviolability and immunity of persons on special missions. The United Kingdom is not a party to any treaty governing the inviolability and immunity of persons on special missions.
21. The Convention on Special Missions of 8 December 1969 (sometimes referred to as the "New York Convention") entered into force on 21 June 1985, and currently there are 38 States Parties. The United Kingdom signed the Convention on 17 December 1970, but has not ratified it. Thus the Convention is not in force for the United Kingdom and it is not bound by it. Mongolia is not a party to the Convention, nor has it signed it.

(c) The obligation not to defeat the object and purpose of the Convention on Special Missions, even supposing it applies, has not been breached by the United Kingdom

22. Both the Foreign Minister of Mongolia (in his letter to the Foreign Secretary of 31 December 2010) and the Appellant in his Grounds of Appeal argue that the United Kingdom is under an obligation not to defeat the object and purpose of the Special Missions Convention, by virtue of article 18 of the Vienna Convention on the Law of Treaties⁹, and should therefore release the Appellant.

⁹ Art 18 of the VCLT provides as follows:
"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

23. There are a number of reasons why this argument does not avail the Appellant:
- (i) Mongolia is not a party to the Special Missions Convention, nor (unlike the United Kingdom) has it signed that Convention. It follows that any article 18 obligation in respect of the Special Missions Convention could not in any event apply as between the United Kingdom and Mongolia.¹⁰
 - (ii) Even if the United Kingdom did have such an obligation vis-à-vis Mongolia, it would be one owed by the United Kingdom to Mongolia as a matter of treaty law, and would not be justiciable in an English court.
 - (iii) Even if, by bringing extradition proceedings against the Appellant and detaining him, the United Kingdom had acted contrary to the provisions of the Special Missions Convention (which is not accepted), nothing that the United Kingdom has done in the present case could be said to “defeat” the object and purpose of the Special Missions Convention. The rule set forth in article 18 (assuming it is a rule of customary international law) does not impose on States an obligation to comply with the treaty, but merely to refrain from acts that could defeat its object and purpose, such as destroying the subject-matter of the treaty.¹¹

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- (a) *it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or*
 - (b) *it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”*

¹⁰ “While neither Article 18 nor the International Law Commission’s Commentary identifies the states to which the obligation is owed, it seems reasonable to hold that the states entitled to invoke the responsibility are only those which are already party to the treaty or those which, having signed the treaty, have agreed to be bound by the same obligation”: P. Palchetti, “Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?”, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), p. 25 at p. 31.

¹¹ “There is little doubt that the Article 18 does not impose on states, in the period between signature and the entry into force of the treaty, a general obligation to refrain from acting in a manner

24. In his Grounds of Appeal, the Appellant cites three judgments of the World Court (Grounds of Appeal, para. 19) for the position “that signatories to a treaty are subject to *some interim legal obligations* even prior to ratification” (emphasis added). The Appellant does not explain what relevance these cases have to the rule in article 18. They have none; in the *North Sea Continental Shelf* cases of 1969 the Court rejected the argument that Germany had by its conduct become bound by the 1958 (Geneva) Convention on the Continental Shelf, which it had signed but not ratified (*I.C.J Reports 1969*, p. 25, para. 28); in *Certain German Interests in Upper Silesia (Germany v. Poland)*, the Court found it unnecessary to deal with the question of interim obligations because the Treaty of Versailles did not impose the obligation alleged (*P.C.I.J. Reports*, Series A, No. 7, May 25, 1926); the question that arose in *Mavromattis Palestinian Concessions Case (Greece v. United Kingdom)* was not whether a State which had signed but not ratified a treaty had obligations thereunder, but whether a treaty by its own terms had retrospective effect (*P.C.I.J. Reports*, Series A, No. 2, August 30, 1924).

(d) The rules of customary international law on the inviolability and immunity from criminal jurisdiction of persons on special missions

Summary

25. While State practice (including the case-law of domestic courts) and the writings of international lawyers do not all point in one direction, the predominant view is that there are certain rules of customary international law concerning the inviolability and immunity of persons on special missions. In large measure the FCO agrees

inconsistent with the treaty”: P. Palchetti, “Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?”, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), p. 27.

“*The obligation [set forth in article 18] is only to ‘refrain’ (a relatively weak term) from acts which would ‘defeat’ (a strong term) the object and purpose of the treaty. The State must therefore not do anything which would prevent it being able to comply with the treaty once it has entered into force. It follows therefore that it does not have to abstain from all acts which will be prohibited after entry into force*”: A. Aust, *Modern Treaty Law and Practice* (2nd ed., 2008), pp. 118-119.

with the conclusions of Sir Elihu Lauterpacht in his “Opinions” dated 5 and 11 May 2011 concerning the inviolability and immunity from criminal jurisdiction under customary international law of persons on special missions sent by one State to another with the consent of the latter. The FCO does not accept all the reasoning in the Opinions. Nor does the FCO agree with the application to the facts of the present case, on the essential requirement of the receiving State’s consent to the special mission. On that, Mr Simon Martin’s letter of 12 January 2011 is conclusive as to the facts stated, in particular as to the absence of consent to any special mission in this case.

26. In the view of the FCO, under customary international law, persons on a special mission enjoy, for the duration of the special mission, inviolability of the person and immunity from criminal jurisdiction to the like extent as members of equivalent rank (e.g., diplomatic, administrative and technical, and service staff) accredited to a permanent diplomatic mission. Thus, if equivalent to diplomatic rank, persons on special missions enjoy the like inviolability and immunity as is provided to diplomatic agents by the Vienna Convention on Diplomatic Relations of 1961, which form part of English law by virtue of the Diplomatic Privileges Act 1964, s. 2 and Schedule 1: see, in particular, articles 29 and 31 in Schedule 1.
27. In considering the materials that evidence the rules of customary international law on special missions, it is convenient to consider, *first*, how far the Special Missions Convention of 1969 reflects or has influenced the rules of customary international law, and, *second*, other evidence for rules of customary international law on special missions, by looking at State practice (including cases before domestic courts in a number of jurisdictions).

Not all provisions of the Convention on Special Missions reflect customary international law: the negotiating history of the Convention

28. Contrary to the impression given by the Appellant and by Mongolia in their submissions, not all provisions of the Special Missions Convention are generally

regarded as reflecting customary international law. As is said in *Halsbury's*, “there are conflicting views as to the extent to which it reflects existing customary international law.” (*Halsbury's Laws of England*, 5th edition, volume 61, para. 246)¹². At the time of its adoption, the UK 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 the practice of States for it to be said that existing international law was clear and settled in the matter of the status of special missions.

29. The negotiating history of the Convention on Special Missions sheds light on a number of important points that arise in the present case. These include the extent to which, even in the 1960s, States and the ILC considered there were rules of customary international law on the immunities of special missions; the scope of the term “special missions”; and the requirement of consent.
30. The Special Missions Convention was adopted by the United Nations General Assembly on 8 December 1969. The text of the Convention had been negotiated within the Sixth (Legal) Committee of the General Assembly of the United Nations in 1968 and 1969, on the basis of draft articles drawn up by the ILC and presented to the General Assembly in 1967.
31. In 1960 ILC Special Rapporteur Sandström presented to the ILC a report in which he described a special mission as follows: “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”. He went on to refer to “the similarity between a special mission’s activities and aims and those of a permanent mission”

¹² As Chanaka Wickremasinghe has written, “there is some dispute as to whether all of its [the Special Missions Convention’s] provisions reflect customary international law” (“Immunities enjoyed by officials of States and international organizations”, in: M. D. Evans, *International Law* (3rd ed., 2010), pp. 380-410, p. 391).

(A/CN.4/129, paras. 5 and 6, in *Yearbook of the International Law Commission* 1960 Vol II, p. 108).

32. In 1964, the ILC presented its draft of the first 16 articles and commentary to the General Assembly (*Yearbook of the International Law Commission* 1964 Vol II, p 208). These draft articles contained rules concerning the establishment, working and ending of special missions, but did not cover their immunities and privileges. The consent of the receiving State was essential to the definition of a special mission: “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” (draft article 1(1)). The commentary emphasises 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” (para (2), p 210)¹³.
33. The ILC, in presenting its final draft articles on special missions in its 1967 Report to the General Assembly, stated as follows:

“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.” (1967 *Yearbook of the International Law Commission*, vol. II, p. 346, para. 12)
34. In its introductory commentary to Part II of its 1967 final draft articles (which became articles 21 to 46 of the Convention as adopted), before discussing the scale of facilities, privileges and immunities to be accorded - on which there were differing views, the ILC said

¹³ Draft article 2 requires that “*The task of a special mission shall be specified by mutual consent of the sending State and of the receiving State*”.

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

35. The draft articles were generally welcomed by States. However, it was the view of certain Governments, including the United Kingdom, that the draft articles were too generous to special missions if the Convention was to cover all kinds of inter-State missions, whatever their standing and the character of their functions. The overwhelming majority of delegations, however, rejected the attempts in the Sixth (Legal) Committee of the UN General Assembly in 1968 to lower the general level of privileges and immunities. When work on the Convention resumed in 1969, certain delegations, led by France and the United Kingdom, succeeded in an alternative approach to the problem of establishing a scope for the application of the Convention which was appropriate to the privileges and immunities granted. As a result, the Convention as adopted applies to missions whose status is, broadly speaking, similar to that of permanent diplomatic missions. The United Kingdom and France, with others, were concerned to ensure that the Convention applied only to certain high-level missions conducting specific diplomatic tasks. And all States were in agreement that special missions could only come into existence with the consent, clearly given, of the receiving State.¹⁴

¹⁴ The negotiation of the Convention in the UN General Assembly is well described in M. Paszkowski, “The Law on Special Missions”, VI *Annuaire Polonais de Droit International* (1974), p. 267, at pp. 273-284.

36. In voting for the adoption of article 1(a) of the Convention in the Sixth Committee of the General Assembly on 20 October 1969, the UK representative (speaking also for the French delegation) made an explanation of vote that included the following:

*“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.”*¹⁵

38. The simple transposition to special missions, which by definition are temporary, of the rules in the Vienna Convention on Diplomatic Relations was controversial both within the United Nations International Law Commission (“ILC”) (which prepared final draft articles on the subject in 1967) and within the Sixth (Legal) Committee of the United Nations General Assembly (which adopted the Convention in 1969). A number of the provisions, such as the inviolability of the premises of the special mission (which may be a hotel room), are scarcely appropriate for a temporary mission. It is probably for this reason that relatively few States have become party to the Convention.¹⁶

¹⁵ Extract from the verbatim text of the Statement made by Mr. Philip Allott, United Kingdom representative, in the Sixth Committee on 20 October 1969; the official UN publication is a summary record, and is to be found in UN Document A/C.6/SR.1129, paras. 25-26.

¹⁶ Writing of the Special Missions Convention in 1987, Sir Ian Sinclair (FCO Legal Adviser) 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.” I. Sinclair, *The International Law Commission* (1987).

37. The drawing up within the United Nations of the Convention on Special Missions had an impact on the development of rules of customary international law in this field, since that instrument was a focus for State practice. Moreover, as already noted, the ILC was of the opinion that its draft reflected, at least in some measure, the rules of customary international law. While it cannot be said that all the provisions of the Convention reflect established customary international law, it is widely accepted that its core provisions, such as those on the scope of special missions (including the requirement of consent) and the inviolability and immunity from criminal jurisdiction of persons on special missions, do now reflect customary law.

State practice, including domestic case-law

38. Article 38.1(b) of the Statute of the International Court of Justice requires the Court to apply, among other things, “international custom, as evidence of a general practice accepted as law”. The two elements required for the establishment of a rule of customary international law are State practice and *opinio juris*.
39. In the field of special mission immunity, as in other cases of immunity (such as State and diplomatic immunity), much of the relevant State practice is to be found in the case-law of the domestic courts of the various States. It would seem that

Sir Arthur Watts (former FCO Legal Adviser) wrote to similar effect in 1999: “*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*”: *The International Law Commission 1949-1998* (1999), Volume I, pp. 344-5.

See also J Salmon, *Manual de droit diplomatique* (1994). He suggests the limited number of ratifications of the Convention “can be explained because of the fact that the Convention sets all special missions on the same footing, according the same privileges and immunities to Heads of State on an official visit and to members of an administrative commission which comes negotiating over technical issues”.

questions of special missions immunity have arisen on relatively few occasions in the courts.

40. Domestic case-law may be relevant to establishing customary international law in this field in a number of ways. *First*, domestic cases may contain State practice in the form of expressions of the position of the Executive (e.g., when the US Administration submits a ‘Suggestion of Immunity’ to a US court). *Second*, the decisions of domestic courts may themselves amount to State practice, since they indicate the position of the judicial branch on the matter. 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, since it is the conclusion of the court after thorough argument.

