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# COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

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## Immunities of special missions

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Document prepared by the delegation of the United Kingdom

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## IMMUNITIES OF SPECIAL MISSIONS

1. The UK would like to propose that as part of its work on immunities, the CAHDI should initiate a discussion on the law relating to special missions immunity status so that members can share their experience and practice. Whilst this is a matter of intense practical importance to all members of the CAHDI, it is less well-known and understood by the public at large than, for example, the immunities of permanent diplomatic missions. The UK has noted a steady increase in volume of its own practice in recent years, and anticipates that further attention will be given to the subject in the context of the work of the International Law Commission on the “Immunity of State Officials from Foreign Criminal Jurisdiction”. The UK therefore considers that discussion and exchange of views and practice in the CAHDI is timely and will assist a broader understanding of the law in this field.

### UK practice

2. There have been a number of cases in which the UK Courts have had to consider the issue of special mission immunity. However the most in-depth treatment of the matter by a UK court was in the case of *Khurts Bat v. Federal Court of Germany* in 2011.<sup>\*</sup> In that case, the court recognised that under customary international law, members of a special mission enjoy immunities, including immunity from criminal proceedings and inviolability of the person, and that these immunities have effect in the United Kingdom by virtue of the common law. However, the Court made it clear that not everyone representing a State on a visit of mutual interest is entitled to the immunities afforded to members of a special mission but only where a visit is consented to as a special mission. In other words there must be (i) prior consent and (ii) consent to the visit as a special mission. In the case of inward missions to the UK, the Court affirmed that it is a matter for Her Majesty’s Government to decide whether to recognise a mission as a special mission. The Court also found that if this matter was disputed before the courts, since it was a part of the conduct of foreign relations in which under the Constitution the role of the courts is more limited, the Government could provide conclusive evidence on the question of whether it had consented or not to a visit as a special mission. The usual means by which the Government provides such evidence is by means of a certificate issued by the Foreign and Commonwealth Office (FCO).

3. In October 2011, in a case which drew some attention, a private person sought the consent of the Director of Public Prosecutions (DPP) to the issue of an arrest warrant against Tzipi Livni who was then the Leader of the Opposition in Israel during an official visit to London for talks with the Foreign Secretary. The allegations concerned war crimes alleged to have been committed by the Israeli Defence Force in 2008, when Ms Livni was the Israeli Foreign Minister. Following the issue of a certificate by the FCO confirming that they had consented to her visit as a special mission, the DPP declined to consent to the prosecution.

4. In the light of these and other experiences, the UK Government decided to establish a more systematic approach to identifying special missions, and minimise the possibility of uncertainties or misunderstandings arising. In March 2013, therefore, the Government announced a new pilot process for notification of special missions, which was to operate at an administrative, rather than a legal, level.

5. In doing so, the Government set out its view that a special mission is “a temporary mission, representing a State, which is sent by one State to another with the consent of the latter, in order to carry out official engagements on behalf of the sending State”. It then asked all diplomatic missions in London to inform the FCO in advance of all inward visits which they believed may qualify for special mission status and to provide relevant details. The FCO would then provide an express decision on the granting of consent to a visit as a special mission.

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<sup>\*</sup> [2011] EWHC 2029 (Admin).

6. Prior to this change in process, the UK position had been that the question of consent had to be implied from all of the circumstances of the visit – e.g. an invitation, exchange of delegation lists, agreed agendas of work etc. However, given that immunities flow from special mission status, we were keen to bring greater formality and clarity to our decision-making processes in this respect.

7. However, this is essentially an internal administrative procedure to be used whenever it can be and it does not change the legal position in the UK. If the procedure is not followed that will not necessarily mean that a visit cannot be considered as a special mission and the status of any visit would be a matter for the Courts to determine from all the relevant circumstances.

## Questions

The UK would be very interested to hear of the practice of the other members of CAHDI, both how they deal with receiving special missions and any jurisprudence from their courts. To this end, the UK would propose that responses of members of CAHDI to the following questions might provide a useful basis to guide future work on this matter:

1. Please identify the sources of the law which apply in this area at both the international and the national level, e.g. are CAHDI members a party to the 1969 *UN Convention on Special Missions*? If obligations in this matter derive from customary international law, please provide a brief description of the key requirements of the law in this respect. Is there legislation in this area at the national level? If so please provide a summary of the key provisions.
2. Have member Governments made any official statements on special missions and the relevant legal regime? If so please provide relevant texts.
3. How do courts of CAHDI members deal with special missions? Please provide short summaries of any key decisions in this field.
4. Are there any special procedures by which the Government's view of whether an official visit constitutes a special mission or not can be communicated to the court? If so what weight does the court attach to such communications?