



Neutral Citation Number: [2011] EWHC 2029 (Admin)

Case No: CO/3672/2011 AND CO/1655/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2011

Before:

LORD JUSTICE MOSES
MR JUSTICE FOSKETT

Between:

Khurts Bat	<u>Appellant</u>
- and -	
The Investigating Judge of the German Federal Court	<u>Defendant</u>
- and -	
The Government of Mongolia	<u>1st Interested Party</u>
- and -	
The Secretary of State for Foreign and Commonwealth Affairs	<u>2nd Interested Party</u>

Mr Alun Jones QC for the **Appellant** and **Sir Elihu Lauterpacht QC** for the **Government of Mongolia** (instructed by **J D Spicer & Co**)

Mr Aaron Watkins for the **German Judicial Authority** (instructed by **The Crown Prosecution Service**) and **Sir Michael Wood** and **Ms Clair Dobbin** for the **Foreign and Commonwealth Office** (instructed by **The Treasury Solicitor**)

Hearing dates: 23rd and 24th June 2011

Approved Judgment

Lord Justice Moses:

Introduction

1. On 18 February 2011 District Judge Purdy ordered the extradition of the appellant, the Head of the Office of National Security, Mongolia. His extradition was requested by the Federal Court of Justice in Germany by virtue of a European Arrest Warrant certified by the Serious Organised Crime Agency on 13 April 2010. This is an appeal pursuant to s.26 of the Extradition Act 2003. District Judge Purdy rejected the two grounds on which, at that time, extradition was resisted. He rejected the appellant's claim that he was entitled to immunity on the ground that he was visiting the United Kingdom on a Special Mission and rejected his claim to be entitled to immunity on the grounds that he held high-ranking office. This appeal is pursued on four grounds:-
 1. That Mr Khurts Bat enjoys immunity in customary international law because at the time of his arrest, on 17 September 2010, he was visiting the United Kingdom on a Special Mission on behalf of the Government of Mongolia, a mission consented to and encouraged by the United Kingdom;
 2. The extradition proceedings are an abuse of process;
 3. At the time of arrest he was representing his Government as a very high-ranking civil servant;
 4. The crimes he was alleged to have committed in respect of which his extradition was sought were official acts committed by him on the orders of the Government of Mongolia and, accordingly, he is entitled to immunity both in Germany and in the United Kingdom.

This fourth ground was not advanced before the District Judge. I should add that the appellant has advanced a separate application for *habeas corpus*. At the time those proceedings were launched neither the Foreign and Commonwealth Office nor the Government of Mongolia were interveners. Both now intervene and have produced evidence on which they seek to rely. In those circumstances, whilst Mr Alun Jones QC, on behalf of the appellant, 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 s.34 of the 2003 Act. There is no need to reach any conclusion as to this issue.

Facts

2. It is necessary to set out some of the facts leading to the arrival of the appellant in the United Kingdom 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.

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:-

“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.

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 2nd October 1998.

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 18th 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.”

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

4. Mr Tsagaandari is the Secretary General to the National Security Council of Mongolia. Part of the task of the Council is to collaborate and co-operate with their counterparts in other countries. On 12 October 2009 Mr Tsagaandari met Mr Bill Dickson, British Ambassador to Mongolia, and raised the possibility of collaborating with the National Security Council’s equivalent in the United Kingdom. On 26 November 2009 His Excellency Mr Altangerel, Ambassador of Mongolia to the United Kingdom, met the Director of the UK National Security Secretariat, William Nye of the Cabinet Office, to discuss the possibilities of co-operation and ties.

5. The British Ambassador to Mongolia, almost one year later, described his conversation with the Secretary General of the Mongolian National Security Council as fairly non-productive (see his e-mail dated 6 September 2010). There was, indeed, no apparent outcome to those discussions.
6. Five and a half months later, on 17 March 2010, an entry clearance officer of the UK Border Agency, stationed in Beijing, received a visa application for the appellant. The entry clearance officer gave the appellant's name and date of birth and described his visa application as being for a "Mongolian Diplomat intending a seven day visit to the UK on official business". On 18 March 2010 a SOCA officer, Mr Keogh, identified Mr Khurts Bat as someone wanted by the German authorities. There was no warrant available and Mr Keogh thought that a warrant would be dependent on whether Mr Khurts Bat had diplomatic protection. He asked the entry clearance officer whether Mr Khurts Bat did have "diplomatic protection" and whether the ECO was likely to issue a visa. The response, on 18 March 2010, was that the applicant would be travelling on a diplomatic passport and "so would have immunity". The e-mail said that the information in relation to the proposed visit was very limited. The ECO suggested that the visit might be refused as being "non-conducive to the public good". It reiterated that the Border Agency had no details of what Mr Khurts Bat intended to do in the UK. Mr Keogh responded on the same day that because the applicant was travelling with diplomatic immunity, SOCA was unable to "progress the German request for arrest and extradition". Mr Keogh said the question of whether a visa should be issued was for the Border Agency to decide but the fact that he was wanted by Germany should not be disclosed to the applicant.
7. On 19 March 2010 an officer of the Entry Clearance Officer's Support Unit, based in London, advised Mr Keogh of SOCA that Protocol had advised that Mr Khurts Bat did not have diplomatic immunity "as he is not being posted here". The Support Unit was referring to the fact that Mr Khurts Bat was not an accredited diplomat at the Mongolian Embassy in London. On 22 March 2010 Mr Keogh responded, telling the Support Unit that SOCA would request a European Arrest Warrant from the Germans and asking what new dates the ECOs had for a visit once a decision had been made to issue a visa. On the same date, the Support Unit repeated to the ECO in Beijing that the applicant did not have diplomatic immunity because he was not posted in the UK. The following day, the ECO in Beijing told Mr Keogh of SOCA and the Support Unit that he intended to contact the applicant and "apologise" for not being able to issue a visa in time and would propose to ask for a new departure date and flight numbers. The ECO wanted to know whether SOCA would need a delay in order to obtain the warrant.
8. On 13 April 2010 the ECO in Beijing notified Mr Keogh of SOCA that the applicant had been contacted in Mongolia two weeks ago and said he was travelling to have meetings with the Mongolian Ambassador in London. The e-mail records that Mr Khurts Bat 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.
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 applicant would travel the following Saturday. He said:-