United Kingdom

41. In addition to the PQ of 13 December 2010 cited by Sir E Lauterpacht, the following question was answered on 26 April 2011:

“Dr Huppert: To ask the Secretary of State for Foreign and Commonwealth Affairs what his policy is on ratification of the 1969 UN Convention on Special Missions. [51887]

Mr Bellingham: 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 courts require that appropriate privileges and immunities are extended to visitors on special missions and other high-level visitors.)” (Hansard Commons 26 Apr 2011 : Column 404W)

42. There have been a number of cases in the English courts touching on special missions. Some of these are relatively old, but the more recent ones reflect greater awareness of the importance of special missions in contemporary diplomacy.
43. In the early case *Service v Castaneda* (1845) 1 Holt Equity Reports 159, Vice Chancellor Knight-Bruce accepted that Mr Castaneda was in England as an envoy on a special mission (as an agent 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 Mr Castaneda brought himself strictly within the wording of the Statute of Anne 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*” (p. 170). The action for an injunction against him was accordingly dissolved.¹⁷
44. Several decades later in *Fenton Textile Association v Krassin* (1921) 7 Ll. L. Rep. 466, Lord Justice Scrutton in the Court of Appeal 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*” (p. 469 rhc). However, Mr Krassin’s immunity was in fact governed by a trade treaty between Great Britain and the USSR, which did not extend to immunities from civil suit and so his claim for immunity failed.
45. In *R v Governor of Pentonville Prison, ex parte Teja* [1971] 2 Q.B. 274, the Divisional Court considered whether Mr. Teja might be on a special mission. Costa Rica had issued Mr Teja with a letter of credence stating it had appointed him

¹⁷ These days Mr Castaneda would probably attract State immunity under the State Immunity Act 1978 because the action against him was for monies not paid by the Spanish Crown, i.e., arose out of his official functions.

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 1964 Diplomatic Privileges Act. He was arrested while passing through England for two days. Lord Parker CJ rejected this contention in forthright terms:

“I confess that at the very outset of 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 should have been in some form accepted or received by this country.” (p. 282B-C)

Lord Parker CJ did accept that Costa Rica intended Mr Teja to go on a special mission covered by the Special Missions Convention, not in force in the UK, 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.” (p. 283F-H)

46. In *R v Governor of Pentonville Prison, ex parte Osman (No. 2)*, 88 I.L.R. 378, the Divisional Court concluded (*obiter*) that the applicant's status as being on a special mission (assuming such to have been established, which it was not) “would not have been recognized in English law, since the United Kingdom has not enacted legislation pursuant to the Convention on Special Missions of 1969. ...”. In reaching this conclusion the Court may have been influenced by a FCO statement, not

incorrect in itself as a general statement, that HMG “does not regard the Convention as being declaratory of international customary law.”¹⁸

47. A series of recent decisions, reported and unreported, by the District Judge have recognised the existence of special mission immunity under customary international law:

(i) In *Re Bo Xilai*, 8 December 2005, 128 *ILR* 709, where Senior District Judge Workman held that Mr. Bo was entitled to immunity under customary international law because he was in the United Kingdom performing official duties as Minister for International Trade, as part of an official delegation for the State visit of the President of the People’s Republic of China;

(ii) By contrast, in *Court of Appeal Paris v. Durbar*, City of Westminster Magistrates’ Court, 16 June 2008 (unreported), Judge N. Evans, implicitly accepted the existence of the immunity but rejected Mr Durbar’s claim that he was on a special mission because there was no evidence to support it and refused to grant procedural immunity from a European Arrest Warrant issued by France for embezzlement in 1995 (described in E. Franey, *Immunity, Individuals and International Law* (2011), pp. 147-149);

(iii) In *Re: Ehud Barak*, 29 September 2009 (unreported) Judge Daphne Wickham was satisfied that Mr. Barak was entitled to special mission immunity on the basis of advice from the FCO that he was here for the purposes of attending the Labour Party Conference and to attend official meetings with the Foreign

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The Divisional Court said:

“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 not enacted legislation pursuant to the Convention on Special Missions of 1969. ...” (p. 393, per Mustill LJ).

A senior 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”, quoted at p. 385

Secretary, arranged prior to his arrival, and meetings with the Prime Minister and the Defence Secretary, requested prior to his arrival by Israel but confirmed subsequently, to discuss high level official engagement between the United Kingdom and Israel, including the Middle East Peace Process (described in E. Franey, *Immunity, Individuals and International Law* (2011), pp. 146-147).

Germany

48. The leading German case on special missions remains the *Tabatabai* case in the 1980s, which came before the Federal Supreme Court. Since then the customary law status of provisions of the Special Missions Convention has been confirmed in one further case.
49. The litigation history of *Tabatabai* (80 *ILR* 389) is complex. For present purposes, it is sufficient to note what the Federal Supreme Court said in its judgment of 27 February 1984:

“(2) It was disputed amongst legal scholars whether or not all, or even part, of the provisions of the United Nations Convention on Special Missions, 1969, ... had the validity of rules of customary international law. It was unnecessary to decide this question, however, because, irrespective of the provisions of the Convention, there was a rule of customary international law based on State practice and opinio juris according to which it was possible for an ad hoc envoy, who had been charged with a special political mission by the sending State, to be granted immunity for that mission by individual agreement with the receiving State” (p. 394)
50. In the *Vietnamese national* case, a judgment of 15 June 2006 (OVG 8 S 39.06) the Higher Administrative Court (*Oberverwaltungsgericht*) of Berlin-Brandenburg overturned a decision of the Administrative Court Berlin in a case concerning 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 said that its conclusion that it 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 immunity for their official acts and personal inviolability (arts. 29, 31 and 41 of the Convention).”

France

51. In connection with the French Property Commission in Egypt case (1961-62), the French Government issued a Press release saying *inter alia* that

“[the arrested French officials] 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.”*¹⁹

52. There seems to be little French case-law on the customary international law of special missions. However, the matter has been touched on in two cases before the Criminal Chamber of the *Cour de cassation*.
53. On 9 April 2008, in a case concerning allegations of crimes against humanity, torture and acts of barbarity and kidnapping in an area of Brazzaville known as “le Beach”, the Chamber had to consider a claim that at the time of his arrest one of the accused (who was the Police Director of Congo) was in France on an official mission and thus benefited from immunity under customary international law. The Chamber held that, as Police Director of the Congo, he was not entitled to immunity.
54. On 23 September 2009, in a case concerning an accused who claimed to be a diplomatic mission on behalf of Burkina Faso, the Criminal Chamber held that he had no such 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.

Austria

55. The leading Austrian case, the *Syrian National Immunity Case* (127 I.L.R. 88) of the Austrian Supreme Court, is important both for its references to the customary international law on special mission immunity and in particular for the central role it gives to the consent of the receiving State/organization.

¹⁹ Press release of 6 December 1961, issued by the French Permanent Mission to the United Nations, cited in A.D.Watts, “Jurisdictional Immunities of Special Missions: The French Property Commission in Egypt”, 12 *ICLQ* (1963), p. 1383, at pp. 1389-90.

56. The lower Court had held that Dr. S was entitled to immunity as a representative of a member State on a visit to UNIDO; and since he was on an *ad-hoc* mission to UNIDO. The Supreme Court overturned the decision on both grounds. In relation to the second ground, the Supreme Court considered *inter alia* the analogy with the Special Missions Convention, 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”.

The Court then looked *inter alia* by way of analogy at the Special Missions Convention, and 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 is 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.”

United States of America

57. The US practice and case-law shows that the US Government considers that persons on “special diplomatic missions”, accepted as such by the Department of State, are entitled to immunity for the duration of their mission.

58. The US understanding of customary international law was recently explained by the then State Department Legal Adviser, John B Bellinger III, in the following terms:

“Another basis for foreign government officials’ immunity that is independent of the FSIA is the doctrine of head-of-state immunity. When applicable, it entails full personal immunity from the jurisdiction of U.S. courts. The Executive Branch has a longstanding practice of affirmatively “suggesting” head-of-state immunity to our courts when a person who enjoys the immunity has been served with judicial process. The practice dates at least to the mid-1960s, when such suggestions were made with respect to the South Korean Foreign Minister (1963) and King Faisal of Saudi Arabia (1965). Since then, we have suggested head-of-state immunity in some thirty cases which have dealt with heads of state, heads of government, the spouse of a head of state, and foreign ministers. The doctrine of head-of-state immunity recognizes the unique role played by government leaders and the special sensitivities of exposing them to civil litigation in foreign courts, particularly while they are still in office.

*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).” (Immunities, by John Bellinger, 2008 Opinio Juris “Blog Archive” Immunities, emphasis added).*

59. The US Restatement (1987) vol. 1, para 464, includes the following comment:

“ i. 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 official 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.”*²⁰

60. US courts have accepted the view of the US Government conveyed to the court in individual cases of persons on “special diplomatic missions”.

61. In *Kilroy v Windsor*²¹ a suit was brought against the Prince of Wales for alleged deprivation of plaintiff’s rights under the Constitution and laws of the United States. The plaintiff was 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 then 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.”²² The Department of State, in a letter to the Department of Justice, recognized that the Prince was on a “special

²⁰ 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.”

²¹ *Kilroy v Windsor (Prince Charles, Prince of Wales)*, 1978 Digest of United States Practice in International Law 641; 81 I.L.R. 605.

²² *Ibid*, p. 642.

diplomatic mission” during his visit to the US.²³ The Court proceeded to find that the Prince of Wales enjoyed immunity.

62. In *Li Weixum. v. Bo Xilai*,²⁴ a suit was brought against the Minister of Commerce 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 US 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”.²⁵ The Court then deferred to the views of the Executive that Bo was on a “special diplomatic mission” and found it lacked jurisdiction to try him.
63. In *USA v Sissoko*²⁶, 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 which he claimed was accepted by the US²⁷. The Court rejected the motion asserting that the UN Special Missions Convention is not customary law, basing itself on the fact that neither the US, The Gambia or any member of the UN Security Council have signed the Convention (despite the fact that the UK has signed the Convention as mentioned above).²⁸ Nevertheless, two points are significant. First, the Court does not appear to have considered the question of customary international law regarding special missions,

²³ Ibid, p. 643.

²⁴ *Li Weixum et al. v. Bo Xilai*, 568 F.Supp.2d 35.

²⁵ Department of Justice filed a Statement of Interest and Suggestion of Immunity, p. 10.

²⁶ *USA v Sissoko*, 995 F.Supp. 1469, 1997, 121 I.L.R. 599.

²⁷ Ibid., p. 1470.

²⁸ Ibid., p. 1471.

independent of the Special Missions Convention. Secondly, the Court appears to have followed the evidence of the State Department that Sissoko did not enjoy any diplomatic status, State of certification and that the only recognition of the US had accorded him was the visa he was issued²⁹, without the expression of any other form of consent. By contrast in a case involving HRH Prince Turki Bin Abdulaziz, the Court accepted an suggestion by the State Department that the Prince's appointment as a "special envoy" entitled him to diplomatic status.³⁰

Writings on the customary international law on special missions

64. Relatively little seems to have been written on the customary international law of special missions, and even less seems to reflect deep study of the subject. Such writings as exist are for the most part tentative or unclear. They are also divided as to their conclusions (if any). The guidance that can be deduced from writings in this field is thus limited. But most of the authors appear to favour the existence of some customary international law on special missions, though not as extensive or detailed as the rules set forth in the Convention on Special Missions.³¹

The current status of the international law on special missions: the concept of a special mission and the requirement for consent of the receiving State

65. State practice, including judicial decisions, supports the existence of rules of customary international law on the immunity of State representatives on special missions. The two crucial points are, first, that the concept or scope of a special mission is that it represents the State and is diplomatic in character and, second, a key requirement for the establishment of a special mission is the prior consent of receiving State.

²⁹ Ibid.

³⁰ *Abdulaziz v Metropolitan Dade County* 741 F 2d 1328 (1984) 99 I.L.R. 113.

³¹ See M. Shaw, *International Law* (6th ed., 2008), p. 775, E. Franey, Immunity, Individuals and International Law (2011), pp. 135-149, C. Wickremasinghe, "Immunities enjoyed by officials of States and international organizations", in: M. D. Evans, *International Law* (3rd ed., 2010), pp. 380-410, at p. 390, Oppenheim's *International Law* (9th ed., Jennings and Watts, 1991), para. 533, Brownlie, *Principles of Public International Law* (7th ed., 2008), p. 366, *Satow's Diplomatic Practice* (6th ed., 2009, I Roberts ed.), at para. 3.13; Halsbury's *Laws of England*, 5th edition, volume 61, para. 264.

