IDENTIFICATION OF SPECIAL MISSION IMMUNITY AND THE RECEPTION OF CUSTOMARY INTERNATIONAL LAW INTO ENGLISH LAW

IN R. (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWCA Civ 1719, the Court of Appeal affirmed a decision of the Divisional Court that (1) members of special missions are entitled to inviolability and immunity from criminal jurisdiction (the “core immunities”) under customary international law; and (2) these immunities form part of English common law. The Freedom and Justice Party, which formed the elected Government of Egypt between June 2012 and July 2013, argued that Mahmoud Hegazy, director of the Egyptian Military Intelligence Service in July and August 2013, was responsible for torture during the 2013 military coup d’état that led to the overthrow of President Morsi. In 2015, the Foreign and Commonwealth Office consented to Hegazy’s visit to the UK as a member of a special mission. The appellants asked the Metropolitan Police to arrest him on suspicion of acts of torture, contrary to section 134 of the Criminal Justice Act 1988, which makes it a criminal offence to commit torture anywhere in the world. However, the Crown Prosecution Service took the view that members of a special mission were immune from arrest; so no action was taken against Hegazy. The appellants then sought judicial review of the decision not to arrest him, and the Divisional Court accepted their request for an advisory declaration on special mission immunity as it applied in the law of England and Wales.

Special missions are one of the earliest forms of diplomatic intercourse, and “an essential part of the conduct of international relations” (at [79]). However, unlike permanent missions, there is no widely accepted convention governing the privileges and immunities of their members. The 1969 Convention on Special Missions has only 39 state parties (neither Egypt nor the UK is a party, although the UK has signed the Convention), largely
because states consider that it grants privileges and immunities that go beyond what is functionally necessary for a special mission. Until relatively recently, the paucity of authorities resulted in some uncertainty as to whether members of a special mission were entitled to immunity under customary international law. States rarely have to assert claims to such immunity: special missions are usually short in duration, and issues of immunity are normally dealt with through diplomatic channels, or national prosecutors decline to prosecute long before governments or courts are required to assert or adjudicate on immunity.

The Court of Appeal paid tribute to the judgment of the Divisional Court (at [10]), for showing “that there is a very considerable amount of evidence of different types to satisfy [the requirements of state practice and opinio juris in favour of immunities for special missions] ... and very little against” (at [78]). Additional evidence presented to the Court of Appeal served only to reinforce this conclusion. Moreover, “[n]o state has taken action or adopted a practice inconsistent with the recognition of such immunities. No state has asserted that they do not exist” (at [79]). The Court of Appeal’s judgment – like that of the Divisional Court – is notable not just for addressing a hitherto unsettled point of international law but also for its careful and methodological approach to the identification of customary international law. In addition to looking for a widespread, representative and consistent practice of states that is accepted as a legal obligation under international law, the judgment considers the relationship between customary international law and treaty law (at [21]) and the relevance of affected states (at [82]). Both courts sought to follow the International Law Commission (ILC)’s 2016 draft conclusions on the Identification of Customary International Law as “a valuable source of the principles on this subject”, noting that, while these were not the final product, they represented the work of “some of the most qualified jurists drawn from across the world who have debated the matter most thoroughly between themselves over an extended period of time” (at [18], stressing that the conclusions must be read with the commentaries). These words of endorsement confirm the potential importance of the work of the ILC for the determination of rules of international law, whether as a subsidiary means under Article 38(1)(d) of the Statute of the International Court of Justice or otherwise (see commentary to conclusion 15). The final set of conclusions/commentaries were adopted three weeks after the judgment, with only minor changes. They have since been annexed by the UN General Assembly to Resolution 73/203 of 20 December 2018.