“Obviously, we need to get our lines sorted out by COP (close of play) tomorrow, Friday.”

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 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 Mr Khurts Bat enjoyed. An e-mail from an ECO in Beijing dated 16 April 2010 reiterated that the applicant was intending to have meetings with the Mongolian Ambassador in London, recorded that he had a valid Schengen Visa, and continued:-

“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 applicant is due to travel sometime in June 2010, no confirmed travel date as of yet.”

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 United Kingdom and Mongolia.
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 Mr Khurts Bat amongst them. The e-mail informed the United Kingdom Ambassador that the delegation would arrive in London on Saturday 25 September 2010 and described proposed sessions. It finished by mentioning “a couple of quick points” that the Mongolian Ambassador had also raised. The second was:-

“The Head of Executive Office will visit the UK this month (15-18 Sept) and hopes to meet Peter Ricketts, HD of NSC.”

It is important to note that that reference was not related to the proposed Round Table discussions and did not identify Mr Khurts Bat by name.

12. His Excellency the Mongolian Ambassador has made a statement concerning that part of the discussions to which the e-mail referred. He says that many issues were discussed relating to Mongolian-British bilateral relations, “including the pending visit of Mr Bat Khurts, currently Head of the Executive Office of the National Security Council of Mongolia”. The Ambassador says that he told a Foreign Office official, Miss Rohsler, that the Embassy had already informed the FCO of his impending visit and had requested assistance in arranging meetings between Mr Khurts Bat and the National Security Secretariat of Great Britain. He continues:-

“I believe these discussions had taken place between members of my staff and the FCO in London, and also through discussions in Mongolia between the British Ambassador, Mr B Dickson, and our officials of the National Security Council. I informed her that we still had not heard from the FCO regarding the appointments.”

13. It appears to me that His Excellency may have elided certain events because it is unlikely there was any discussion prior to 31 August 2010 in relation to the possibility of arranging meetings between Mr Khurts Bat and the National Security Secretariat of Great Britain. Those discussions appear to have taken place later following a meeting between Mr Dickson in Ulaan Baator and the Secretary General of the Mongolian National Security Council, Mr Tsagaandari.

14. This meeting took place on 6 September 2010. According to Mr Tsagaandari, he invited the Ambassador, Mr Dickson, to a meeting and reiterated the conversation of the previous year regarding contacts with UK organisations similar to the Mongolian National Security Council. Mr Tsagaandari says:-

“I also informed [the UK Ambassador] that Khurts Bat Bat, Head of the Executive Office, *was being sent* to London on 13 September, and the purpose of his visit was to meet the Head of the National Security Secretariat of Great Britain so as to exchange views on establishing ties and developing co-operation between the two organisations.

Mr Dickson said that he would inform the Foreign and Commonwealth Office about Khurts Bat Bat’s visit and *gave his full support in helping to arrange the visit*. The Ambassador also emphasised the need to find different fields of co-operation and new horizons in bilateral relations between Mongolia and Great Britain and suggested that this issue should be raised at the British-Mongolian Round Table which was due to take place on 27 September...” (my emphasis)

15. This meeting on 6 September 2010 was reported in an e-mail on the same date from the Ambassador to the United Kingdom which reads:-

“The Secretary General of the Mongolian National Security Council, Enkhuvshin, *asked me to call on him at short notice* this morning. I met him in similar circumstances almost a year

ago in what turned out to be 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.” (my emphasis)

16. Shortly after, on the same day, the FCO Desk told the United Kingdom Ambassador, in an e-mail, that Mr Khurts Bat was the subject of an International Arrest Warrant and would be arrested upon arrival. The author continued:-