66. The precise scope of the term ‘special mission’ for the purposes of the customary international law of special missions is undefined. This is not a real problem in diplomatic practice, given the requirement of mutual consent to the sending of a special mission.
67. In the practice of States, special missions are limited to high-level missions that represent the sending State in the way that a permanent diplomatic mission represents that State. This is perhaps why another term for them, commonly used in United States practice, is “special diplomatic missions”.
68. The United Kingdom’s view in this sense was clearly expressed in the course of the negotiation of the Special Missions Convention: see the explanation of vote cited above.
69. The consent of the receiving State, given in advance through diplomatic or other agreed channels, is a central requirement for the sending of a special mission. The importance of such consent was clear during the negotiation of the Convention in the Sixth Committee of the General Assembly, which took place in 1968 and 1969 and in the course of which the role of consent was significantly enhanced.
70. Article 1(a) of the Convention, as finally adopted by the General Assembly, reads as follows:

*“For the purposes of the present Convention:
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 purposes of dealing with it on specific questions or of performing in relation to it a specific task;”*
71. Article 2 of the Convention reads as follows:

“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.”

72. In each case, the words in bold were added in the course of the negotiations in the Sixth Committee. The ILC’s own version of article 2 had read:

“A State may, for the performance of a specific task, send a special mission to another State with the consent of the latter.”

73. The ILC’s Commentary on draft article 2 read as follows:

“(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.”

74. It is clear that States represented in the Sixth Committee were not satisfied with the ILC’s approach; hence the amendments to article 2 requiring that consent be previously obtained through appropriate channels and the inclusion of the consent of the receiving State as part of the definition of a special mission in article 1(a).

75. Consent is central to the operation of the Convention: the functions of a special mission are to be determined by the “mutual consent” of the sending and receiving State (article 3); a State or States which wish to send the same special mission to two or more States shall inform the receiving State of this when seeking its consent (articles 4-6); the sending State must give notice to the receiving State of the size

and composition of the special mission and the names and designations of the persons it wishes to appoint and the receiving State may decline any member of the special mission or declare them “non grata” (articles 8, 11-12); special missions are to have their seat in the locality of the Ministry of Foreign Affairs of the receiving State, unless agreed otherwise; and special missions from two or more States may meet in the territory of a third State “only after obtaining the express consent of that State” and the third State “shall assume in respect of the sending States the rights and obligations of a receiving State to the extent that it indicates in giving its consent” (article 18);

(e) Application of the rules on special missions to the facts of the present case

76. The United Kingdom had not given its consent to Mr. Khurts’ presence on a special mission from Mongolia to the United Kingdom at the time of his arrest (on 17 September 2010). As a result, Mr. Khurts did not benefit from the inviolability and immunity from suit and legal process attaching to a person on a special mission. Nor has consent been given subsequently.
77. The absence of consent is clear from Mr. Martin’s letter [at page 84]. That letter should be regarded by the Court as conclusive as to the facts contained therein. The absence of consent that is clearly stated in the letter is a “fact of state”, and such a statement by the FCO is, under the common law, conclusive. The letter is the common law equivalent of the statutory certificate under s. 4 of the Diplomatic Privileges Act 1964 or s. 21 of the State Immunity Act 1978.
78. For an example of a conclusive statement on behalf of the FO under the common law (before the entry into force of the Diplomatic Privileges Act 1964) see *Engelke v Musmann* [1928] AC 433 (a statement made to the Court by the Attorney-General on the instructions of the Foreign Office as to the status of a person claiming immunity from judicial process on the ground of diplomatic privilege, whether as ambassador or as a member of the ambassador’s staff, is conclusive.); see *R (oao HRH Sultan of Pahang) v. Secretary of State for the Home Department* [2011]

EWCA Civ 616, a recent decision of the Court of appeal of 25 May 2011 as to the effect of a certificate.

79. There is no need for such a communication to take any particular form (such as a “certificate”). It is common practice for the FCO to write a letter to the Court, upon request, which will be treated in the same way as a “certificate”.
80. *Halsbury’s Laws of England* includes in its list of “facts of state”, “(9) the status of a person claiming immunity from the jurisdiction on the ground of his diplomatic status”, and goes on to say, “The court will take notice of such facts of state, and for this purpose, in any case of uncertainty , will seek information from the executive, and the information received is conclusive except where what is involved is the construction of some term in a commercial document or an Act of Parliament. Statute apart, the power of conclusive certification is restricted to matter of fact” (*Halsbury’s Laws of England*, 5th edition, vol 61, pp. 13-15, para. 15). See also F. Vallat, *International law and the Practitioner* (1966), Chapter IV (Foreign Office Certificates); E. Wilmshurst, “Executive Certificates in Foreign Affairs: the United Kingdom”, 35 *International and Comparative Law Quarterly* 157 (1986); *Oppenheim’s International Law* (9th ed., 1991, Jennings and Watts), para. 460; E. Franey, *Immunity, Individuals and International Law* (2011), p. 144 (footnote 160).
81. The letter is in any event an accurate reflection of the communications between the UK and Mongolian authorities. These communications demonstrate nothing which could be construed as consent to the sending by Mongolia to the UK of a special mission including Mr Khurts.
82. The acceptance of a special mission, like the acceptance of a permanent diplomatic mission, is a matter within the discretion of the Executive.

83. As indicated above, the statement by the FCO that HMG had not given its consent to a special mission in the present case is conclusive on that fact. In any event, *even on the basis of what the Mongolian officials say* it is extremely difficult to identify anything which could be construed as consent to a special mission. This is because it is clear that the decision was taken to send the Appellant to the UK prior to any attempt being made to arrange meetings for him. No one was asked to consent to the Appellant's visit. See further the abuse of process section below.
84. The FCO has nevertheless attached internal email correspondence to the affidavit of Ms Julia Longbottom, which confirms that there was no consent. In particular, it shows that Mongolia's claim that the British Ambassador to Mongolia had given consent on behalf of HMG³² is incorrect. Mr. Dickson made clear that (i) he would have to refer the entire issue of security co-operation back matter back to London and (ii) he was told that the Appellant was coming to the UK. He was not asked whether the Appellant could come to the UK for any purpose.³³

(4) THE CLAIM THAT THE APPELLANT ENJOYS INVIOABILITY, AND IMMUNITY AS A PERSON HOLDING HIGH-RANKING OFFICE

(a) Customary law

85. Under the rules of customary international law, Heads of State, Heads of Government and Ministers for Foreign Affairs are entitled to immunity *ratione personae*. This immunity includes inviolability, and complete immunity from criminal jurisdiction. It lasts only during their term of office. Thereafter, former holders of high-ranking office enjoy immunity *ratione materiae* and not in respect of private acts.

³² Opinion of Sir Elihu Lauterpacht dated 11 May 2011, paras. 54, 57-80.

³³ Email of 6 September. See JL/1 page 17.

86. Authority for this is to be found in the International Court of Justice's Judgment of 14 February 2002 in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, where the Court 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.” (I.C.J. Reports 2002, p. 3, at pp. 20-21, para. 51).*
87. The ICJ recalled this paragraph in its judgment of 4 June 2008 in the Case concerning *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France)* (*I.C.J. Reports 2008*, p. 177, at pp. 236-7, para. 170). The three categories of persons mentioned by the ICJ are those who, by virtue of their office are taken as representing the State in its international relations. They may, for example sign treaties without having to produce Full Powers (see article 7 of the Vienna Convention on the Law of Treaties).
88. It is clear from the language used by the ICJ (“certain holders of high-ranking office in a State, such as ...”) that its list is not exhaustive. Thus the same immunity *ratione personae* attaches to certain other holders of high-ranking office in the State to whom similar considerations apply.³⁴ There is as yet not much guidance in State practice as to which other persons are covered. It is also clear from the language used by the ICJ that they had in mind holders of office similar to the three high officials mentioned. The immunity may therefore extend to other persons of Cabinet rank who similarly need to travel to represent their State at the highest levels. It is, in any event, confined to ‘a narrow circle of high-ranking State officials’ (Kolodkin second report para. 94 (i)).

³⁴ “How far such immunities can also be extended to other Ministers or officials may depend on analogous reasoning, based on the involvement of such persons in international relations”: C. Wickremasinghe, “Immunities enjoyed by officials of States and international organizations”, in: M. D. Evans, *International Law* (3rd ed., 2010), pp. 380-410, p. 395.

89. In its judgment of 4 June 2008 in the Case concerning *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France)*, the ICJ did not suggest that either the Djiboutian *Procureur de la République* and Head of National Security enjoyed immunity as persons occupying high-ranking offices in the State; France considered that they “did not, given the essentially internal nature of their functions, enjoy absolute immunity from criminal jurisdiction or inviolability *ratione personae*.” (*I.C.J. Reports 2008*, p. 177, at pp. 241-242, para. 186).

(b) English decisions

90. 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.³⁵ So far as concerns other holders of high-ranking office, English courts (at the magistrates court level) have recognized that immunity *ratione personae* applies to a Defence Minister (*Re Mofaz*, Bow Street Magistrates’ Court, 12 February 2004, 128 ILR 709, *Ehud Barak*, unreported, described in E. Franey, *Immunity, Individuals and International Law* (2011), pp 146-147), and a Minister of Commerce (*Re Bo Xilai*, Bow Street Magistrates’ Court, 8 November 2005, 129 ILR 713).

(c) Application to the facts

91. At the time of his arrest in September 2010, Mr. Khurts Bat was the Secretary of the Executive Office of the National Security Council of the Republic of Mongolia. As such (and assuming that he still holds that office), he would fall well outside the “narrow circle of high-ranking State officials” who, like the Head of State, Head of Government and Foreign Minister, enjoy full inviolability and immunity *ratione personae*. He is not a member of the Cabinet, and or does not otherwise hold comparable high-ranking office in the State. (In British terms he would seem to be a mid-ranking civil servant, perhaps of Director-level in the FCO, as is indeed

³⁵ *Halsbury’s Laws of England*, 5th edition, volume 61, pp. 178-9, para. 363.

suggested by Mr Narhuu in his witness statement, where he suggests that officials of the UK National Security Council were the Appellant's counterparts [page 62].)

(5) THE CLAIM THAT THE CRIMINAL ACTS ALLEGED IN THE ARREST WARRANT WERE OFFICIAL ACTS

92. In his 'Second Supplementary Opinion', dated 20 May 2011, submitted to the Court on behalf of the Republic of Mongolia, Sir Elihu Lauterpacht QC says that

"Mr. Khurts's position should also be assessed by reference to the direct application of the law of State immunity as extended to the conduct of officials acting on behalf of the State". (para.1)

93. The implication (it is no more than that) is that Mongolia now asserts, for the first time, before the Divisional Court, that the acts of which Mr. Khurts is accused were carried out by Mr. Khurts as official acts on behalf of the State.

(a) The terms of the arrest warrant

94. The arrest warrant for Khurts Bat is dated 30 January 2006. It was issued by an investigating judge at the German Federal Court (*Bundesgerichtshof*).

95. The arrest warrant states (under (e)) that Khurts is accused of "abduction" and "serious bodily injury", contrary to specified provisions of the German Code of Criminal Law.

96. The arrest warrant includes (under (e)) the following details of the alleged offences:

The offences are alleged to have taken place between 14 and 18 May 2003, in Le Havre, France, and Berlin, Germany.

"At the latest at the beginning of 2003 the Mongolian Security Agencies decided to mandate the Mongolian secret service to bring the Mongolian

national Enkhbat Damiran, who lived in France. Back to Mongolia by using force.”

“Bat Khurts, who worked at the Mongolian Embassy in Budapest, was entrusted with this mission.”

“Khurts ... lured [Damiran] to a meeting [in Le Havre on 14 May 2003]. ...Bat Khurts and his three companions kidnapped him and took him, after a stopover in Brussels, to the Mongolian embassy in Berlin. There [Damiran] was kept imprisoned in a basement flat where he was repeatedly drugged by injection.” On 18 May 2003, Khurts and others *“managed to get the drugged and wheelchair-bound Damiran through passport control by using a diplomatic passport and flew with him to Ulan Bator”*.

(b) It is unclear whether Mongolia is now claiming that the serious crimes alleged were official acts carried out on behalf of Mongolia

97. The FCO is not aware that Mongolia made any such claim at any time prior to 20 May 2011. No such claim was made before the District Judge in the court below. No such claim was made at the directions hearing on 13 May 2011. Even now the claim is uncertain, with little or no argument or relevant case-law.
98. The Mongolian authorities have at no point informed the FCO that they consider the acts of “abduction” and “serious bodily injury” alleged to have been carried out in France and Germany by Mr. Khurts (who was at the time a member of the Embassy of Mongolia in Budapest) to be official acts of the Republic of Mongolia. They did not do so, for example, in the letter from the Mongolian Foreign Minister to the Foreign Secretary dated 31 December 2010.
99. Nor is the FCO aware that Mongolia has made any such claim to the German authorities, who issued the arrest warrant, with a view to having the warrant withdrawn. This would seem to be the obvious course if it is their position that the

German courts do not, as a matter of international law, have jurisdiction over the offences alleged.

