

CAHDI, 27 September 2019

*Immunities of Special Missions*

**Sir Michael Wood**

Mr Chairperson, Members of the CAHDI, Secretary of the CAHDI and colleagues from the Secretariat,

1. Andrew and I are very honoured to address this meeting of the CAHDI. For my part, it is always a pleasure to visit Strasbourg, especially to attend a meeting of the CAHDI.
2. I shall say a few words by way of introduction to the new Council of Europe publication on *Immunities of Special Missions*.
3. Andrew Sanger will then speak about the importance of the CAHDI's work in this field, which has already been referred to in proceedings in the English courts.

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4. Andrew and I were honoured to be asked to assist with the preparation of the new book. It is always a great pleasure to work closely with Marta and her colleagues.
5. Both Marta and, I have to say, the publisher (Brill) were very patient and understanding. Andrew and I regularly asked for changes to ensure that our *Analytical Report* was as up-to-date and accurate as possible (though we tried to do so with some restraint).
6. We are grateful to the CAHDI participants for choosing this very interesting topic for the questionnaire. Above all, we are grateful to those of you who took the time to respond to the questionnaire on "Immunities of Special Missions".. Many of the replies are very informative, as we have tried to show in the book.
7. Of course, not all member and observer States responded. But many did. Thirty-eight responses were received by June 2018. They are, I believe, broadly representative.

But 38 means that there were 19 who did not respond – in some cases I was quite surprised. For those who have not yet responded, or any who would like to update their responses, it could be valuable at some point to supplement the book by placing further responses and updates on the CAHDI's website. This is especially the case if there are new decisions in your domestic courts. I understand that there is already a specific document (currently *CAHDI (2019)5 prov*) devoted to the inclusion of any new or revised replies to the questionnaire, which is updated every year and which is publicly available on the CAHDI website.

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8. We thank the then Secretary General of the Council of Europe, Thorbjørn Jagland, for writing the Foreword to the volume. He summed up the position very well in the first sentence:

*“Special missions sent by one State to another play an increasing and crucial role in international diplomacy, while the international law governing them remains to some extent uncertain.”*

It is that uncertainty, in particular, that the work of the CAHDI on the questionnaire, and the book, have sought to address. The uncertainty arises particularly because only 39 States are parties to the Convention on Special Missions. The core immunities in the Convention may now be said to reflect customary international law, in particular as regards inviolability of the person and immunity from criminal proceedings for the duration of the visit.

9. This is the fourth Council of Europe book based on responses to a questionnaire. The earlier ones were on *State Succession and Issues of Recognition*; on *Treaty Making - Expression of Consent by States to be Bound by a Treaty*; and on *State Immunities*. Together with other publications under the auspices of the CAHDI, such as the 2016 volume on *The Judge and International Custom* and the recent volume on the CAHDI contribution to the development of public international law, these volumes are a valuable source of materials and analysis of the law.
10. Questionnaire, responses from States, then a book. That is, I believe, a good and well-tried formula. I hope there will be future projects of this kind.

11. It is a good formula for at least four reasons:

- (i) The questionnaire, provided it is well considered, prompts States to reflect on the law in a particular field, a field that is both topical but perhaps understudied or even underdeveloped. That in itself has great merit. In this ever-faster world, to have to spend some time in reflection is no bad thing.
- (ii) Responses to the questionnaires may be valuable for the identification of the current state of the law (the *lex lata*), domestic and international, conventional and customary. They may assist with both elements of customary international law: they describe State practice, and they may be evidence of acceptance as law (*opinio juris*). (An example taken from almost ninety years ago, which still has influence in the law of the sea, are the responses of States to the Bases of Discussion prepared for the League of Nations 1930 Codification Conference. States' replies to questionnaires may also be of interest in showing possible trends for the future development of the law.)
- (iii) The publication of a book based on the responses is an opportunity to analyse the current state of the law on the issue in question. That is what Andrew and I have sought to do in the *Analytical Report*, particular in the concluding chapter (Chapter 4).
- (iv) As in other fields of international law, the activity of the Council of Europe should be seen as a contribution to the rule of law world-wide. It is closely connected with the work of the United Nations, including in this case the work of the International Law Commission both on the topic of special missions, immunities and customary international law. So an exercise like this promotes international law and the rule of law in international affairs. The great contribution that the CAHDI makes in the field of international law is now more necessary than ever. It is important therefore that the CAHDI's work is well known within the United Nations. The annual visit of the CAHDI Chairperson and Secretary to the ILC to Geneva is an important occasion, which I know my colleagues on the Commission look forward to each year. Also, it is important that the activities of the CAHDI are presented to the Sixth Committee of the UN General Assembly.