“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:-

“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 Mr Khurts Bat "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 Mr Khurts Bat during his intended visit.
18. On 7 September 2010 the FCO informed Mr Keogh that the appellant would arrive in the UK between 13 and 17 September. On the same day Mr Chinuukhei, First Secretary to the Mongolian Embassy, spoke to the FCO's Desk Officer asking whether he had received a response from the Office of the UK National Security Advisor, Sir Peter Ricketts. He repeated that request on 9 September 2010. At the same time, the UK Ambassador in Mongolia was making persistent requests as to details of the appellant's date of arrival in London. Those details were given to the Embassy in Mongolia between the 9 and 10 September 2010.
19. In the meantime Mr Narkhuu told the appellant that he was due to meet an associate of Sir Peter Ricketts, possibly Mr Hopkins, who was, in fact, the Desk Officer for Mongolia. On 13 September 2010 Mr Chinuukhei told Mr Hopkins that the date of Mr Khurts Bat's visit had been changed to 24 September 2010. He was told by Mr Hopkins that it would be difficult to arrange a meeting with Sir Peter Ricketts due to his hectic schedule. Mr Chinuukhei requested a meeting with one of Sir Peter's deputies. On 16 September 2010 Mr Chinuukhei was told by Mr Hopkins that both Sir Peter Ricketts and his deputies would be unable to meet the appellant during his visit. The Mongolian Ambassador wrote on that date to Mr Nye, Director of National Security, to request a meeting with the appellant. It is important to note that Mr Khurts' date of departure was on 24 September 2010, one day before the Round Table meeting was due to start. It was in that letter of 16 September 2010 that His Excellency associated the visit of Mr Khurts Bat with the meeting with Mr Nye of the year before in November 2009. The Ambassador continued in that letter:-

"We view that the visit of Mr B Khurts Bat is a clear outcome of our meeting where you and I discussed some possibilities of establishing and maintaining co-operation and ties between the National Security Council of Mongolia and the UK National Security Secretariat.

I sincerely hope that you will be able to spare some time to meet with Mr B Khurts Bat to discuss concrete issues of co-operation between the two National Security authorities."
20. The following day, 17 September 2010, the appellant was arrested on board a Russian plane when it landed at Heathrow airport. He had clearly intended to meet officials of the United Kingdom, since he was carrying working papers, emblems of his office in Mongolia, small Mongolian gifts, and internet photographs of people he was expecting to meet. He was brought before the City of Westminster Magistrates Court the following day and remanded in custody.

21. A number of features emerge from the statements of the Mongolian officials and of His Excellency and the contemporaneous e-mails. On a number of occasions UK officials were told that Mr Khurts Bat would be coming. Their response was not to discourage that visit but rather to ask when and on what flight he would arrive. It is clear that the Mongolian authorities received the impression from the Ambassador that Mr Khurts Bat's visit was for the purpose of establishing direct contact and co-operation between the security agencies of the two countries and that such a visit was encouraged by the Ambassador. It is also apparent that no meetings for that purpose had been arranged and that on a number of occasions the Mongolian authorities were told that meetings with either the Head of the UK National Security Council or his deputy would not be possible.

Immunity on the Grounds that Mr Khurts Bat was a Member of a Special Mission

22. The court had the benefit of submissions from both Sir Elihu Lauterpacht 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 Mr Khurts Bat was entitled to inviolability of the person and immunity from suit if he was travelling on a Special Mission sent by Mongolia to the United Kingdom with the prior consent of the United Kingdom. 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 United Kingdom and Mongolia governing the inviolability and immunity of persons on Special Missions. There are 38 States which are parties to the Convention on Special Missions of 8 December 1969 ("The New York Convention") which entered into force on 21 June 1985. But although the United Kingdom 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 requires the United Kingdom 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:-

- (i) Whether the letter from the Protocol Directorate dated 12 January 2011 is conclusive as to the facts it stated;
- (ii) if the letter should not be regarded as conclusive, whether, as a matter of fact, it is established that the United Kingdom gave consent to a Special Mission of which Mr Khurts Bat 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 appellant'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 Mr Khurts Bat had come to the United Kingdom on a Special Mission and also as to the criteria on which the United Kingdom 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 both the sending and the receiving States to the Special Mission. Whilst in FCO practice there are no prescribed formalities, such consent would normally be demonstrated by, for example, an invitation by the receiving State and an acceptance by the sending State, an agreed programme of meetings, an agreed agenda of business and so on.

In the case of Mr Khurts Bat, the FCO did not consent to his visit as a Special Mission, no invitation was issued, no meeting was arranged, no subjects of business were agreed or prepared. The FCO therefore did not consider that Mr Khurts Bat came to the UK on 18 September on a Special Mission.”

25. Both the appellant and the Government of Mongolia stress the Director of Protocol’s reference to what would normally be expected and the examples he gave. They contend that the letter was no more than a response to the District Judge’s request for assistance as to the FCO’s approach and cannot bind the court in relation to the contentious issue of consent. In order to resolve this issue it is necessary to give further consideration to the nature and consequences of a Special Mission.
26. It is important to appreciate that the status of immunity conferred by a Special Mission is that which is conferred on a permanent Diplomatic Mission. Under customary international law those accredited to a permanent Diplomatic Mission enjoy inviolability of the person and immunity from suit. Those accredited to a permanent Diplomatic Mission are now afforded such inviolability and immunity by virtue of the Diplomatic Privileges Act 1964 which gives effect to the Vienna Convention on Diplomatic Relations of 1961 (see Article 29 and Article 31 in Schedule 1). A Special Mission performs temporarily those functions ordinarily taken care of by a permanent mission. The Special Mission represents the sending State in the same way as a permanent Diplomatic Mission represents the State who sends it (see, for example, the statement made by the UK representative, speaking also for the

French delegation, at the vote for the adoption of Article 1(a) of the Special Missions Convention at the Sixth (Legal) Committee of the General Assembly of the United Nations on 20 October 1969 (UN Document A/C.6/SR.1128 paragraphs 25-26).