100. It would seem to be all the more obvious the right course since the arrest warrant itself states (under (f)) that “The accused does not benefit from immunity in the Federal Republic of Germany.”

101. It is for the State seeking immunity for one of its officials in respect of official acts to notify the other State or States concerned. This was the approach taken by the ICJ in its judgment of 4 June 2008 in the Case concerning *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v. France)*, paras. ((*I.C.J. Reports 2008*, p. 177, at pp. 243-244, para. 194-197, esp. para. 196). See also the summary of the ILC Special Rapporteur’s *Third report on immunity of State officials from foreign criminal jurisdiction*, R. A. Kolodkin, Special Rapporteur (read out at a public meeting of the ILC on 10 May 2011, not yet issued), which includes the following point:

“f) With respect to an official who enjoys functional immunity the burden of invocation of immunity lies with the State of the official. If that State is willing to protect its official from foreign criminal prosecution by invoking immunity, it must notify the State exercising jurisdiction, firstly, that a person in question is its official and, secondly, that this person enjoys immunity because acts imputed to him were taken in his official capacity. In the absence of such notification the State exercising jurisdiction is not obligated to raise and consider the issue of immunity proprio motu and may, therefore, proceed with the criminal prosecution.”

B: ABUSE OF PROCESS

102. The essence of the Appellant’s abuse of process application is that:

- (i) The FCO “colluded with the issuing judicial authority to encourage the defendant, and his government, to believe that he could travel to the United Kingdom in furtherance of his government’s business; and that they jointly procured his arrest on arrival” (Appellant’s skeleton argument at paragraph 107).
 - (ii) That the FCO and the issuing judicial authority “through its agents in SOCA plainly show that the ordinary diplomatic courtesies were abused to lure the defendant into this country for the purposes of executing an arrest warrant” (Appellant’s skeleton argument paragraph 108).
 - (iii) It is executive lawlessness to entrap a senior representative of a friendly foreign state [paragraph 8 (submission on 12 November 2010)].
103. It is respectfully submitted that the Appellant’s abuse of process application, as formulated above, fails, upon the application of well established principles, for three fundamental reasons. First, because there is simply no evidence of collusion between the FCO and the German authorities in order to encourage the Appellant to enter the United Kingdom; secondly because, taken at its highest, the conduct, as described by the Mongolian officials, does not disclose any abuse; and thirdly because (even such conduct was made out) a breach of diplomatic courtesy would not amount to an abuse of process.
104. The Court is invited to consider this application in light of the procedure for resolving abuse of process applications in *USA v Tollman* [2007] 1 W.L.R. 1157 (Phillips CJ and Cresswell J); Phillips CJ at paragraph 84. According to that procedure:
- (i) No steps should be taken to investigate an alleged abuse of process unless the judge is satisfied that there is reason to believe that an abuse may have taken place.

- (ii) Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process.
- (iii) If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred.

105. The Court also set out the following principles to be applied in extradition proceedings where an abuse of process was alleged:

- (i) Orders for disclosure are not appropriate (see Phillips CJ at paragraph 85).
- (ii) Neither the rules governing disclosure in a civil action, nor those governing disclosure in a criminal trial could be applied to an extradition hearing (paragraph 85).
- (iii) The appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the arrest warrant, or the state seeking extradition in a Part 2 case, for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not (paragraph 89).

106. As is thus plain, it is a matter for the District Judge as to whether he requires information or evidence from an issuing judicial authority or a UK authority in order to determine whether an abuse of process may have taken place. The threshold for such an inquiry is that (i) the conduct alleged, if made out, would constitute an abuse of process and (ii) whether there are reasonable grounds for believing that such conduct may have occurred. It follows from *Tollman* that a

Judge does not need to receive evidence in order to determine an abuse of process application but may instead rely upon information³⁶.

107. Applying *Tollman*, it is submitted that (i) the conduct alleged in this matter is incapable of amounting to an abuse of process and (ii) there are no reasonable grounds for believing that the UK and German authorities colluded so as to encourage the Appellant to enter the UK or that he was encouraged to enter the UK by the FCO so as to procure his arrest.

The conduct alleged

108. The following points emerge from the evidence relied upon by the Appellant (emphasis has been added to those parts upon which particular reliance will be placed):

- (i) The Appellant was asked by the Secretary to the Mongolian National Security Council to travel to the United Kingdom to discuss issues of national security with the head of the UK National Security Council³⁷. He was informed that the Mongolian Ambassador to the UK (Mr Altangerel) would arrange the meeting in time for his visit [Appellant's witness statement at page 52].
- (ii) Mr Bat-Erdene Chinuukhei (First Secretary at the Mongolian Embassy in London) was asked to try and arrange a meeting with members of the UK National Security Secretariat. On 7 September 2010 he spoke to a Mr Hopkins of the FCO to ascertain whether Mr Hopkins had heard from the office of Sir Peter Ricketts [see page 57]. On 13 September (the Appellant's visit having been postponed) the First Secretary spoke to Mr Hopkins who

³⁶ See also *Friesel v Government of the United States of America* [2009] EWHC 1659 (Admin) reliance upon a letter containing hearsay from a prosecutor permitted. Hearsay went to weight not admissibility; per Pill LJ at paragraph 36.1. Criminal rules relating to hearsay did not apply.

³⁷ The National Security Council (NSC) is the UK Government's main forum for discussion of the Government's objectives for national security and about delivery of those objectives. The NSC is chaired by the Prime Minister. The National Security Adviser is Sir Peter Ricketts. He also acts as secretary to the NSC. The NSC comes under the auspices of the Cabinet Office. The Council was set up after the election in May 2010.

said it would be difficult to arrange a meeting with Mr Ricketts). On 16 September, the First Secretary learnt that neither Mr Ricketts nor his deputies would be able to meet the Appellant.

- (iii) Mr Bulgaa Altangerel (Ambassador of Mongolia to the UK) attended a meeting with Ms Rohsler of the FCO on 31 August 2011. He states that they discussed, amongst other matters, the impending visit of the Appellant. He told her that the Mongolian authorities had requested assistance from the FCO to arrange meetings with the UK National Security Council. He informed Ms Rohsler that the Mongolian authorities had still not heard anything about these meetings. He asked Ms Rohsler for assistance. According to the Ambassador, she advised him that it would be better to contact Sir Peter Ricketts' office in order to arrange a meeting. On 16 September, the Ambassador sent a letter to Mr William Nye requesting a meeting [see page 59].
- (iv) Mr Narkhuu (director for International Security at the Secretariat of the National Security Council of Mongolia) suggested that following a meeting between William Nye and the Mongolian Ambassador to the UK in November 2009, it was decided that the Appellant would be the right person to visit the UK [page 62]. The visit was originally to take place in March or April 2010. At the beginning of September 2010, his office asked the Mongolian Ambassador to arrange meetings for the week beginning 13 September 2010. He then states that he instructed the Embassy to fix another date for the meeting when it transpired that neither Mr Ricketts nor his deputy would be available [page 62].
- (v) Mr Narkhuu also refers to a meeting between the UK Ambassador to Mongolia and Mr Enkhtuvshin (Secretary of the Mongolian National Security Council) which took place on 6 September 2010. During that meeting, Mr Narkhuu said that Mr Enkhtuvshin expressed the wish of the Mongolia to establish working relations with the UK National Security Council informing him that Mr Khurts would be leaving for London for this purpose on 13

September and asked Ambassador Dickson for assistance in arranging meetings[page 62] .

- (vi) In a further witness statement, Mr Narkhuu refers to this meeting of 6 September and said that the UK Ambassador fully supported the plan and said that he would convey the request for assistance in arranging the meeting [page 64].
 - (vii) Mr Enkhtuvshin confirmed that Mr Narkhuu's account of his conversation with the UK Ambassador was correct [page 65]. He also stated that at the meeting of 6 September 2010 he informed Ambassador Dickson that the Appellant was being sent to London on 13 September and the purpose of his visit was to meet the head of the National Security Council [page 68]
 - (viii) Mr Keogh, a SOCA officer, has given an account of his involvement in this case prior to the arrest of the Appellant. His involvement was prompted by the Appellant's application for a visa (the Appellant was circulated as having been wanted since 6 March 2006). Having ascertained that the Appellant did not have diplomatic immunity, he requested the European Arrest Warrant from the German authorities. He was contacted by the FCO in September 2010 and told the dates that the Appellant would be visiting the UK [page 45].
109. The Court is also asked to note that in an undated witness statement (submitted for the first time in the appeal proceedings), Damdin Tsogtbaatar (the Secretary of State for Foreign Affairs and Trade for Mongolia) states that the Government of Mongolia accepts that there could be no question of the UK tipping off the Appellant that he was wanted on a European Arrest Warrant. He accepts that such a course would have been illegal and equally unacceptable for Mongolia (see paragraph 35). It is therefore assumed that it will not be argued (as part of the abuse of process application) that the FCO ought to have informed the Appellant that he was wanted on a European Arrest Warrant.

110. It is respectfully submitted that the particulars of abuse, as set out in the evidence of the Mongolian officials, are very far removed from the type of conduct categorised as abusive in this jurisdiction.
111. The first point which may be made is that the Mongolian authorities evidently decided that they would send the Appellant to the UK on a speculative basis. On the account given by the Mongolian officials, the arrangements were made, to send the Appellant to the UK, without any meeting having been arranged for him by the FCO or the National Security Council.
112. No Mongolian official provides any evidence that he was encouraged to believe that the Appellant would be meeting members of the National Security Council and *for that reason* decided to send the Appellant to the United Kingdom.
113. This crystallises in respect of the evidence given about Mr Dickson, UK Ambassador to Mongolia. Little is actually said about the role which Ambassador Dickson played by any Mongolian official (in contrast to how much reliance is now placed upon Ambassador Dickson, in this appeal, as having consented to the visit as a special mission). The evidence of Mr Narkhuu is limited but the following points emerge from it:
- (i) The meeting between Ambassador Dickson and Mr Enkhtuvshin did not take place until 6 September 2010 (note that the Appellant was due, at that point, to travel on 13 September).
 - (ii) Mr Enkhtuvshin informed Ambassador Dickson that the Appellant *would* be leaving for the UK on 13 September 2010. In other words, the Ambassador was not being asked to consent to the Appellant coming to the UK for any purpose.
 - (iii) Mr Enkhtuvshin asked Ambassador Dickson for help in arranging meetings between the Appellant and UK counterparts. In other words, the visit was taking place despite no such visits having been arranged.

114. The evidence of the meeting which took place at the FCO on 31 August 2010 takes the abuse allegations no further. According to the Mongolian Ambassador to the UK (Ambassador Altangerel), he informed Ms Rohsler that the Mongolian Embassy had previously informed the FCO of the Appellant's trip. There is however no evidence from any other Mongolian official that they specifically approached the FCO about the *Appellant* visiting the UK prior to 31 August 2010 and it would appear that Ambassador Altangerel is in error about this. This is demonstrated by the evidence of Mr Narkhuu who expressly states that "*At the beginning of September 2010 my office asked Ambassador Altangerel to arrange a meeting with British counterparts during the week beginning 13 September 2010....*" [page 62]. This demonstrates just how shortly before the Appellant's planned visit to the UK the Mongolian authorities initiated arranging meetings for him.
115. It is extremely difficult to see how any allegation can be made that the FCO *lured* or *entrapped* the Appellant into the UK in light of this evidence. It is equally difficult to see how this conduct could possibly have constituted *encouragement* to the Mongolian authorities to send the Appellant to the UK given that Mongolia had already decided to send the Appellant to the UK.
116. Far from the evidence of the Mongolian officials demonstrating encouragement, all of the evidence is to the effect that UK officials did nothing to encourage the belief that the Appellant would meet a member of the UK National Security Council in the near future. *Before* the Appellant left for the UK it had been conveyed to the Mongolian authorities on 7 September 2010 and 9 September 2010 that no response had been received by the FCO desk officer from the office of Sir Peter Ricketts about a meeting [see the witness statement of Mr Chinuukhei [page 57]. Furthermore it is stated that on 13 September 2010, the Desk Officer said that it would be *difficult to arrange a meeting* with Sir Peter Ricketts owing to his busy schedule [57]. Finally on 16 September 2010, Mr Chinuukhei states that he was told by the Desk Officer, that it would not be possible for Sir Peter Ricketts or any

of his deputies to meet the Appellant. It is untenable to suggest that these conversations constituted a form of encouragement.

