

UKRAINE

LEGAL BASIS

1. Has your State signed and/or ratified the United Nations Convention on special missions (1969)? If not, does your State intend to sign/ratify the Convention?

Yes. Ukraine has ratified the United Nations Convention on special missions (1969) and it entered into force in respect of Ukraine on 14.07.1993. Ratified by the Decree N3383-XII of the Verkhovna Rada of Ukraine. At the same time Ukraine is not a party to the Optional Protocol to the Convention on special missions concerning the compulsory settlement of disputes.

2. Does your State apply other international legal instruments in this area (ex.: bilateral, multilateral agreements or headquarters agreements)?

Currently, Ukraine does not apply any other multilateral international legal instrument specifically in the area of the immunities of special missions.

However, in this regard it is worth to mention that Ukraine hosts the seat of the Organization for democracy and economic development (GUAM), established in 2001 by four Former Soviet Union Republics: the Republic of Azerbaijan, Georgia, the Republic of Moldova and Ukraine. For special missions to this international organisation the respective agreements are relevant: Charter of Organization for democracy and economic development – GUAM (Article 16), signed on 23 May 2006 (<http://guam-organization.org/en/node/450>), and Agreement on privileges and immunities of the Organization for democracy and economic development – GUAM, signed on 19 June 2007 (<http://guam-organization.org/node/365>).

Besides that, it is pertinent to recall that on 28 July 2014 Ukraine and the Kingdom of the Netherlands signed the Agreement on the International Mission for Protection of Investigation regarding the accident of the downing of a civilian aircraft, Malaysian Airlines flight MH 17 on 17 July 2014. The Article 6 of this Agreement stipulates that “*Personnel of the Mission shall be accorded the status equivalent to that accorded to the administrative and technical staff of a diplomatic mission of a State that is a party to the Vienna Convention on Diplomatic Relations of 18 April 1961*”. This Agreement was concluded for the duration of one year, but, taking into account the necessity to facilitate prompt completion of the investigation into the MH17 tragedy, it has already been extended twice and remains in force. Ukrainian version only: http://zakon5.rada.gov.ua/laws/show/528_039.

In this context, it should be also noted that a large number of agreements on special missions of international organisations were concluded by Ukraine during last years.

The European Union Border Assistance Mission to Moldova and Ukraine (EUBAM) was launched in 2005. This advisory, technical body promotes border control, customs and trade norms and practices that meet EU standards. The Memorandum of Understanding, signed by the Governments of Moldova and Ukraine and the European Commission on 7 October 2005 (http://eubam.org/wp-content/uploads/2015/11/memorandum_of_understanding_en.pdf), as well as Addendum to the Memorandum of Understanding, signed on 24 November 2015, constitute the legal basis for EUBAM (<http://eubam.org/wp-content/uploads/2015/12/Addendum-1-to-MoU-EC-English-version.pdf>). Ukraine regards EUBAM as a special mission. Its mandate is established by the Article 1 of the Memorandum of Understanding. Privileges and immunities are granted to staff on the basis of the Article 3 of the Memorandum and respective provisions of the Addendum thereto. The mandate of the Mission has already been extended four times (in 2007, 2009, 2011 and 2015), with the current mandate expiring on 30 November 2017.

OSCE Special Monitoring Mission in Ukraine (SMM) was deployed on 21 March 2014, following a request to the OSCE by Ukraine’s Government and a consensus decision by all 57 OSCE participating States (<http://www.osce.org/special-monitoring-mission-to-ukraine>). The SMM is an unarmed, civilian mission, present on the ground 24/7 in all regions of Ukraine. Its main tasks are to observe and report in an impartial and objective way on the situation in Ukraine; and to facilitate

dialogue among all the parties concerned. The activities of SMM are regulated by the provisions of the Decision of the OSCE Permanent Council No 1117 of March 21, 2014 and the Memorandum of Understanding between the Government of Ukraine and the Organization for Security and Cooperation in Europe (OSCE) on the deployment of a special monitoring mission of the OSCE of April 14, 2014. These two instruments outline the SMM's structure, composition and mandate. According to the Article 5 of the Memorandum of Understanding, the Mission and its staff will enjoy on the territory of Ukraine the same status, rights, privileges and immunities as are accorded by the Government of Ukraine to diplomatic representations and the diplomatic agents accredited in Ukraine in accordance with the Vienna Convention on Diplomatic Relations of 1961. In February 2016, its mandate was extended until 31 March 2017, with the possibility of further extension if necessary.