27. The essential requirement for recognition of a Special Mission is that the receiving State consents to the mission, as a Special Mission. This central requirement is reflected in Article 1(a) of the Convention, which provides:-

“(a) 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 of performing in relation to it a specific task.” (my emphasis)

Article 2 provides that the consent must be “previously obtained through the diplomatic or another agreed or mutually acceptable channel”.

28. It is worth recalling that the words I have emphasised in Article 1 represent a stricter and more formal view at the Sixth Committee than that previously expressed in the International Law Commission’s commentary on draft Article 2. That stated:-

“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.”

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 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-parte Teja* 2 QB 274 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:-

“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.” (282B)

31. Special Mission immunity under customary international law has been recognised in a number of decisions of District Judges.

32. The importance of prior consent has been acknowledged in decisions to which this court was referred in Germany (*Tabatabai* 80 ILR 389) and in Austria (the *Syrian National Immunity* case 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 edition, Vol. I, 1048-9) 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 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 Vallat points out in *International Law and the Practitioner*, the list is not exhaustive.
34. The list relates to matters which in *Halsbury's Laws of England* (5th edition, 61, paragraph 15) are called "Facts of State". They are facts which the court accepts, not so much because they are within the exclusive 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 United Kingdom 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 Corporation v Iraqi Airways* (nos. 4 and 5 [2002] AC 883:-
- "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." (paragraph 349)
35. Brooke LJ was referring to the speech of Lord Atkin in the *Arantzazu Mendi* [1939] AC 256:-
- "Our State cannot speak with two voices on such a matter (*viz.* State Sovereignty and matters deriving from it), the judiciary is saying one thing, the Executive another. Our Sovereign has to decide whom he will recognise as a fellow Sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone." (page 264)
36. These authorities were cited by the Court of Appeal in *The Queen on the Application of HRH Sultan of Pahang v SSHD* [2011] EWCA Civ 616 when it regarded the Certificate that the Sultan was not the Head of State of Malaysia as conclusive for the purposes of deciding whether the Sultan enjoyed State immunity.
37. I can see no rational basis for distinguishing between the effect of a Certificate in relation to whether the United Kingdom consented to the visit of Mr Khurts Bat as a Special Mission and from other factual circumstances which give rise to immunity. It is true that the conclusive effect of a Certificate in relation to those identified in Schedule 1 Article 1 of the Diplomatic Privileges Act 1964 is enshrined in S.4 of that Act. But since the essential question is whether the British Government recognised Mr Khurts Bat's visit as a Special Mission with the immunities which flow from such

recognition, it seems to me just as much a matter for the Executive as recognition of an Ambassador or a member of an Ambassador's staff, a matter properly the subject of a conclusive statement long before the 1964 Act (see, e.g., *Engelke v Musmann* [1928] AC 433).

38. It is true that the Protocol letter said that the question whether Mr Khurts Bat came to the UK on 18 September 2010 on a Special Mission was a question of law for the court to determine but that, in my judgement, was no more than a proper and respectful acknowledgement that the consequences of absence of consent to Mr Khurt's visit as a Special Mission were a matter for the court. Exactly the same problem arose in the letter discussed in the *Aranzazu Mendi* in relation to whether the nationalist Government was recognised by the UK as exercising *de facto* control over the larger portion of Spain. The letter concluded:-

“The question whether the nationalist Government is to be regarded as that of a foreign sovereign State appears to be a question of law to be answered in the light of the preceding statements (that HMG did recognise that Government) and having regard to the particular issue or circumstances with respect to which the question is raised.” (258)

Lord Wright concluded that the difficulty was more apparent than real:-

“The Foreign Office stated the precise facts as then existing in regard to recognition by His Majesty's Government, by the decision of which recognition is given or withheld. The question of law left to the court is what was the effect of these facts on the issues before the court?” (268)

39. In just the same way, the consequences of the fact that the United Kingdom Government did not recognise Mr Khurt's visit as a Special Mission is a matter for the court. Whether or not the United Kingdom Government chose to consent to Mr Khurts Bat'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 United Kingdom did not consent to the visit as a Special Mission.
40. I recognise that the Government of Mongolia takes a different view and contends that the United Kingdom, 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 Mr Khurt'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.
41. For that reason, it seems to me that Mr Khurts Bat is not entitled to immunity on the grounds that his visit was a Special Mission.

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 Mr Khurts Bat'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 appellant was seeking a visa so as to visit the Ambassador of Mongolia in London.
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 Mr Khurts Bat *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 United Kingdom 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 United Kingdom Government told Mr Khurts Bat 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 United Kingdom consented to the visit as a Special Mission.
44. It is necessary to underline that the meeting on 6 September 2010, on which the appellant 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 Mr Khurts Bat visiting on a Special Mission.
45. In those circumstances, it is not established that the visit was on a Special Mission even if the Foreign Office letter is not conclusive evidence of that fact.
46. I agree with the District Judge that Mr Khurts Bat is not entitled to immunity on that ground although I should emphasise that much of the evidence on which reliance is now placed was not before him.