117. Nor is there any evidence that the UK and German authorities colluded so as to lure the Appellant into the UK. First, for all of the reasons set out above, the evidence of the Mongolian officials does not disclose luring or encouragement. Secondly, the height of the evidence is that SOCA³⁸ sought the European Arrest Warrant from the German authorities it having been determined that the Appellant had no diplomatic immunity. The warrant appears to have been transmitted in March 2010 and was certainly certified on 13 April 2010. There is no evidence, taking the Appellant's evidence at its highest, that the UK authorities knew, at this stage, the reason why the Appellant was coming to the UK. There is no evidence and indeed no suggestion by any Mongolian official that in March 2010 they were trying to arrange meetings between the Appellant and his counterparts in the National Security Council.
118. For all of these reasons, it is respectfully submitted that this application must fail. Applying *Tollman* (i) there is no evidence to believe any conduct amounting to an abuse took place and (ii) taken at its highest the conduct alleged would not amount to an abuse.
119. The most the Appellant can possibly say is that the UK authorities granted him a visa and either should not have granted him one or should have informed him that there was a warrant in existence for his arrest. Neither contention is sustainable (as the Government of Mongolia recognizes as regards the latter). The idea that the UK should not grant visas to persons who are wanted is entirely unrealistic. The UK owes no duty to such individuals. A visa provides a permission to enter the United Kingdom and no more. It is a matter for the individual whether they use it or not. The gulf between this complaint and the type conduct which constitutes abuse of process in this jurisdiction is apparent from domestic jurisprudence.

³⁸ Which is not, contrary to that asserted by the Appellant, an agent of the FCO or the Issuing Judicial Authority.

Legal principles: abuse of process

120. Even if any abuse of diplomatic courtesy was made out on the face of the abuse of process application, on well established principles, this would not render the City of Westminster's court proceedings an abuse of process. To the extent that it might be suggested (see paragraph 114 of the skeleton argument) that the test for abuse as applied to a suspected criminal should be modified here to reflect the Appellant's position, it is submitted that this is erroneous. The essential test or the threshold to be reached in determining whether conduct constitutes an abuse is whether it degrades the rule of law. It does not require any gloss.

121. As a matter of domestic law, the court's abuse of process jurisdiction is commonly said to arise in two broad circumstances. The first is where a fair trial will not be possible and the second is where a trial of the accused would offend the Court's sense of justice and propriety in the particular circumstances of the case. The unlawful deportation or removal of an individual from a foreign State to the United Kingdom may well give rise to an abuse of the second type; *R v Mullen* [2000] QB 520; *R v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42. In *Bennett* the issue before the House of Lords was (per Lord Bridge at page 64) whether it was a valid ground of objection to the exercise of the court's jurisdiction to try a defendant whose presence the prosecuting authority had secured within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of another State, in violation of international law, in violation of the laws of the State from which he was abducted and in disregard of available procedures to secure his lawful extradition to the UK.

122. The issue was one of upholding the rule of law (per Lord Bridge at page 67):

“When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that

circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view”.

123. In *Ex Parte Westfallen*, Lord Bingham considered that there must be:

“.. grounds for objection if the British authorities knowingly connive at or procure an authorised deportation from a foreign country for some ulterior or wrongful purpose. The question in each of these cases is whether it appears that the police or prosecuting authorities have acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign states or abused their powers in a way that should lead this court to stay the proceedings against the applicants” [page 665].

124. Inherent in all conduct said to constitute an abuse of process is the *degradation of the lawful administration of justice*; *R v Mullen* [2000] QB 520; *R v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42 and *Reg. v. Latif* [1996] 1 W.L.R. 104. These principles were reiterated by the Supreme Court in *R v Maxwell* [2010] UKSC 48. Although the Judgment in that case has not been reported (pending trial) it was expressly cited by the Privy Council in *Warren v A-G of Jersey* [2011] UKPC 10 (per Sir John Dyson SCJ) at paragraph 22:

*“It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will ‘offend the court's sense of justice and propriety’ (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 ,*

74G) or will ‘undermine public confidence in the criminal justice system and bring it into disrepute’ (per Lord Steyn in *R v Latif* [1996] 1 WLR 104 , 112F).”

125. In *Warren* the Board considered whether it was correct that there were certain types of abuse which would inexorably lead to a stay. It rejected this (per Sir John Dyson at paragraph 25):

“25. Mr Farrer QC suggested that it is possible to identify categories of cases where the court will always grant a stay. He gave as examples the unlawful abduction cases (such as *Ex p Bennett* [1994] 1 AC 42 and *R v Mullen* [2000] QB 520); entrapment cases (such as *R v Looseley* [2001] 1 WLR 2060); and cases which involve the breach of an assurance that there will be no prosecution in circumstances such as those that occurred in *R v Croydon Justices, Ex p Dean* [1993] QB 769.

26 The Board recognises that, at any rate in abduction and entrapment cases, the court will generally conclude that the balance favours a stay. But rigid classifications are undesirable. It is clear from *Latif* and *Mullen* that the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute. It is true that in *Bennett* the need for a balancing exercise was not mentioned, but that is no doubt because the House of Lords considered that the balance obviously came down in favour of a stay on the facts of that case (the kidnapping of a New Zealand citizen to face trial in England)”.

126. There is little authority on abuse of process linked to the conduct of UK officials in the context of extradition. In the case of *In re Schmidt* [1995] 1 A.C. 339 the House of Lords considered, *obiter*, whether the conduct of the police amounted to an abuse of process in circumstances where a police officer secured the presence of the applicant in the UK by untruthfully telling him that he was wanted for

questioning in respect of a cheque fraud. The accused was told that if he did not attend then his name would be circulated as a suspect and that that he would be arrested when his presence in the United Kingdom next came to the notice of the authorities. This was simply a device to persuade the applicant to enter the United Kingdom. The reality was that he was wanted for extradition to Germany.

127. In a speech, with which all members of the House of Lords agreed, Lord Jauncey rejected that this constituted an abuse of the extradition court's process [page 379]:

“There was in this case no question of forceable abduction as in Bennett. The only sanction attached to the ruse was that the applicant, if he did not attend a meeting with D.S. Jones in England, would be arrested when his presence in England was next detected by the authorities. In these circumstances to suggest that he had no alternative but to come to this country and was thereby coerced seems to me to be unrealistic. Had he chosen to remain in Ireland, there was nothing that the authorities here could have done about it. At the very worst, he was tricked into coming to England but not coerced”.

128. This part of the Judgment in *Re Schmidt* was obiter but this is largely immaterial for the purposes of this case because there is no peg whatsoever upon which to hang an abuse argument. Modern law is that entrapment and forcible abduction cases will probably result in a stay but that is not necessarily so. There was nothing here which approached forcible abduction; manipulation of foreign deportation law; or entrapment. There was no illegality on the part of any FCO official.

The evidence of Julia Longbottom

129. The first statement of Ms Longbottom (dated 22 December 2010) was prepared in order to set out to the parties and to the Court, at first instance, that the FCO did not accept that anything which it had done constituted an abuse of process. It was served upon both of the parties below, and only with their consent, upon the District Judge.

130. Upon an application of the *Tollman* principles recourse to this witness statement would only be necessary if it was considered that there was anything alleged in the abuse of process application which required further information from the FCO. It is submitted that the abuse of process application can be dismissed without any need to consider the witness statement. In other words, the abuse application falls at the first hurdle.
131. Ultimately this witness statement demonstrates that there is little which is in factual dispute between the parties. It comes back to the fundamental point that the Mongolian authorities had decided that the Appellant would visit the United Kingdom prior to any meetings being arranged for him and absent any encouragement being given that such meetings would take place.
132. The bald assertion is made in the Appellant's skeleton argument that, in respect of the first Longbottom witness statement and the letters sent to the Court by the FCO, that because *no-one supported the various hearsay statements of the FCO, the challenged statements in those letters were not evidence* (skeleton argument at paragraph 12).
133. The legal basis for this assertion is unknown. The view expressed in the letter of 12 January 2011 was provided at the request of the Court and constituted the view of the Secretary of State as to whether the FCO had consented to the Appellant's visit as a special mission. Such letters are the usual vehicle by which such views are expressed to courts by the FCO. This is an expression of a Governmental view, it is not hearsay.
134. In any event extradition proceedings proceed on the basis of witness statements containing hearsay and upon the communication of information by way of letter. Extradition would be impossible if this were not the case. Reference need only be made to the *Tollman* procedure to see that the Court expressly envisaged that information (as distinct from evidence) could be communicated to the Court whether it was from a foreign authority or a UK authority. In *Friesel v Government*

of the United States of America the Court dismissed in short terms the argument that a letter (from a prosecuting Attorney in the United States) could not be relied upon because it contained hearsay (see above at footnote 36). The Court made the obvious point that hearsay went to weight not admissibility.

135. A further witness statement from Ms Longbottom has been submitted in these proceedings in order to produce contemporaneous email correspondence which is relevant to the international law arguments. No proper objection can be taken to the admission of this witness statement.

CONCLUSION

136. The Court is respectfully asked to dismiss this appeal on grounds that (i) the Appellant does not enjoy inviolability or immunity in respect of these extradition proceedings; and (ii) the extradition proceedings do not constitute an abuse of process.

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ANNEX

JURISDICTION TO HEAR AN APPLICATION FOR A WRIT OF HABEAS CORPUS.

1. There is no jurisdiction on the part of this Court to consider the application for a writ of Habeas Corpus. Such jurisdiction is expressly excluded by section 34 of the Extradition Act 2003 which provides that:

“ a decision of the judge under this Part may be questioned in legal proceedings only by means of an appeal under this Part”.
2. The decision which the Appellant seeks to challenge is that of the District Judge to order his extradition. That decision is, in its entirety, capable of being challenged within the statutory appeal process. The application for a writ of Habeas Corpus is both unnecessary and impermissible. The entire purpose of the Extradition Act 2003 was to simplify the extradition process and to remove collateral challenges to extradition outwith the statutory scheme. The instant application for Habeas Corpus is precisely the sort of application which the 2003 Act makes impermissible.
3. That it is unnecessary is apparent from the fact that the content of the habeas corpus application replicates the statutory appeal. The notion that such an application might be necessary so as to create a Government respondent is simply wrong. The Respondent to a Habeas Corpus application is the Governor of the prison where the person is held- habeas corpus cannot be used to force a Government or a Government Department into being a Respondent to proceedings (see the witness statement of the Appellant’s solicitor at Tab 11, paragraph 4). By contrast, the Court has a flexible jurisdiction to allow Interested Parties to intervene in statutory appeals. It is by virtue of that jurisdiction that the Foreign and Commonwealth Office and the Government of Mongolia have been able to intervene in the instant appeal.
4. The scope of section 34 (and its Part 2 analogue, section 116) has been considered in a number of cases. It has been recognised that there is a narrow category of exceptional circumstances which may give rise to challenge to a decision in the extradition process outwith a statutory appeal. This only arises in two categories. The first is where there is a supervening event, following the exhaustion of the statutory procedures under the Act, which necessitates a further consideration, particularly on human rights grounds; *The Queen on the Application of Navadunskis v The Serious Organised Crime Agency* [2009] EWHC 1292 (Admin); *Gary McKinnon v Government of the USA, Secretary of State for the Home Dept* [2007] EWHC 762 (Admin).
5. The second category is a decision of the District Judge, within the extradition process, which does not amount to a “decision” for the purposes of section 34 or

116. In short these are decisions in respect of which the Extradition Act 2003 does not provide any route of appeal. Examples of these circumstances are:

- (i) A judge's refusal to adjourn *Benjamin Herdman v City of Westminster Magistrates' Court* [2010] EWHC 1533 (Admin); *Olah v Regional Court in Plzen, Czech Republic* [2008] EWHC 2701 (Admin);
 - (ii) A decision under Section 4(3) of the 2003 Act (which requires that a person arrested under a Part 1 warrant “must be brought as soon as practicable before the appropriate judge”). *Regina (Nikonovs) v Governor of Brixton Prison and another* [2006] 1 W.L.R. 1518
 - (iii) A judge's refusal to discharge an offender pursuant to s.75(4) of the 2003 Act (date by which an extradition must begin) *Asliturk v City of Westminster Magistrates' Court* [2010] EWHC 2148 (Admin)
6. The Administrative Court in *Mann v The City of Westminster Magistrates' Court, Serious Organised Crime Agency* [2010] EWHC 48 (Admin) [per Lord Justice Moses at paragraphs 11-12] described the residual jurisdiction in the following terms:
- “In my view, there is no arguable basis upon which this court can now intervene. In relation to extradition under Part 1 of the 2003 Act, s.34 has removed the possibility of either a remedy by way of habeas corpus or of judicial review (see *R (Hilali) v Governor of Whitewall Prison and Another* [2008] UKHL 3 [2008] 1 AC paragraphs 17 and 36). The only circumstances in which this court's jurisdiction may be invoked to intervene by way of judicial review were identified by this court in *The Crown (Navadunskis) v The Serious Organised Crime Agency* [2009] EWHC 1 292. The court concluded that Part 1 of the 2003 Act removed the possibility of collateral challenges which extend and delay the process of extradition (see *Maurice Kay LJ* § 15, *Collins J* at § 32). But the court did accept that in circumstances where substantial supervening events had arisen after the time limit for a statutory appeal, the court had an exceptional jurisdiction to intervene in order to comply with its obligation under the Human Rights Act 1998 . But such substantial intervening events were acknowledged to be genuinely supervening events such as an outbreak of genocidal behaviour or an unforeseen medical affliction which arose after the time of the extradition hearing (see § 20)”.
7. The Appellant’s case falls into neither the “supervening event” category nor the residual category of cases where there is no statutory route of appeal available. His appeal and application for habeas corpus are identical. It is respectfully submitted that the Court ought to conclude that it has no jurisdiction to consider the application for habeas corpus.