The Court of Appeal nevertheless appeared to go beyond the methodology for identifying customary international law when it explained that “[i]f an international court had to consider the question whether a member of a special mission enjoyed the core immunities as a matter of customary international law, it would have regard to the importance and long
acceptance of the role of special missions”, noting that such missions “cannot be expected to perform their role without the functional protection afforded by the core immunities” (at [79]). While diplomatic immunities reflect a functional necessity that underpins all diplomatic law, that necessity is the rationale for immunity rather than evidence of its existence. The judgment also does not always distinguish clearly between state practice and evidence of acceptance as law. For example, the Court of Appeal, like the Divisional Court, devoted considerable attention to state responses to a Council of Europe questionnaire on special missions. However, it did not explain what precise role or weight it attributed to them: the Court considered the questionnaire responses under the headings “State practice: CAHDP” (at [75]–[77]) and “CAHDI: State practice survey” (at [99]–[106]) yet seems to have referred to them primarily as evidence of opinio juris (at [95], [98], [99]–[106]). Responses to questionnaires may be evidence of opinio juris and they may point to state practice, but how far they may be regarded in and of themselves as state practice is another matter.

The Court of Appeal acknowledged that, although older authorities had described customary international law as part of the common law, “the better view is [that] customary international law is a source of common law rules, but will only be received into the common law if such reception is compatible with general principles of domestic constitutional law” (at [114], emphasis added). It was common ground that Lord Mance had set out the correct approach in his obiter comments in R. (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, [2016] A.C. 1355 – namely, that “the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration” (Keyu, at [150], emphasis added). The presumption “reflects the policy of the common law that it should be in alignment with the common customary law applicable between nations” (at [117]). The position is different for unincorporated treaties, since the UK constitution assigns to the executive the authority to make treaties but not the power to alter domestic law unilaterally. According to the Court, the “common law is more receptive to the adoption of rules of customary international law because of the very demanding nature of the test to establish whether a rule of customary international law exists . . . . This is not something that the Crown can achieve by its own unilateral action by simple agreement with one other state” (ibid.). This explanation is not entirely convincing: it assumes too much about the ease of concluding treaties and the degree to which the test for customary international law is demanding. It also overlooks the fact that
unincorporated treaties may have a role to play in deciding questions of English law and that the executive of certain states sometimes exercises a disproportionate influence in the shaping of customary international law.

The Court rejected the argument that Parliament is the more appropriate body to decide whether to incorporate the core special mission immunities into English law. Not only is there no constitutional reason that the rules should not be part of domestic law, but their recognition “is in accord with [the] constitutional principle in the present case that the courts should act to ensure that the United Kingdom abides by its obligations under international law” (at [134]). Furthermore, in excluding immunity from criminal jurisdiction from the scope of the State Immunity Act 1978 (s. 16), Parliament left this area to general common law as informed by customary international law (at [125]). From a rule of law perspective, treating the core immunities as part of the common law is also very different from incorporating a new criminal offence: the former “protect[s] a person who has the benefit of them from criminal process” while the latter may result in a person being subject to a criminal penalty in the absence of a law expressly created by Parliament (at [121]); see R. v Jones (Margaret) [2016] UKHL 16, [2007] 1 A.C. 136).

The Court also rejected the argument that it was creating a “non-reviewable discretion in the executive to confer immunity upon individuals simply by agreeing to accept them ... as members of a special mission” (at [122]). The receiving state’s consent is an essential characteristic of a special mission under customary international law; it protects the receiving state from having to confer immunity “upon anyone that the sending state wishes to designate as a member of a special mission” (at [130]). It is not contrary to constitutional principle that the UK benefits from this protection, and the decision whether to accept a special mission falls squarely within the executive’s constitutional role of carrying out international relations. While a decision to accept a special mission may affect individual rights under domestic law, it does not alter or suspend the law contrary to Article 1 of the Bill of Rights (at [131], drawing on R. (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, [2018] A.C. 61, at [52]).

Minor quibbles aside, the Court of Appeal (like the Divisional Court) has not only clarified the position of special mission immunity under customary international law and English law but in doing so has set an example for the rigorous and systematic application of the methodology for the identification of customary international law, and provided further evidence that English judges have embraced Brierly’s contention that “international law is not a part, but is one of the sources, of English law” ((1935) 51 L.Q.R. 24, at 31).

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