Abuse of Process

47. It is convenient to deal next with the submission that the extradition proceedings were an abuse of the process of the court because the appellant was lured into the jurisdiction for the purpose of securing his arrest. The facts which I have recently related form the basis of that allegation.
48. The appellant's submission is that 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. The ordinary diplomatic courtesies were abused to lure the appellant into this country for

the purposes of executing an arrest warrant. The conduct was abusive because it amounted to entrapment of a senior representative of a friendly foreign state.

49. The principles to be deployed for resolving the contention were not in dispute. First, 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. Second, the conduct alleged to constitute the abuse must be identified with particularity. If it is so identified then the judge's first task is to decide whether it is capable of amounting to an abuse. Third, if it is capable of amounting to abuse, the judge must consider whether there are reasonable grounds for believing that such conduct may have occurred. If such reasonable grounds exist, then the judge should not order extradition unless he is satisfied himself that no such abuse has occurred (see Lord Philips CJ in *USA v Tollman* [2007] 1WLR 1157 at paragraph 84).
50. It is clear that the Government of Mongolia believed that the appellant would be welcome in the United Kingdom. It is also plain that it had no idea that Mr Khurts Bat was wanted under a European Arrest Warrant. Equally, that belief must have been plain to the FCO and to SOCA. Both appear to have taken pains to do nothing to alert either the appellant or the Government of Mongolia to the fact that SOCA had sought a Warrant from Germany and that, should he arrive, he would be arrested. It is true that he was granted a visa. But he was granted a visa in response to his request on the basis that he intended to visit on official business (the reason described in his visa application as reported on 17 March 2010) or subsequently (on 13 April 2010) to have meetings with the Mongolian Ambassador in London (see paragraphs 6 and 8 above). The grant of the visa of itself cannot possibly be described as deceitful, let alone as executive misconduct. The trick by which police secured the presence of a wanted person for the purposes of extradition did not amount to an abuse of process in *In re Schmidt* [1995] 1 AC 339 (see the speech of Lord Jauncey at 379). The Mongolian Government itself accepts that the United Kingdom was under no obligation to tell the appellant that he was wanted on a European Arrest Warrant (see paragraph 35 of Mr Tsogbaatar's statement as Secretary of State for Foreign Affairs and Trade for Mongolia).
51. Accordingly, the appellant must establish conduct which goes beyond the issue of the visa. It must show that the appellant 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 United Kingdom 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 Sir John Dyson SCJ in *Warren v AG of Jersey* [2011] UKPC 10 at paragraph 22. The Board was at pains not to impose rigid classifications (see paragraph 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 appellant 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 appellant 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 Mr Khurts Bat 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 paragraph 16 above). In those circumstances there is no question of any official in the United Kingdom luring the appellant to this country in the belief that he was going to meet United Kingdom 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 Mr Khurts Bat *would* be coming to the United Kingdom. There was no question of asking for an invitation.
54. The highest that it can be put is that at 6 September 2010 the United Kingdom 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 United Kingdom. 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 Mr Khurts Bat to this country. The Government of Mongolia intended Mr Khurts Bat to visit the United Kingdom 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 United Kingdom Ambassador or Government. I reject the allegation.

Immunity as a Person Holding a High Ranking Office

55. The appellant 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 QC 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. There is no dispute but that in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office. They enjoy complete immunity from criminal jurisdiction.
56. 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* (ICJ Reports 2002, page 3) the Court said:-

“...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.” (paragraph 51)
57. The Court went on to observe that the immunities afforded to Ministers for Foreign Affairs, were not for their personal benefit, but to ensure the effective performance of their functions. Such officials are recognised, under international law, as representative of the State solely by virtue of their office (paragraph 53). To expose a Minister for Foreign Affairs to legal proceedings might deter that Minister from international travel when required to do so for official functions.

58. The ICJ reiterated those propositions in *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)* (ICJ Reports 2008, page 177). It is of note that in that case the Court appears to have endorsed the view of France that a Djiboutian Procureur de la République and Head of National Security did not enjoy immunity as persons occupying high-ranking offices in the State (see paragraphs 185-186).
59. In his Second Report to the International Law Commission on immunity of State officials from foreign criminal jurisdiction (International Law Commission, 62nd Session, Geneva 2010 A/CN.4/631), the Special Rapporteur Kolodkin described the immunity as being enjoyed by a narrow circle of high-ranking State officials (see summary 94(i)). The wording of the ICJ in the *Arrest Warrant*, which I have quoted above, demonstrates that the paradigm of those entitled to such immunity is a Head of State or Head of Government. The words “such as”, whilst indicating that the list is not limited to those they identify, also carries with it the implication that in order to fall within that narrow circle it must be possible to attach to the individual in question a similar status.
60. Defence Ministers and a Minister of Commerce have been afforded that immunity by District Judges in *Re Mofaz* 128 ILR 709, and in *Re Bo Xilai* 129 ILR 713.
61. It is clear to me that Mr Khurts Bat falls outwith that narrow circle. In British terms he is a civil servant whose counterparts, so the United Kingdom contends, would be someone of director level, at a mid-rank in the FCO. The documents showing his job description and his authority, shown to the court by the Government of Mongolia, underline his status as an administrator far removed from the narrow circle of those who hold the high-ranking office to be equated with the State they personify and with those identified by the International Court of Justice.
62. The District Judge rejected the claim partly on the grounds that Mr Khurts Bat was not engaged on foreign affairs. I do not regard that as a ground for rejection of the claim. It was plainly the purpose of Mr Khurts Bat’s visit to discuss matters of mutual security concern and, had he held the status which customary international law would regard as of sufficient high rank, that purpose would not entitle the United Kingdom to deprive him of immunity. But for the reasons I have given, Mr Khurts Bat 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.