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3 Raymond Buildings
Grays Inn

2 June 2011.

A Divisional Court

**Khurts Bat v Investigating Judge of the Federal Court
of Germany**

[2011] EWHC 2029 (Admin)

B 2011 June 23, 24; July 29 Moses LJ, Foskett J

C *Conflict of laws — Sovereign immunity — Diplomatic immunity — Defendant's extradition sought in respect of crimes of kidnap and false imprisonment committed in other EU member states when Head of Mongolian Office of National Security — Defendant arrested in United Kingdom pursuant to European arrest warrant — Whether on special mission to United Kingdom on behalf of Mongolian Government at time of arrest — Whether enjoying immunity in customary international law — Whether enjoying immunity from criminal jurisdiction *ratione personae* as holder of high-ranking office — Whether state officials enjoying immunity *ratione materiae* in respect of acts committed in third states — Whether defendant immune from extradition from United Kingdom*

D The defendant, who was the Head of the Office of National Security of Mongolia, was arrested in the United Kingdom pursuant to an European arrest warrant issued in Germany with a view to his prosecution there for offences of kidnap and false imprisonment. The warrant alleged that in 2003 the defendant, together with three other members of the Mongolian Secret Service, had kidnapped a Mongolian national in France, believing him to have been involved in the assassination of the Mongolian Minister of the Interior five years previously, and taken him to the Mongolian Embassy in Berlin where they held him for several days before taking him back to Mongolia. Before the extradition hearing, in response to a request from the district judge, the Secretary of State for Foreign and Commonwealth Affairs wrote to the district judge expressing the view that the defendant had not been on a special mission to the United Kingdom on behalf of the Mongolian Government at the time of his arrest and stating that the Foreign and Commonwealth Office had not consented to the defendant visiting the United Kingdom on a special mission.

E The district judge ordered the defendant's extradition to Germany. The defendant appealed on the grounds, *inter alia*, that he enjoyed immunity in customary international law on the bases that (i) at the time of his arrest he had been visiting the United Kingdom on a special mission on behalf of the Mongolian Government, (ii) at the time of his arrest he had been representing his government as a very high-ranking civil servant, and (iii) the crimes in respect of which his extradition was sought were official acts committed by him on the orders of the Mongolian Government.

F On the appeal—

G *Held*, dismissing the appeal, (1) that the essential requirement for the recognition of a special mission was that the receiving state had given its prior consent to it and thereby recognised the special nature of the mission and the status of inviolability and immunity which participation in that special mission conferred on the visitor; that, although no one on behalf of the United Kingdom Government had told the defendant that he was not welcome to visit or had tried to dissuade him from coming, that was not to be equated with consent to his visit as a special mission which, on the facts, had not been given, and that, accordingly, the defendant could not claim to enjoy immunity by virtue of having been on a special mission at the time of his arrest (post, paras 27, 29, 41-43, 45-46, 102-103, 109, 111).

H (2) That the paradigm of those who in customary international law enjoyed immunity *ratione personae* from both civil and criminal jurisdiction in other states

- A *R (Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616, *The Times*, 13 June 2011, CA
Schmidt, In re [1995] 1 AC 339; [1994] 3 WLR 228, [1994] 3 All ER 65, HL(E)
Syrian National Immunity Case (1998) 127 ILR 88
Tabatabai (1983) 80 ILR 389
Warren v Attorney General for Jersey [2011] UKPC 10; [2012] 1 AC 22, [2011] 3 WLR 464, [2011] 2 All ER 513, PC

B

The following additional cases were cited in argument:

- Chong Boon Kim v Kim Yong Shik* (1963) 81 ILR 604n
Kilroy v Windsor (1978) 81 ILR 605n
Liangsirprasert (Somchai) v Government of the United States of America [1991] 1 AC 225, [1990] 3 WLR 606, [1990] 2 All ER 866, PC
Psinakis v Marcos (1975) 81 ILR 605n
- C *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42; [1993] 3 WLR 90; [1993] 3 All ER 138, HL(E)
Trendtex Trading Corp v Central Bank of Nigeria [1977] QB 529, [1977] 2 WLR 356; [1977] 1 All ER 881, CA
United States of America v Sissoko (1997) 121 ILR 599

APPEAL from District Judge Purdy sitting at the City of Westminster Magistrates' Court

D

By a notice of appeal dated 22 February 2011, the defendant, Khurts Bat, appealed under section 26 of the Extradition Act 2003 against the decision of District Judge Purdy sitting at City of Westminster Magistrates' Court on 18 February 2011 to order his extradition to the Federal Republic of Germany pursuant to an European arrest warrant which had been issued by the German judicial authority with a view to the defendant's extradition for the purpose of being prosecuted for the offences of kidnap and imprisonment. The grounds for the appeal were that (1) the defendant enjoyed immunity from prosecution as a person engaged upon a special mission; (2) the defendant enjoyed immunity as a high-ranking civil servant representing the Mongolian Government, (3) the criminal process brought against the defendant was an abuse of process since he had been lured into the United Kingdom by police officers who had connived with the German prosecuting authorities; and (4) the defendant enjoyed immunity because his actions had been official acts undertaken by order of the Mongolian Government.

E

F

The facts are stated in the judgment of Moses LJ.

G

Alun Jones QC (instructed by *J D Spicer & Co*) for the defendant.

The district judge's findings demonstrate that the United Kingdom authorities encouraged the defendant's visit to the United Kingdom to facilitate enforcement of an European arrest warrant. The arrest and detention of the defendant therefore violated article 29 of the United Nations Convention on Special Missions of 8 December 1969 ("the New York Convention"). Although neither Mongolia nor the United Kingdom has ratified that Convention it should be treated as having effect on accepted principles of customary law: see *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529; article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969 and *Kilroy v Windsor* (1978) 81 ILR 605n. Although Britain should have consented to the defendant's visit for a special

H

A themselves of that advantage is slight. There was no collusion or entrapment of the defendant, who should be extradited to Germany for the grave charges raised against him to be properly tested.

Sir Michael Wood and Clair Dobbin (instructed by *Treasury Solicitor*) for the Foreign and Commonwealth Office, as an interested party.

B Customary international law is not part of the law of England but rather one of the sources of English law. There is no treaty in force between the United Kingdom and Mongolia governing the inviolability and immunity of persons on special missions. In any event the United Kingdom is not in breach of any obligations which might exist as to special missions. Whilst customary international law does mean that for the duration of a special mission its members enjoy immunity, not all provisions of the United Nations Convention on Special Missions (1969) reflect customary law. In Britain there has been an awareness of the importance of special missions and an awareness of such missions as attracting immunity on a customary basis: see *In re Bo Xilai* (2005) 128 ILR 713. In *Kilroy v Windsor* (1987) 81 ILR 605 it was accepted that the United States of America should give effect to the notion of special missions immunity and *United States of America v Sissoko* (1997) 121 ILR 599 did nothing to detract from that position. In *Tabatabai* (1983) 80 ILR 389 the United States Federal Supreme Court found that, in addition to the New York Convention, a customary international law rule already subsisted to the effect that an ad hoc envoy should enjoy immunity. However the equal importance of prior consent for the establishment of a special mission under either customary law or treaty is demonstrated in *Tabatabai* and the *Syrian National Immunity Case* (1998) 127 ILR 88. The importance of clear acceptance of status by the United Kingdom is illustrated by *R (Sultan of Pahang) v Secretary of State for the Home Department* *The Times*, 13 June 2011 and *Engelke v Musmann* [1928] AC 433. A special mission capable of attracting diplomatic immunity is characterised by an envoy who can be seen clearly to represent his state and whose mission is diplomatic in character. The United Kingdom Government had not given its consent to the defendant's supposed mission in the present case and that can be certified to the court by the Foreign and Commonwealth Office as a fact which represents the genuine United Kingdom position as to his visit. Such certification has the same weightiness as the executive's right to inform the courts as to its recognition of states which is established by such cases as *Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 and *The Arantzazu Mendi* [1939] AC 256.

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H The established immunity *ratione personae*, to which heads of state, heads of government and ministers for foreign affairs are entitled under customary law, subsists only for the duration of the person's time in office, after which the immunity becomes *ratione materiae* and does not subsist in relation to private acts: see *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3 and *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177. Such immunity should include people of cabinet rank. In the present case immunity is claimed by someone who has not been a cabinet member and who did not otherwise hold a comparable high-ranking office in the state.

A Jones QC, on behalf of the defendant, does not withdraw this application, he advances no reason as to why it is necessary to pursue it. The defendant and counsel acting for the Home Department wish to contend that this court has no jurisdiction to hear such an application by virtue of section 34 of the 2003 Act. There is no need to reach any conclusion as to this issue.

B *Facts*

2 It is necessary to set out some of the facts leading to the arrival of the defendant in the UK on 17 September 2010. They are relevant to the issue of whether he is entitled to immunity because he was travelling on a special mission and the argument that the extradition proceedings amount to an abuse of process. But I should make it clear at the outset that the FCO contend that a letter sent to the district judge dated 12 January 2011 from the Director of Protocol is conclusive as to the facts it asserts and this court must accept those facts. I should add that it would, in any event, be necessary to consider the facts for the purposes of ruling on the argument as to abuse of process.

C 3 The European arrest warrant asserts that the offences were committed between 14 and 18 May 2003 at Le Havre, France/Berlin, Germany. The warrant states:

D *Facts*
“On 14 May 2003 the accused Khurts Bat and three other unidentified members of the Mongolian secret service attacked the Mongolian national Enkhbat Damiran, kidnapped him and abducted him to Berlin. On 18 May 2003, they took him by plane to Mongolia where he was imprisoned.”

E “Further details: At the latest at the beginning [sic] of 2003 the Mongolian security agencies decided to mandate the Mongolian secret service to bring the Mongolian national Enkhbat Damiran, who lived in France, back to Mongolia by using force. Enkhbat Damiran, was accused of having been involved in the assassination of Mr Zorig, the Mongolian Minister of the Interior, on 2 October 1998.”

F “Bat Khurts Bat, who worked at the Mongolian Embassy in Budapest, was entrusted with this mission. Based on information provided by Mongolian nationals who also lived in France, Khurts Bat established the whereabouts of Enkhbat Damiran and lured him to a meeting. When Enkhbat Damiran arrived at the agreed place in Le Havre on 14 May 2003, Bat Khurts Bat and his three companions kidnapped him and took him, after a stopover in Brussels, to the Mongolian Embassy in Berlin. There, Enkhbat Damiran was kept imprisoned in a basement flat where he was repeatedly drugged by injection. On 18 May 2003, Bat Khurts Bat and his companions took him to Tegel Airport in Berlin. They managed to get the drugged and wheelchair-bound Damiran through passport control by using a diplomatic passport and flew with him to Ulaan Baator. After his arrival Enkhbat Damiran was imprisoned and questioned about the assassination. The investigations against him have been stopped. At present he is serving a prison sentence.”

H The offences were certified as abduction and serious bodily injury. The warrant stated that the defendant did not benefit from immunity in the Federal Republic of Germany.

A was travelling to have meetings with the Mongolian Ambassador in London. The e-mail records that the defendant gave no other details. That information, confirmed in a subsequent note of 16 April 2010, is of importance. It makes no suggestion that the visit had anything to do with the earlier discussions in October and November 2009, still less made any reference to a special mission for the purposes of security collaboration.

B 9 On 13 April 2010 Mr Keogh notified the ECOs in Beijing that SOCA had obtained a full warrant from the Germans. On 15 April 2010 the Management Officer for Visa Operations, based in Beijing, notified the UK Ambassador in Mongolia and informed him that the visa would not be issued until confirmation from the ambassador. On the same date, 15 April 2010, the ambassador contacted the desk in London, in the expectation that the defendant would travel the following Saturday. He said: "Obviously, we need to get our lines sorted out by COP [close of play] tomorrow, Friday." C He notified the desk of the sequence of e-mails and asked that the press office and ministers should be briefed "armed with lines in advance". He was expecting protests, he foresaw the need to give an explanation and that he would be "thrown" to the media. He expected the Mongolian Ambassador to ask why the Mongolian authorities had not been informed in advance and asked whether there was "some sort of relevant international or bilateral D legal instrument that we can point to". The response from the desk stressed the importance of co-ordinating lines and action in London but did not anticipate "too much difficulty, bar the fact that he is a diplomat". It is worth noting that no advice appears to have been given by the Foreign Office desk responsible for Mongolia. The cause of concern was the diplomatic status which it was believed the defendant enjoyed. An e-mail from an E ECO in Beijing dated 16 April 2010 reiterated that the defendant was intending to have meetings with the Mongolian Ambassador in London, recorded that he had a valid Schengen visa, and continued:

F "I am fully aware of Home Office information and cases being authorised at the highest level, please also refer to Home Office information if this information is still valid and current and should be acted upon. The [defendant] is due to travel sometime in June 2010, no confirmed travel date as of yet."