EU Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) began operations from its headquarters in Kyiv on 1 December 2014, following the Maidan revolution of 2013/14 and an invitation issued by the Ukrainian Government. EUAM Ukraine aims to assist the Ukrainian authorities towards a sustainable reform of the civilian security sector. The Agreement between Ukraine and the European Union on the status of the European Union Consultative Mission for the Reform of the Civil Security Sector of Ukraine of 17 November 2014 constitutes the legal basis for this special mission. Article 5 of the Agreement outlines privileges and immunities of EUAM Ukraine granted by the Host State, Article 6 – privileges and immunities of EUAM Ukraine personnel. The full text is available via the following link:

<http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=17101>.

UN Human Rights Monitoring Mission in Ukraine (HRMMU) was deployed in March 2014 by the Office of the United Nations High Commissioner for Human Rights at the request of the Ukrainian Side to evaluate and report on the human rights situation and to provide support to the Government of Ukraine in the promotion and protection of human rights. The Agreement between the Office of the United Nations High Commissioner for Human Rights and the Government of Ukraine concerning the deployment of a short-term UN Human Rights Monitoring Mission in Ukraine (HRMMU), concluded on 31 July 2014, is the legal basis for HRMMU's activities. This Agreement regulates the conditions and modalities relating to the establishment and functioning of the HRMMU, its status and the status of its officials and premises. According to the Article III of the Agreement, the Government of Ukraine shall apply to the HRMMU, Officials and Experts on Mission, Persons performing services on behalf of the HRMMU the provisions of the privileges and immunities set out in the Agreement between the Government of Ukraine and the United Nations relating to the establishment of a United Nations Interim Office of 6 October 1992.

3. Has your State adopted a specific national legislation in the field of immunities of special missions?

- a. If so, please provide information concerning the relevant legislative provisions (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources);**
- b. If not, is the issue of immunities of special missions covered by another part of your legislation? If so, please provide information concerning these relevant legislative provisions (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources).**

Ukraine has ratified the United Nations Convention on special missions (1969) by the Decree N 3383-XII of the Verkhovna Rada of Ukraine. Article 9 of the Constitution of Ukraine stipulates that "*International treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine*". Article 19 of the Law of Ukraine "On International Treaties of Ukraine" states that international treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine and have to be applied in a manner similar to any other act of national legislation. Therefore, the United Nations Convention on special missions (1969) is an integral part of national legislation and its provisions are directly applicable in Ukraine.

Article 6.2 of the Code of Criminal Procedure of Ukraine prescribes that criminal proceedings against a person enjoying diplomatic immunity may be exercised in accordance with the rules of this Code only with the consent of such person or with the consent of the competent authority of the State (international organization) represented by such person, in accordance with the procedure provided by the legislation of Ukraine and international agreements of Ukraine (<https://rm.coe.int/16802f6016>).

According to the Plenary Session resolution of the High Specialized Court for Civil and Criminal Cases for consideration of civil cases with foreign element of 16.05.2013 №2754/0/4-13, the diplomatic representatives of foreign States accredited in Ukraine and other persons specified in the relevant laws of Ukraine and international treaties of Ukraine are subject to the jurisdiction of the courts of Ukraine only within the limits defined by the principles and norms of international law or international treaties of Ukraine (Part Two of Article 79 of the Law of Ukraine "On International private law", Ukrainian version only: <http://zakon3.rada.gov.ua/laws/show/2709-15/page>). International organizations are subject to the jurisdiction of the courts of Ukraine within the limits defined by international treaties of Ukraine or the laws of Ukraine (Part Three of Article 79 of the Law of Ukraine "On Private International Law").