Does the Appellant have Immunity by Reason of His Conduct as an Official of the Government of Mongolia?

63. The appellant 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, i.e., *ratione personae*. The immunity claimed, if established, entitles him to immunity from extradition. None of the parties contended that if he was entitled to immunity from criminal prosecution in Germany he was, nonetheless, 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 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 Elihu's second supplementary opinion dated 20 May 2011 and reiterated in his points in reply dated 15 June 2011.
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 two and a half 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 could not be taken since the Government of Mongolia had not notified either Germany or the United Kingdom that the conduct of which it was said the appellant 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 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 appellant:-

“...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 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 to Mongolia by using force. It alleges that the appellant, working at the Mongolian Embassy in Budapest, was entrusted with the mission. But the warrant itself, as I have already noted, asserts that he is not entitled to immunity and that denial of immunity has been repeated in a letter from the office of the Public Prosecutor General of the German Federal Court of Justice dated 24 June 2011.
69. The issue is not straightforward. There is much dispute between respected authorities. But the effect of the delay in raising this point has been that Sir Michael was compelled to deal with the issue orally without the benefit of any full written

argument, let alone a complete analysis of the relevant sources. Analysis of those sources is vital in relation to an issue which depends solely on customary international law. Identification of principle in customary international law depends upon State practice and *opinio juris* to be culled from those sources recognised by the International Court of Justice: international conventions, international custom, general principles of law recognised by civilised nations and, as a subsidiary means, judicial decisions and the teachings of the most highly qualified publicists of the various nations (Article 38 of the Statute of the International Court of Justice). The appellant has now been in custody for over a year. The need to produce a conclusion allows of no detailed analysis of the many available sources of which only a few were mentioned.

70. Notwithstanding the wealth of written commentary, there is a dearth of cases which have decided that an official acting on behalf of a State is entitled to immunity from criminal prosecution in respect of an offence committed in the forum state.
71. There is no want of authority in relation to immunity from civil suit. All State officials enjoy immunity *ratione materiae* for their official acts from the civil jurisdiction of the courts of other States. This immunity is reflected in the UN Convention on the Jurisdiction Immunities of States and Their Property 2004 (see in Article 1(b)(iv) the reference to representatives of the State acting in that capacity).
72. In the United Kingdom that protection is afforded by the State Immunity Act 1978. Section 14(1) affords individual employees or officers of a foreign State protection under the same cloak as protects the State itself. In *Jones v The Ministry of the Interior of the Kingdom of Saudi Arabia*, (2007 1 AC 230) both the Kingdom and individual defendants acting or purporting to act on behalf of the Kingdom were entitled to immunity from civil proceedings alleging that the claimants had been systematically tortured whilst in official custody in the Kingdom of Saudi Arabia. None of the claims fell within an exception to immunity under the State Immunity Act 1978. The *jus cogens* nature of the prohibition of torture did not enable the United Kingdom to assert civil jurisdiction and there was no generally accepted exception to State immunity from civil jurisdiction in relation to breaches of international law (280-281).
73. The appellant relies upon this authority as authority for the proposition that a foreign State's right to immunity cannot be circumvented by suing servants or agents. He seeks to apply this to immunity from criminal prosecution.
74. But as Wickremasinghe notes in *M D Evans, International Law, Third Edition 2010*, there are fewer cases where State officials have invoked State immunity in relation to criminal proceedings (page 397). He refers to a recent example in *Italy v Lozano* [Case No. 3117/2008] ILDC 1085 24 July 2008 and *Pinochet III (R v Bow Street Metropolitan Stipendiary Magistrates and Others ex-parte 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", (Lap, Lambert 2011), there is an essential distinction between civil and criminal liability (page 204). It does 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 part of call is, inevitably, *Pinochet III*. In a second provisional warrant it was alleged in two of the charges (4 and 9, see page 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 United Kingdom ratified the United Nations Convention against Torture.

76. Lord Brown-Wilkinson merely said 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.” (249D)

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 (265G). He then went on to consider whether there was a qualification or exception in a case relating to torture.

77. Lord Goff focussed on the position of Pinochet as Head of State. He said:-

“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 s.16(4) which provides that Part I does not apply to criminal proceedings (210E-F).”

78. Lord Hope adopted a similar approach in asking 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.” (241G)

He concluded 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 (242D).

79. Lord Phillips and Lord Millett appear, however, to have taken a different view. They rejected the suggestion that there was:-

“...any custom which would have protected from criminal process a visiting official of a foreign State who was not a member of a Special Mission had he the temerity to commit a criminal offence in the pursuance of some official function.” (283A)

80. Lord Millett, at 277C, said:-

“I can deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the Requesting State. The plea of immunity *ratione materiae* is not available in respect of an offence committed in the Forum State, whether this be England or Spain.”