G 10 Whilst the interchange of e-mails between the Border Authority, SOCA and the FCO is part of the context in which subsequent events took place, nothing within them establishes that there was any thought of, let alone discussion about, a special mission. The exchange in March and April relating to the application for the visa was not even associated with the discussions in October and November 2009 relating to security co-operation between the UK and Mongolia.

H 11 Nothing further occurred in relation to the proposed visit until 31 August 2010. On that date the Mongolian desk at the FCO told Mr Dickson, the Ambassador in Mongolia, that there had been a meeting with the Mongolian Ambassador to discuss what was described as "the round table agenda". According to the desk, the ambassador had said that he was finalising the delegation whose members were identified by name. There was no mention of the defendant amongst them. The e-mail informed the UK Ambassador that the delegation would arrive in London on Saturday 25 September 2010 and described proposed sessions. It finished by

A fairly non-productive conversation then. It was a bit different this time. He said he had been talking to Altangerel in London about establishing with UK counterparts on national security issues (we have seen this come up before). He added that there are a number of motives behind this . . . He cited the growth of Islamic fundamentalism in Mongolia as an issue; there are about 150,000 Khlazakh.[sic] Moslems in the west of the country. I said *that I had no instructions of course*, but that my instinct was that this was something we would like to look at especially in CT [counter-terrorism] and CP [counter-proliferation]. We had recently established our own NSC, we were looking at ways of expanding our co-operation with Mongolia, and we had the UK/Mongolia round table on 27 September—perhaps there might be scope to include this in our *initial closed session*. I said I would report to London on our conversation and suggested he brief Altangerel. He seized on this enthusiastically and said that the Head of the Executive Office of the National Security Council, Khurts Bat, *would be calling* on William Nye, Director of the NSC Secretariat in London, next week. I would have thought that this could be a promising area for discussion, at least at a preliminary level on 27 September, and a demonstration of our willingness to broaden the substance of our relationship.” (Emphasis supplied.)

16 Shortly after, on the same day, the FCO Desk told the UK Ambassador, in an e-mail, that the defendant was the subject of an International arrest warrant and would be arrested upon arrival. The author continued:

E “But as he is travelling officially now, and from discussions with Altangerel last week, it looks like he will (or was) going to be part of the Mongolian delegation at the round table. Do you know whether Khurts Bat has a visa or provided any details of his flight/times?”

The same day Julia Longbottom, Head of the Far Eastern Group at the FCO, e-mailed the ambassador saying:

F “This seems like a good idea in principle. Our challenge will be to work out what is in it for the UK . . . You will need to test this out here, I guess starting with CPD [counter-proliferation] colleagues.”

17 Mr Narkhuu, Director for International Security at the National Security Council of Mongolia’s Secretariat, confirms Mr Tsagaandari’s account of the meeting on 6 September 2010 and noted that the UK Ambassador fully supported the Mongolian plans and shared Mr Tsagaandari’s views and ideas on how to make “this endeavour” a success. He also notes that Mr Tsagaandari informed the ambassador that the defendant “would be leaving for London” for the purpose of establishing working relations with the UK National Security Committee on 13 September. He recalls, in a later statement, that the Mongolian Ambassador said that he would immediately convey the request to assist in arranging a meeting for the defendant during his intended visit.

18 On 7 September 2010 the FCO informed Mr Keogh that the defendant would arrive in the UK between 13 and 17 September. On the same day Mr Chnuukhei, First Secretary to the Mongolian Embassy, spoke

A *Immunity on the grounds that the defendant was a member of a special mission*

22 The court had the benefit of submissions from both Sir Elihu Lauterpacht QC and Sir Michael Wood, whose authority and expertise in the field of international law are unlikely to be equalled. It is a pity not to record their submissions in full since they were so illuminating but it is unnecessary because there was a large measure of agreement. It was agreed that under rules of customary international law the defendant was entitled to inviolability of the person and immunity from suit if he was travelling on a special mission sent by Mongolia to the UK with the prior consent of the UK. It was agreed that whilst not all the rules of customary international law are what might loosely be described as part of the law of England, English courts should apply the rules of customary law relating to immunities and recognise that those rules are a part of or one of the sources of English law. It was agreed that there is no treaty in force between the UK and Mongolia governing the inviolability and immunity of persons on special missions. There are 38 states which are parties to the United Nations Convention on Special Missions of 8 December 1969 (“the New York Convention”) which entered into force on 21 June 1985. But although the UK signed the Convention on 17 December 1970, it has not ratified it. Mongolia is neither a party to the Convention nor has it signed it. Article 18 of the Vienna Convention on the Law of Treaties (1969) (Cmnd 4818) requires the UK to refrain from acting in a manner which would defeat the object and purpose of the New York Convention. The controversy centred on two issues: (1) whether the letter from the Protocol Directorate dated 12 January 2011 is conclusive as to the facts it stated; (11) if the letter should not be regarded as conclusive, whether, as a matter of fact, it is established that the UK gave consent to a special mission of which the defendant was a member.

Conclusive certification

23 The primary submission advanced on behalf of the FCO is that the letter dated 12 January 2011 is conclusive evidence that the FCO did not consent to the defendant’s visit as a special mission.

24 The letter was written to District Judge Purdy in answer to his request as to whether the FCO, as a matter of fact, considered that the defendant had come to the UK on a special mission and also as to the criteria on which the UK Government considered that a visit of foreign officials to the UK constitutes a special mission. The letter was written by the Director of Protocol on behalf of the Secretary of State for Foreign and Commonwealth Affairs. It said:

“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

A forms, ranging from a formal treaty to tacit consent.” The states represented in the Sixth Committee did not accept that approach.

29 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
B representing their state on a visit of mutual interest is entitled to the inviolability and immunity afforded to participants in a special mission.

30 In *R v Governor of Pentonville Prison, Ex p Teja* [1971] 2 QB 274, 282 Lord Parker CJ rejected an application for diplomatic immunity on the basis that the applicant was on a special mission to Switzerland and was passing, for that purpose, through England:

C “As I see it, it is fundamental to the claiming of immunity by reason of being a diplomatic agent that that diplomatic agent should have been in some form accepted or received by this country”

31 Special mission immunity under customary international law has been recognised in a number of decisions of district judges.

D 32 The importance of prior consent has been acknowledged in decisions to which this court was referred in Germany (*Tabatabai* (1983) 80 ILR 389) and in Austria: the *Syrian National Immunity Case* (1998) 127 ILR 88.

33 It seems to me that the analogy with the inviolability and immunity of accredited members of permanent missions and the importance of consent illuminate resolution of the issue as to whether the FCO letter dated 12 January 2011 is conclusive. The acceptance of accreditation to a permanent diplomatic mission is a matter within the discretion of the executive, or, more accurately, the Royal Prerogative. *Oppenheim's International Law*, 9th ed (1992), vol 1, Pt III, para 460 identifies a list of eight topics in respect of which Foreign Office certificates have been issued. One of them (g) is the question whether a person is entitled to diplomatic status. All of them, as Sir Elihu submitted, relate to matters which are either
E for the Royal Prerogative or express a view held by the Foreign Office (whether a state of war exists with a foreign country or between two foreign countries). As Sir Francis Vallat points out in *International Law and the Practitioner*, 1st ed (2010), para 15, the list is not exhaustive.

34 The list relates to matters which in *Halsbury's Laws of England*, 5th ed, vol 61 (2010), para 15 are called “facts of state”. They are facts which the court accepts, not so much because they are within the exclusive
G knowledge of the UK Government, but because they represent matters which are exclusively for decision by the Government and not for the courts. It is for the UK Government to decide whether to recognise a mission as a special mission, just as it is for the Government to decide whether it recognises an individual as a head of state. As Brooke LJ said in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883,
H para 349:

“Her Majesty’s Government has never given up the right to inform the courts as to its recognition or non-recognition of states, and the public policy need for the courts to follow that information, spoken to by Lord Atkin and others, remains.”

A to the defendant's visit as a special mission was exclusively a matter for the Government and not for the court. The letter of 12 January 2011 conclusively establishes that the UK did not consent to the visit as a special mission.

B 40 I recognise that the Government of Mongolia takes a different view and contends that the UK, through its Ambassador in Mongolia, did consent to the mission as a special mission. It seems to me that that controversy underlines the need for the courts not to question that which the Government chooses to recognise and that which it does not. Recognition is a matter, as it seems to me, of foreign policy which is unsuitable for discussion or a view in the courts. Whether or not the purpose of the defendant's visit and that which the Government of Mongolia hoped to achieve by the visit, was or was not capable of constituting a special mission, is beside the point. It was for the FCO to decide whether it would choose to recognise that visit as a special mission or not.

C 41 For that reason, it seems to me that the defendant is not entitled to immunity on the grounds that his visit was a special mission.

D 42 I should add, however, that even if I were wrong as to the conclusive effect of the letter I reject the submission that the FCO consented to the defendant's visit as a special mission. It seems to me plain that there can be no question of consent in the period up to April 2010. As far as the FCO was aware, the defendant was seeking a visa so as to visit the Ambassador of Mongolia in London.

E 43 After 31 August 2010 it is clear that no invitation was ever issued. As the statements on behalf of the Government of Mongolia reveal, officials in London and the UK Ambassador in Ulaan Baator were informed that the defendant was visiting and were asked to arrange meetings. The visit was presented as fulfilling the Government of Mongolia's wish and was not a matter which depended upon any consent of the UK Government. There is a dispute as to the extent to which the ambassador encouraged such a visit on 6 September 2010 and the extent to which the subsequent request for flight number and arrival time led the Government of Mongolia to believe that the visit was welcome. But to my mind, those considerations do not go to the crux of the point. It is clear that no one on behalf of the UK Government told the defendant that he was not welcome or tried to dissuade him from coming. But that is not to be equated with consent to his visit as a special mission. As Sir Michael pointed out on behalf of the FCO, absent any arrangements for meetings, absent any discussion as to the content of the meetings, it is quite impossible to identify the visit as a special mission, let alone to infer that the UK consented to the visit as a special mission.

F 44 It is necessary to underline that the meeting on 6 September 2010, on which the defendant places considerable reliance, was arranged at short notice and, it seems inconceivable that without instructions, without even the opportunity to obtain instructions, the ambassador would have gone so far as to consent to the visit as a special mission. The Government of Mongolia's statements do not go so far. They stop short of a suggestion that he agreed, without instructions, that the visit should be as a special mission. It seems to me there is a considerable difference between encouraging dialogue in relation to security matters of mutual interest, and consent to the defendant visiting on a special mission.

A warrant: see para 35 of Mr Tsogbaatar's statement as Secretary of State for Foreign Affairs and Trade for Mongolia.

51 Accordingly, the defendant must establish conduct which goes beyond the issue of the visa. It must show that the defendant was lured to this country on the pretext that he would be welcome as an official to discuss security matters of mutual interest. It may be, if that were established, that it would amount to conduct which would bring the UK criminal justice system into disrepute. The most recent account of the approach of the court to such an allegation is contained within the opinion of the Privy Council given by Lord Dyson JSC in *Warren v Attorney General for Jersey* [2012] 1 AC 22, para 22. The Board was at pains not to impose rigid classifications: see para 26. The court must balance the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive conduct does not undermine public confidence in the criminal justice system. I am, therefore, reaching no conclusion as to whether, if the defendant could establish that he had been lured into this country, such conduct would amount to an abuse of process.

52 My reluctance stems from the fact that the defendant has not established that he was lured into this country. Far from being lured, at every stage when the Government of Mongolia, particularly through its ambassador, attempted to arrange meetings, they were rebuffed. The Government chose to send the defendant on a speculative visit. Time and again officials on behalf of the Government of Mongolia sought to arrange meetings but were informed that they would not be possible: see para 19 above. In those circumstances there is no question of any official in the UK luring the defendant to this country in the belief that he was going to meet UK officials to discuss security matters. I repeat that he was due to leave the day before the round table was expected to take place on 25 September 2010.

53 On the contrary, at every stage when the Government of Mongolia referred to the visit, they said that the defendant *would* be coming to the UK. There was no question of asking for an invitation.