12. As you will see, Andrew and I have reached certain key conclusions the *Analytical Report*. These conclusions represent, of course, our personal views, though they are,

we believe, firmly based in the practice of States, as reflected in responses to the questionnaire and in recent case law.

13. The book follows the model of earlier CAHDI volumes based on questionnaires. The *Analytical Report* forms Part I of the book. The responses by States - the raw material, as it were - form Part II. The Report itself is divided into four chapters and is we believe quite a thorough analysis of all the points covered in the questionnaire.
14. The first Chapter is introductory. It gives some general background. This includes sections on the history and importance of special missions; their place within the law on international immunities; and the sources of the international law on special missions, that is, treaties customary international law, with case-law and writings as a subsidiary means for the identification of the law.
15. Chapter 2 deals with some fundamental matters concerning the establishment of a special mission, matters that were so important when the 1969 Special Missions Convention was drafted. The chapter considers practice concerning the sending and receiving of special missions, in particular the requirement of consent to the mission and to its functions. A question raised in some replies is whether consent may be implicit or even retroactive. Customary international law allows considerable flexibility in this regard. Clearly if a Defence Minister is invited for official talks in the receiving State consent to the special mission will normally be implicit. Retroactive consent would be exceptional; ultimately what matters under customary international law is whether the receiving State has in fact consented.
16. Chapter 3 turns to what may be considered the heart of the matter: the immunities of members of special missions, in particular inviolability of the person and immunity from criminal jurisdiction. This is especially so, I suspect, if you are the public international law legal adviser to a Government. Immunity from civil jurisdiction is also touched on.
17. Perhaps the most important chapter is the last one, Chapter 4, in which we try to draw the threads together. We try to set out, briefly, our conclusions on the present state of international law on special missions. As you will see, we conclude that

*“Although uncertainties remain as to the precise scope of special mission immunities under customary international law, State practice and opinio juris – reflected in the replies to the CAHDI Questionnaire that are reproduced in this book – demonstrate*

*that the basic characteristics and rules of special missions are regulated by customary international law. This includes the requirements of mutual consent and representation of the sending State; and the grant of personal inviolability and immunity from criminal jurisdiction for the duration of the special mission and during a reasonable period of time for travel.”*

18. That, as it happens, is quite similar to the conclusions of the English courts in the recent *Freedom and Justice Party* litigation. As Andrew will show, the CAHDI's work played a major, a surprisingly major role at both levels, in the High Court in 2016 and in the Court of Appeal in 2018.
19. Before concluding, I would like to draw attention to the potential increasing importance of special mission immunity if certain proposals currently before the ILC were to be taken forward. This could make special mission immunity even more essential for the smooth functioning of international relations.

**Dr Andrew Sanger**

20. I would like to begin by echoing the words of Sir Michael: it is an honour to address this meeting and to have had the opportunity to assist with the preparation of the Analytical Report and the CAHDI book on special missions.
21. There is no doubt that the CAHDI's work on Special Missions will make an important and lasting contribution to the law and practice in the field of special mission immunity. Most of the responses to the questionnaire indicated whether states accept that the practice of conferring immunity on members of a special mission is required under customary international law. They also referred to examples of state practice, including domestic legislation, judicial decisions and executive pronouncements, making them a valuable repository of practice and evidence of *opinio juris*.
22. The value of this project is illustrated by *R (on the application of Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs*, a case that was heard by the Divisional Court of the High Court of England and Wales in 2016 ([2016] EWHC 2010 (Admin)), before being heard by the Court of Appeal in 2018 ([2018] EWCA Civ 1719; [2019] 1 All ER 133). (There was no further appeal to the Supreme Court, so the Court of Appeal's judgment was the final decision in the case.) As I will explain, these judgments demonstrate the value of questionnaires on areas of state practice that are not regulated by widely accepted international treaties. They provide