81. Dr Franey takes the view that all the judges in *Pinochet III*, apart from Lord Millett, were agreed that Pinochet, as a former Head of State, had immunity from prosecution in Spain for offences of murder and conspiracy to murder in Spain, since they were committed as part of Pinochet’s public authority as Head of State.

82. The speeches in *Pinochet III* were not subjected to any detailed analysis by way of argument. But no one suggested in argument before me that *Pinochet III* was binding authority on this court in relation to whether an official, who was not a Head of State or former Head of State, enjoyed immunity from criminal prosecution in the forum state, Germany. It is, therefore, necessary to consider other sources for the immunity on which the appellant relies.

83. Lady Fox’s “The Law of State Immunity” (2nd Edition) 2008 states that in relation to those who do not enjoy diplomatic immunity, such as high-ranking officials and diplomats after vacating office, that “the rule (as to immunity from criminal proceedings in municipal courts) is more complex”. She says:-

“Broadly it would seem that, with the exception of certain international crimes, immunity continues for acts performed in the course of official functions. Criminal proceedings may be brought against the official on vacating office but the position in classical law is to declare such criminal liability of officials to be restricted to private acts and acts committed outside the course of their official functions.” (page 94)

84. Lady Fox refers firstly to *Macleod’s* case (McNair’s Law Officers’ Opinions II, 221-30) as the traditional authority and then states that it was recently endorsed by the International Tribunal for former Yugoslavia Appeals Chamber when it ruled that a subpoena could not be served on a State official. The International Tribunal took the view that it was a well-established rule of customary international law that State officials acting in their official capacity enjoy “functional immunity”, that is, they cannot suffer the consequence of wrongful acts which are not attributable to them personally but to the State on whose behalf they act (*Prosecutor v Blaskic* 110 ILR 607 at 707.)

85. The authority of the Appeals Chamber and of *Macleod* have, however, recently been questioned. Dr Franey subjects both *Macleod's* case and more recently the decision of the Appeals Chamber in *Blaskic* to detailed and critical analysis.
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* 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 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.
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 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, page 1139, quoted by Franey, page 209).
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:-

“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 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.” (page 210)

89. *The Rainbow Warrior* case was further authority on which the ICTY relied. But although France asserted that its agents should not be punished, it did not contend that they were not responsible for blowing up the boat on New Zealand territory and killing a member of its crew. As Dr Franey explains, the French agents did not contend for immunity and France did not intervene on their behalf to claim immunity. The officers were sentenced to substantial periods of imprisonment (*R v Mafart and Prieur* [74] ILR 241).
90. New Zealand had asserted the right to prosecute. It released Major Mafart and Captain Prieur on condition that they were kept in custody in France for the remainder of their sentences. New Zealand and France referred all outstanding disputes to the UN Secretary-General, who ordered that the prisoners should be transferred to French military custody and imprisoned for three years. France breached the agreement and released them. An arbitration tribunal declared that by doing so it violated its international obligations towards New Zealand (82 ILR 499). Dr Franey concludes that *The Rainbow Warrior* case represents State practice which demonstrates that State officials have individual criminal liability for offences committed on the territory of another State, even though the offences were committed whilst they were on duty and acting under the orders of that State (see page 214). She describes the UN Secretary-General's conclusions as evidence of customary international law.
91. Dr Franey concludes that the cases cited by the ICTY in *Blaskic* were not authority for the proposition that functional immunity for all State officials is an established rule of customary international law (page 215).
92. Dr Franey refers also to Professor Greenwood's submissions in *Pinochet* which referred to the imprisonment of two Israeli intelligence agents for approaching a prohibited military zone in Cyprus. Israel did not assert that the agents were entitled to immunity.
93. Dr Franey points out that in both the case of the Mossad Agents in Cyprus and *The Rainbow Warrior* the agents entered the territory of a foreign State without the consent of that foreign State and without their knowledge. The conduct of those agents, in Cyprus collecting information covertly, and in New Zealand bombing and murder, constituted what Dr Franey describes as breaches of the sovereignty of Cyprus and New Zealand. No one involved considered that immunity from criminal prosecution applied to people even though they were clearly State actors (see page 231). She concludes that:-
- “These two cases are instances of State practice where State immunity is not accorded to State officials undertaking official business.” (page 232)
94. Dr Franey gives other examples of criminal offences where state immunity has not been claimed. *R v Lambeth Justices ex-parte Yusufu* [1985] Crim LR 510 concerned kidnapping by Nigerian foreign agents in which the defendant claimed diplomatic immunity. There had been no prior notification. Accredited Nigerian diplomats implicated in the drugging and kidnapping of a former Nigerian transport minister in a crate accompanied by several Nigerian diplomats were allowed to leave the UK or were expelled. Although the accredited diplomats were entitled to diplomatic

immunity, the United Kingdom did not afford the defendant, 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 page 272). Lady Fox 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 (see page 96). 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:-

“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.” (page 284)

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 (paragraph 94) he concludes:-

“(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;”

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 paragraph 81). The Special Rapporteur’s conclusion in that respect is:-

“(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.” (page 59)
(and see paragraph 90)