54 The highest that it can be put is that at 6 September 2010 the UK Ambassador, Mr Dickson, "gave his full support in helping to arrange the visit" (Mr Tsaganndari's statement referring to the meeting of 6 September 2010). I have to bear in mind that that meeting was at short notice at a time when Mr Dickson had no instructions from the UK. But even accepting that Mr Dickson made polite and encouraging noises, and certainly did nothing to discourage the visit, that falls far short of establishing that he lured the defendant to this country. The Government of Mongolia intended the defendant to visit the UK to discuss co-operation in security and his visit was in fulfilment of that intention. That falls far short of showing any abusive behaviour by the UK Ambassador or Government. I reject the allegation.

Immunity as a person holding a high-ranking office

55 The defendant claimed immunity by reason of his position as the Head of the Office of National Security of Mongolia, as a very senior governmental officer, as Sir Elihu Lauterpacht describes it in his supplement to his opinion of 5 May 2011. In that position, it is contended that he possesses immunity even if his visit was not in the course of a special mission.

A held the status which customary international law would regard as of sufficient high rank, that purpose would not entitle the UK to deprive him of immunity. But for the reasons I have given, the defendant did not attain that rank and is not entitled to immunity by reason of his position as Head of the Executive Office of the National Security Council of Mongolia.

B *Does the defendant have immunity by reason of his conduct as an official of the Government of Mongolia?*

63 The defendant asserts that as an official acting on behalf of the Government of Mongolia he is entitled to immunity from criminal prosecution in Germany *ratione materiae*, that is, entitled to immunity by virtue of his actions on behalf of that state as opposed to his status, *ie*, *ratione personae*. The immunity claimed, if established, entitles him to
C immunity from extradition. None of the parties contended that if he was entitled to immunity from criminal prosecution in Germany he was, none the less, liable to extradition under the European arrest warrant.

64 This issue only arises once the claims to immunity *ratione personae* have been dismissed. This may explain why the point was raised so late. It was not argued before the district judge, nor at a directions hearing in April
D 2011. There was no reference to such immunity in the letter written on behalf of the Government of Mongolia by the Minister for Foreign Affairs to the Foreign Secretary. Nor did Mr Tsogtbaatar make any reference to such immunity in his latest statement, dated as recently as 24 June 2011.

65 The point was, however, raised in Sir Elisha's second supplementary opinion dated 20 May 2011 and reiterated in his points in reply dated 15 June 2011.

E 66 I mention the late assertion of this type of immunity, not so much because the delay in raising it casts doubt on its substance, but rather because of the effect on these proceedings. The assertion of immunity was first made in a short supplementary opinion of little more than 2½ pages. Sir Michael, in his written argument on behalf of the FCO, was unclear even by June 2011 whether the point was to be taken. He asserted that the point
F could not be taken since the Government of Mongolia had not notified either Germany or the UK that the conduct of which it was said the defendant was guilty was performed in pursuance of official duties.

67 This led to a dispute as to whether such notification was necessary. The Government of Mongolia also relied upon the fact that it had formally apologised to the German Government in a letter of 20 October 2010, produced in the course of this hearing. It was only on the second and last
G day of the hearing of that a letter dated 21 January 2011, translated on 23 June 2011, addressed to the public prosecutor in Germany, was produced. In that letter the Government assert that the defendant: "participated in the operation to forcibly return the Mongolian national D Enkhbat, who was accused of having been involved in the assassination of Mr Sanjaasuren Zorig." The letter continues: "Mr B Khurts was a Special Secret Service Officer who fulfilled a task entrusted by the Mongolian
H competent authority." The letter goes on to say that criminal proceedings had been started against those officials who authorised and instructed the operation as a violation of Mongolian criminal laws.

68 The arrest warrant itself asserts that the Mongolian security agencies "decided to mandate" the Mongolian Secret Service to bring the victim back

A officials have invoked state immunity in relation to criminal proceedings. He refers to a recent example in *Italy v Lozano* Case No 31171/2008, ILDC 1085 (IT 2008), 24 July 2008 and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147. It seems to me that as Dr Elizabeth Franey points out in her recent publication *Immunity, Individuals and International Law* (2011), p 204 there is an essential distinction between civil and criminal liability.

B not follow that because there is immunity from civil suit, an individual, acting as an official on behalf of his state, is immune from criminal liability.

75 The first port of call is, inevitably, *Ex p Pinochet Ugarte (No 3)*. In a second provisional warrant it was alleged in two of the charges (4 and 9, see p 240D) that Pinochet was guilty of murder in Spain and conspiracies to commit murder in Spain. This raised separate questions from the issue of immunity for a former head of state for alleged official torture and conspiracy to torture. The issue of immunity in relation to charges of murder and conspiracy to murder appears to have merited no detailed analysis in the light of the conclusion that there was no immunity for former heads of state for crimes of torture or conspiracy to torture, said to have occurred after 8 December 1988, when Chile, Spain and the UK ratified the

C United Nations Convention against Torture (1984).

D

76 Lord Browne-Wilkinson merely said, at p 205, that:

“As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.”

E At pp 249C–250B Lord Hutton agreed and took as his starting point the proposition that under customary international law a former head of state enjoys immunity from criminal proceedings in other countries in respect of his actions in his official capacity as head of state. He then went on to consider whether there was a qualification or exception in a case relating to torture.

F 77 Lord Goff of Chieveley focussed on the position of Pinochet as head of state. He said [2000] 1 AC 147, 210:

“There can be no doubt that the immunity of a head of state, whether *ratione personae* or *ratione materiae*, applies to both civil and criminal proceedings . . . one sovereign state does not adjudicate on the conduct of another. This principle applies as between states, and the head of a state is entitled to the same immunity as the state itself, as are the diplomatic representatives of the state. That the principle applies in criminal proceedings is reflected in the Act of 1978, in that there is no equivalent provision in Part III of the Act to section 16(4) which provides that Part I does not apply to criminal proceedings.”

G

H 78 Lord Hope of Craighead adopted a similar approach in asking, at p 241G, whether the acts of which Pinochet was accused were “private acts on the one hand or governmental acts done in the exercise of his authority as head of state on the other”. He concluded, at p 242D, that the principle of immunity *ratione materiae* protects all acts which the head of state has performed in the exercise of the functions of government.

A and more recently the decision of the Appeals Chamber in *Prosecutor v Blaškić's* to detailed and critical analysis.

B 86 The conventional starting point to establishing state practice, on which the rule of customary international law depends, is MacLeod's case. But, as Dr Franey points out, MacLeod's case is a confusing example of state practice. In December 1837, British forces captured *The Caroline*, crewed by US citizens, which had been providing matériel from an island in the United States to Canadian rebels attacking British territory in Canada. *The Caroline* was boarded, towed into the current of the river, and disappeared over the Niagara Falls. No one was at that stage on board but two lost their lives; one, a cabin boy known as Little Billy, had been shot while attempting to leave the boat. When a Canadian Deputy Sheriff, Macleod, (whilst in New York) boasted of taking part in the destruction of *The Caroline*, he was C arrested and committed for trial. The British Minister in Washington asserted that United States national courts did not have jurisdiction to try individuals for involvement in *The Caroline* incident. The American Secretary of State, Forsythe, replied that the Federal Executive had no power to interfere with the jurisdiction of the tribunals of the State of New York.

D 87 When the administration changed in March 1841 the British Minister wrote to Mr Webster who was by then the American Secretary of State, disputing the proposition that the Federal Government had no control over the separate states. Secretary of State Webster wrote to the US Attorney General saying that an individual, forming part of a public force acting under the authority of his government, was not to be held answerable; he described that proposition as "a principle of public law sanctioned by the E usages of all civilised nations, and which the Government of the United States has no inclination to dispute": British and Foreign State Papers, vol 29, p 1139, quoted by Dr Franey in *Immunity, Individuals and International Law* (2011), p 209.

F 88 As Dr Franey points out, the British contended that MacLeod should not be tried, whereas the American Government took the view that he should be released by judicial process. MacLeod wanted a trial without further delay. It emerged there was no evidence to show that he had been present at the destruction of *The Caroline* and he was acquitted. Dr Franey comments that the armed attack into the territory of the United States should be regarded as part of an international armed conflict, subject to the Geneva Convention. In a passage of significance in the instant appeal she says, at p 210:

G "What is being suggested is that the facts of this case and the law applicable thereto are time-specific. Customary international law changes to reflect the needs of the international community. It is only if H state practice and *opinio juris* show that states continue to hold to the same tenets, that the law in the mid-nineteenth century can be quoted as the law now. The international community, and the consensus regarding international law, has changed so fundamentally since those events, that the agreement of the British and American Governments as to the state of the law at that time, indicates what the law was understood to be at that time, but further investigation is required before it can be stated to be the law now "

A the UK did not afford the applicant, Mr Yusufu, who was not an accredited diplomat, state immunity *ratione materiae*.

95 There are, besides the case of the Mossad agents in Cyprus, numerous examples of prosecution of foreign agents for collecting information in respect of which no immunity has been claimed: see the references given by Dr Franey at p 272. Lady Fox *The Law of State Immunity*, 2nd ed, p 96 regards espionage in time of peace as a violation of international law but, she says, that because it is unusual for a state to admit that spying has been undertaken on its behalf, it may be that the cases of spying which have led to prosecution are not an exception to the general rule. But even though states are not in the habit of accepting responsibility for criminal acts of espionage on the territory of another state, the absence of such claims diminishes the prospect of establishing state practice on which customary international law must depend. Dr Franey concludes *Immunity, Individuals and International Law* (2011), p 284:

D “The preceding analysis of the cases shows that state officials do not have immunity *ratione materiae* for criminal charges in respect of acts committed on the territory of the forum state, or the territory of a third state, unless that immunity is accorded by a special regime such as that afforded diplomats and consuls, or by agreement such as that accorded to special missions, or by ad hoc agreement . . . state practice shows that agents are not only held responsible for what can be considered serious crimes of violence . . . but they also routinely arrested and prosecuted for trespassing and collecting information. State practice shows that states demonstrate *opinio juris* by arresting, charging and prosecuting the agents of other states and by not objecting to their own agents being prosecuted.”

96 This conclusion is shared by Roman Kolodkin, Special Rapporteur to the International Law Commission, 62nd Session, in his Second Report on immunity of state officials from foreign criminal jurisdiction. The Special Rapporteur reaches the same conclusion as Dr Franey. In his summary he concludes, at para 94:

F “(b) state officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the state which they serve itself . . .”

G But the question whether immunity *ratione materiae* exists where a crime is perpetrated in the territory of the state which exercises jurisdiction is a separate question. see para 81. The Special Rapporteur’s conclusion (at para 94) in that respect is:

H “(p) A situation 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, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity.”

(And see para 90.)

A (1995) 104 ILR 691. But that was a civil case in which the defendant claimed damages for an alleged assault by a British soldier guarding a checkpoint. It does not, in my view, assist in relation to the issue in question.

101 For those reasons, I conclude there is no customary international law which affords this defendant immunity *ratione materiae* and I dismiss his appeal on that ground.

B FOSKETT J

102 I agree that this appeal should be dismissed.

103 Subject only to a minor reservation about one matter to which I will refer below (see paras 110–112), I respectfully agree with the analysis of this case carried out by Moses LJ and the conclusions he has reached. I add these few observations out of deference to the distinguished arguments addressed to the court and in order to articulate briefly my one slight reservation.

State immunity

104 As Moses LJ has indicated, the contention that the defendant's alleged acts in Germany were carried out as an agent of the State of Mongolia and that, accordingly, he was entitled to state immunity as a result was raised very late in the day in these proceedings. It may be (see para 64) that it would not, as a matter of logic, arise until claims to immunity *ratione personae* have been dismissed. However, that would not have precluded the issue being raised at an earlier stage as an alternative argument if the other arguments had been rejected. The late deployment of the argument was not, I venture to suggest, explained satisfactorily.

105 However, notwithstanding that observation, it is not an argument that can be dismissed out of hand and it has, of course, the distinguished support of Sir Elihu Lauterpacht. Unfortunately, because of its late deployment, the issue has not had the benefit of the sustained argument that would have been of value to the court. On the basis of the arguments advanced and the material put before the court and in agreement with Moses LJ, I have found the analysis of Dr Elizabeth Franey persuasive and nothing in *McElhinney v Williams* (1995) 104 ILR 691 that truly assists the resolution of the issue in this case. Accordingly, I do not consider that the point avails the defendant.

Abuse of process

106 Whilst from the defendant's perspective (and, perhaps, that of the Mongolian Government), one can see how the perception of some kind of unjustified entrapment might have arisen, any fair analysis of the evidence does not support such a conclusion. There is nothing I would wish to add to the analysis of the position set out in paras 47–54 above.

High-ranking officer

107 I have little doubt that the subject matter of the discussions that the defendant hoped to have with high-ranking government officials in the UK was of the nature that ought, in principle, to attract immunity. With respect to the view of the district judge, I consider that it is too restrictive a view to hold that the defendant would not have been engaged in "foreign