According to the Decree of the President of Ukraine №198/93 of 10.06.93 "*Regulations on Diplomatic and Consular Missions of Foreign States in Ukraine*" (Ukrainian version only: <http://zakon2.rada.gov.ua/laws/show/198/93>), in order to ensure the efficient performance of its functions, diplomatic representation (embassy, mission) of a foreign State in Ukraine and consular post (consulate-general, consulate, vice-consulate or consular agency) of a foreign State in Ukraine, as well as the staff of a diplomatic representation and a consular post shall enjoy privileges and immunities, provided in the Regulations, in accordance with relevant provisions of Vienna Convention on Diplomatic Relations of 18 April 1961 and Vienna Convention on Consular Relations of 24 April 1963. Paragraphs from 6 to 26 of the Regulations clarify the content and the scope of privileges and immunities granted to diplomatic representations and consular posts on the territory of Ukraine. This list includes but is not limited to: personal inviolability; inviolability of the premises; inviolability of archives and documents ; immunity from jurisdiction for their official acts; freedom of movement and communication, etc. Paragraph 27 specifies that privileges and immunities, provided in the Regulations for diplomatic staff, cover representatives of foreign States, members of parliamentary and government delegations visiting Ukraine with the aim of participating in bilateral or multilateral interstate negotiations, international conferences and summits or with other official purposes, as well as accompanying members of their families, who are not nationals of Ukraine. Representatives of foreign States, members of parliamentary and government delegations of foreign States, who transit through the territory of Ukraine with the same aims, as well as accompanying members of their families, who are not nationals of Ukraine, enjoy personal inviolability and such other immunities as may be required to ensure their transit. Paragraph 28 stipulates that privileges and immunities, which are granted in Ukraine to the international intergovernmental organizations, missions of the foreign States to these organizations, as well as to their officials are stipulated by the corresponding agreements, which Ukraine is a party to.

4. Have the authorities of your State released official statements, reports or any other document concerning the status and the immunities of special missions? If so, please provide any relevant information relating to these documents.

Not available. Ukrainian authorities have not released any official statements, reports or any other document concerning the status and the immunities of special missions.

5. Does your State consider that certain obligations and/or definitions regarding immunity of special missions derive from customary international law? If so, please provide a brief description of the main requirements of customary international law in this respect.

Ukraine is of the view that the United Nations Convention on special missions (1969) to large extent reflects customary international law. Its provisions relating to the mutual consent of the sending and the receiving State to send / to receive a special mission, the scope of privileges and immunities were repeatedly recognized as customary international law. Thus, the International Court of Justice in its case concerning the Arrest Warrant of 11 April 2000 noted that the New York

Convention provides “*useful guidance on certain aspects of the question of immunities*” (Dem. Rep. Congo v. Belg.; // I.C.J. – 2002. – No 3 (Feb. 14). – Para. 52; <http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>). In the process of the elaboration of the New York Convention by the International Law Commission there was no doubt that, at least, some of its provisions had the nature of customary international law, particularly as regards to such basic principles as the requirement of consent, inviolability and immunity of persons on special missions, premises, correspondence, property, transport etc. It seems that the customary nature of the Convention’s provisions is also widely recognized by the doctrine of international law.

For the purposes of this questionnaire and without prejudice to the position of Ukraine in other areas, we are of the opinion that such elements should be considered as a part of customary international law (non-exhaustive list):

- special mission is a temporary mission, representing a State, which is sent by this State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task;
- the functions (mandate, terms of reference) of a special mission shall be determined by the mutual consent of the sending and the receiving State;
- 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;
- customary international law calls for notification of the exact composition of the special mission, travel dates and its seat in the host State in order to enable the latter to guarantee the mission’s privileges and immunities;
- members of special missions enjoy privileges and immunities at least comparable to those accorded to diplomatic missions and their staff members. In any event the representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State;
- in case of explicit consent on transit, customary law also stipulates the granting of privileges necessary for transit;
- the receiving State may, at any time and without having to explain its decision, notify the sending State that any representative of the sending State in the special mission or any member of its diplomatic staff is *persona non grata* or that any other member of the staff of the mission is not acceptable. The sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission.