97. The Special Rapporteur, Roman Kolodkin, takes the view that consent of the receiving State, not only to the discharge of function, but the presence of the foreign official in its territory, is crucial (see paragraph 82). He draws the distinction between those cases where the receiving State consents in advance to the presence of a foreign official operating in the receiving State’s territory and those cases where the State has not given its consent to the presence of a foreign official and his presence is unknown. Where a State has consented to the presence and activity of a foreign official in its territory in advance, it has also consented in advance to the immunity of that person in connection with his official activity. He continues:-
- “If, though, there was no such consent, and the person is not only acting illegally but is present in the State territory illegally, then it is fairly difficult to assert immunity. Examples of this type of situation include espionage, acts of sabotage, kidnapping etc.”
98. He supports that proposition by references to cases where immunity was asserted but not accepted, or not even asserted, as in *The Rainbow Warrior* case. Greek and Italian courts have not recognised the immunity of Germany in *Prefectoria Voiotia v Germany* in Supreme Court of Greece 11/2000/4 May 2000 and *Ferini v Repubblica Federale v Germania*, Corte di Cassazione, Judgment 6 November 2003-11 March 2004 N.5044. He refers to the fact that when a Canadian court recognised immunity in spite of an act of torture in *Bouzari v Iran* [2002] OJ No. 1624, the court referred to customary international law providing State immunity for acts of torture committed *outside the forum state*.
99. Despite the view of the majority of the House of Lords in *Pinochet III* that the former Head of State would have immunity from prosecution for murder and conspiracy to murder in Spain, I believe that it is open to this court to have regard to the evidence of State practice which has emerged since the decision in that case. It seems to me of significance that when the point was raised by Sir Elihu in his second supplementary opinion dated 20 May 2011, as supplemented by his points in reply dated 15 June 2011, he made no reference to *Pinochet III*. He certainly did not suggest that the decision of the majority was binding on this court. Since the quest must be to identify State practice I am persuaded by the full and cogent analysis of Dr Franey, supported by Special Rapporteur Kolodkin, that the appellant does not enjoy immunity by reason of his conduct as an official of the Government of Mongolia from prosecution in Germany and, accordingly, does not enjoy immunity from extradition in the United Kingdom. It seems to me the fact that, in recent years, States have not claimed immunity is just as much evidence of the absence of State practice as those cases where immunity is claimed but denied by the forum state. I am particularly persuaded by Dr Franey’s analysis of *The Rainbow Warrior* case and the difficulty of identifying State practice by reference to events which occurred, in relation to the loss of *The Caroline*, between 1838 and 1841. That seems to me to be a poor guide to modern State practice.
100. I have to acknowledge that the evidence of State practice is not all one way. The ICTY recognised the immunity in question in *Blaskic*. Sir Elihu relied strongly on

McElhinney v Williams and The Secretary of State for Northern Ireland [1995] 104 ILR 691. But that was a civil case in which the appellant 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 appellant immunity *ratione materiae* and I dismiss his appeal on that ground.

Mr Justice Foskett:

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 paragraphs 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 Appellant'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 paragraph 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 the case of *McElhinney v Williams and the Secretary of State for Northern Ireland* [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 Appellant.

Abuse of Process

106. Whilst from the Appellant'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 paragraphs 47-54 above.

High Ranking Officer

107. I have little doubt that the subject matter of the discussions that the Appellant 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 Appellant would not have been engaged in “foreign affairs”. Discussion of matters relating to terrorism and counter-terrorism must surely be embraced within the subject matter ordinarily afforded immunity status.

108. However, notwithstanding that the Appellant may fairly be called a “very senior governmental officer”, he was not within the relatively exclusive group identified in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo) v Belgium* (see paragraph 56 above).

Special Mission

109. I respectfully agree with the analysis of Moses LJ on the issue of whether the Appellant’s visit to the UK could be characterised as a “Special Mission”. I would have thought that the purpose of the visit in so far as it was intended to open a dialogue about terrorist and counter-terrorist matters was undoubtedly capable of enabling it to be treated as a Special Mission. However, I agree that it is for the UK Government to consent to the visit as a special mission and the evidence does not support the existence of such consent.
110. For my part, I would prefer to leave open the question of whether a letter of the nature written by the FCO to the District Judge is to be regarded as of conclusive effect. It is not impossible to envisage circumstances in which the FCO might certify that consent had not been given, but other evidence suggested to the court a contrary view. Whether the court would regard the former as prevailing is an issue I would prefer to leave for consideration and resolution in a case in which the issue arises more starkly than it does in this case.
111. In this case, I was at one stage attracted to the view that there was a continuity of contact between the Mongolian government and the UK authorities from November 2009 onwards which, on an objective analysis, yielded the conclusion that there was at least an implied consent to the visit and that its subject matter was appropriate to “Special Mission” status such that, accordingly, it should be regarded as a Special Mission. However, on further reflection, I do not think that there was a true continuity of contact between the authorities on a clear agenda for the discussions that could result in the conclusion that there was an implied consent to the visit as a Special Mission.
112. That raises the question of whether an implied consent could ever arise. I think that this is an issue that would need to be resolved in a case where the factual scenario was far more compelling than it is in this case. Where it is and yet the FCO certifies that no consent has been given, the issue of the conclusiveness or otherwise of any such certificate is, in my judgment, something best resolved in that context than in the less compelling circumstances of this case.