an opportunity for states to provide examples of their practice and to indicate whether they understand that practice to be binding as a matter of customary international law. Prior to the work of CAHDI, there was only limited authority on special mission immunity under customary international law. This was for a number of reasons, including the fact that there are only 39 states parties to the 1969 Convention on Special Missions, and that, given the typically short duration of a special mission, issues concerning the immunity of its members rarely arise before domestic courts. The opportunity for domestic judges and state officials to make a statement on the content of the law seldom arose. The value of the CAHDI questionnaire—and of the published Report and Book that followed—is that it provides an authoritative collation of state practice and *opinio juris* on special missions.

23. The *Freedom and Justice* case required the Divisional Court and later the Court of Appeal to consider whether members of a special mission are entitled to inviolability and immunity from criminal jurisdiction under customary international law, and whether those rules formed part of English common law. The United Kingdom signed the 1969 Convention on Special Missions in December 1970 but has not ratified it, meaning that it is not formally binding on the UK and its terms have not been incorporated into English law through an Act of Parliament. As the UK government had expressly left it to courts to determine whether members of a special mission were entitled to inviolability and immunity, this meant that judges were required to determine the position under customary international law and whether any customary rule formed part of English law. The English High Court had previously considered special mission immunity in *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2013] QB 349. However, as the participants in that case—Mongolia and the UK Government—accepted that members of a special mission were entitled to immunity under customary international law, the court was apparently not required to rule on whether this was correct as a matter of international law.
24. In the *Freedom and Justice Party* case, both the Divisional Court and the Court of Appeal concluded first, that customary international law requires members of a special mission to be granted inviolability and immunity from criminal jurisdiction and second, that these rules formed part of English law without the need for an Act of Parliament. For both courts, the CAHDI questionnaire was invaluable in providing examples of state practice and evidence of *opinio juris*.

25. Both courts considered the responses to the CAHDI questionnaire in some detail, and individual responses were the subject of submissions by the parties to the case. The Divisional Court was presented with a draft set of questionnaire answers dated February 2016, and it annexed a summary of the answers that states gave on the specific question whether special mission immunity was to be considered customary international law (question 5 of the questionnaire). After analysing and categorising the responses, the Court concluded that the CAHDI survey “does not cause us to doubt that the general weight of State practice summarised earlier in this judgment demonstrates the existence of the proposed rule of customary international law. On the contrary we consider that it is broadly consistent with or supportive of that conclusion” (para 147).
26. In the Court of Appeal, the appellant argued that the CAHDI survey contained responses primarily from only European states. But the Court pointed out that that the survey actually contained responses from a broader array of states, including those from the Middle East (Israel), the Far East (Japan) and the Americas (the United States, Mexico). The Court noted that the Divisional Court had “carefully considered the responses to the CAHDI survey that were available to it” (para 99), and that the Court of Appeal now had the benefit of seeing some thirty-six responses to the survey (following the circulation of the draft judgment, the Court was provided with an updated version of the CAHDI survey published on 28 June 2018, which included a response from the Russian Federation, which the Court duly took into account) (para 106). In its final analysis, the Court recognised that, while some responses required interpretation and some were more developed than others, twenty-eight states recognised that customary international law requires or may require immunity to be given to special missions to at least some extent (para 99). In its view, eight states did not express an opinion on whether customary international law required states to grant immunity to members of a special mission. This allowed the Court to conclude that the “CAHDI survey with the further responses available to us seems to us to be more supportive of the existence of customary international law on immunities for special missions than it was at the time of the Divisional Court’s judgment” (para 99).
27. The responses by states to the CAHDI questionnaire were central to the examination of state practice and *opinio juris* in both the Divisional Court and the Court of Appeal. This is clear from the fact that the Divisional Court considered responses to the CAHDI survey before it was published officially; and that it considered it prudent to

annex a summary of the relevant parts of responses to its judgment; and by the fact that, despite a draft judgment having been circulated, the Court of Appeal took account of an updated version of the published responses. The function of the English courts in identifying customary international law in this area could have been significantly more challenging without the CAHDI survey.

28. The major role played by the CADHI survey in the English courts therefore confirms the high value and importance of the CAHDI's work and of questionnaires like that the one on special missions.