Ukraine also takes the view that under customary international law the Head of State, Head of Government and the Minister for Foreign Affairs, mentioned in Article 21 of the Convention, enjoy immunity *ratione personae* irrespective of their status as members of a special mission.

Within the framework of international law currently in force, there are no general treaty provisions, which regulate the modalities of forming, sending and determining the functions (mandate, terms of reference) of special missions of international organizations to the Member States outside the regular monitoring cycles or *ad-hoc* missions, the possibility of sending which is regulated by valid international treaties.

In view of the fact that the United Nations Convention on special missions (1969) is considered to a large extent as a reflection of customary norms, which are applicable to all special missions, its provisions can also be applied *mutatis mutandis* to special missions sent by international organizations.

6. Please provide information on the scope of the immunities of special missions, in particular:

a. The extent of the privileges and immunities granted to special missions and to their members;

In general terms, the extent of the privileges and immunities granted to special missions is determined according to the United Nations Convention on special missions. At the same time Ukraine enjoys discretion concerning the exact scope of immunities and privileges of special

missions representing States which are not parties to the Convention or international organizations. In such cases, the customary nature of relevant rules is assessed on a case-by-case basis.

b. The scope *ratione personae* (categories of individuals who may enjoy an immunity of special mission);

The rules on special missions apply to all members of the special mission regardless of their rank. The relevant criterion for the applicability of the Convention is the consent of the receiving State to the mission and its members.

c. The scope *ratione materiae*, in particular by specifying if there are exceptions to the granting of the immunity;

Every member of a special mission enjoys immunity from criminal jurisdiction for official acts. As to immunity in civil and administrative proceedings, Article 31 (2) of the Convention applies. As to private acts, there is no immunity from jurisdiction for certain members of the mission (see Article 37 of the Convention relating to service staff). It depends on the type of the member of a special mission (diplomatic staff, administrative and technical staff, service staff, private staff) whether immunity is granted.

d. The temporal limits of the immunities accorded to special missions.

According to Article 43 of the Convention on special missions, members of the special mission enjoy the privileges and immunities from the moment they enter the territory of the receiving State for the purpose of performing their functions in the special mission or from the moment when their appointments are notified to the relevant authority of the receiving State if they are already present in its territory. The privileges and immunities cease at the moment of leaving the territory of the receiving State or on expiry of a reasonable period in which to do so, except for the immunity in respect of acts performed by them in the exercise of their functions.

NATIONAL PRACTICE AND PROCEDURE

7. Is there national case law in the field of immunities of special missions? If so, please provide information on these decisions (date of the judgment, authority that issued the judgment, name of the parties, main points of law, French or English translation of the judgment or summary of the judgment in English or in French).

There is no available information on this issue.

8. Is there a mechanism of formal agreement of special missions, namely a process under which your State can accept in advance that an official visit constitutes or not a special mission?

No special mechanism has been established so far. In order to be considered as a special mission it is necessary to obtain consent of the receiving State. This consent can take different forms: international (bilateral or multilateral) treaty concluded in accordance with national legislation of both the sending and the receiving States; memorandum of understanding, mandate, terms of reference, any other bilateral or multilateral document agreed following negotiations or consultations between the sending and the receiving States; exchange of letters between Heads of State, Heads of Government, Ministers of Foreign Affairs or any other competent high-ranked State officials, exchange of verbal notes between Ministries of Foreign Affairs of the sending and the receiving States. At least, as envisaged by the Convention on special missions, the sending State is required to notify to the receiving State the exact composition of the special mission, travel dates and the place of seat in the host State.

Ukraine does not accept that the behaviour of the governmental authorities may constitute implied consent.