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Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

The United States of America

Supreme Court of the State of New York, County of the Bronx—Part IA-19A

Nafissatou Diallo v. Dominique Strauss-Kahn, Decision, Index No. 307065/11 of 1 May 2012

Motion to dismiss on grounds of lack of subject-matter jurisdiction—Claims of immunity from civil process by former Managing Director of the International Monetary Fund—"Absolute" or "functional" immunity—International Monetary Fund Articles of Agreement and International Organizations Immunity Act bestow only functional immunity—Express right of a specialized agency to modify and curtail standard immunity clauses under the United Nations Convention on Privileges and Immunities of the Specialized Agencies, 1947—Rejection of claim that absolute immunity for executive heads under the 1947 Convention is evidence of customary international law—Question whether customary international law trumps conflicting domestic statute—Non-applicability of article 39 of the Vienna Convention on Diplomatic Relations—Enjoyment of residual immunity from pre-resignation acts in furtherance of the business of the International Monetary Fund

> "The reputation of a thousand years may be determined by the conduct of one hour" - Japanese proverb (The International Monetary Fund ["IMF"] 2011 Annual Report - Ethics Applied).

Few are unfamiliar with the highly publicized events at New York City's Sofitel Hotel on May 14, 2011 involving claims by Nafissatou Diallo, a chambermaid at the hotel, that she was sexually assaulted by Dominique Strauss-Kahn, then Managing Director of the IMF, who denied Ms. Diallo's allegation but admitted to a consensual sexual encounter with her.

Mr. Strauss-Kahn was arrested on May 14, 2011, resigned his post at the IMF on May 18, 2011 and was indicted on felony charges on May 19, 2011. Several months later, on August 8, 2011, Ms. Diallo instituted this civil action, venued in this court because of her Bronx residence, seeking damages for injuries and other losses she alleges she suffered as a result of the claimed attack.

Prior to Mr. Strauss-Kahn interposing an answer to the civil complaint, all criminal charges against him were dropped. Thereafter, he moved pre-answer, as was his right under New York law, to dismiss plaintiff's civil complaint on the grounds that this court lacks subject matter jurisdiction of this action because, on the day this action was commenced and service effectuated, he enjoyed immunity from civil process because of his previous

position as Managing Director of the IMF.[1] Ms. Diallo has opposed the motion, arguing that on the day of service, Mr. Strauss-Kahn enjoyed no immunity, except for any residual immunity which might attach to acts he performed in furtherance of the business of the IMF prior to his resignation on May 18, 2011. Mr. Strauss-Kahn has conceded that whatever occurred at the Sofitel Hotel with Ms. Diallo was not in the furtherance of the business of the IMF.

Indisputably, as Managing Director of the IMF, Mr. Strauss-Kahn enjoyed some type of immunity, either "absolute", as he contends, which would spare him from criminal or civil liability in this country, even on matters strictly personal and unrelated to the IMF, or "functional" or "official acts" immunity which only relates to activities in furtherance of the business of the IMF and would be of no benefit to him as to the claims asserted in this lawsuit. Thus, to prevail on his motion, Mr. Strauss-Kahn must establish that he enjoyed absolute immunity which continued after his resignation from the IMF until at least August 8, 2011, the day process in this action was served. The court heard extensive oral argument on the motion on March 28, 2012.

Background

In July, 1944, optimistic that the conclusion of World War II was near, delegates from 44 nations met at Bretton Woods, New Hampshire, to promulgate plans for a post-World War II international monetary system. From that gathering came the idea for the IMF. Soon, Articles of Agreement* ("Articles") for the proposed agency were drafted which were ratified by the United States in 1945 by enactment of the Bretton Woods Agreement Act (22 USC § 286 *et seq*). By 1946, the Articles were ratified by sufficient nations to make the IMF a legally empowered specialized agency.

Today, nearly 70 years later, the IMF is an organization of 188 countries headquartered in Washington D.C. and capitalized by a quota system which requires that an IMF member country be assigned a quota which is based on the country's relative economic size in the global community. A country's voting power is linked to its quota. The United States of America pays the largest quota of any member nation.

Turning to the issue of immunity, pursuant to IMF Articles § 8(i), *all employees of the IMF are "immune from legal process with respect to acts performed by them in their official capacity* except when the Fund waives [the] immunity . . ." (emphasis supplied). This provision is expressly incorporated in the Bretton Woods Agreement (22 USC § 286h), which gives the immunity provisions of the Articles "full force and effect in the United States . . ." hence, the document creating the IMF and the American statute approving it provide for "functional" or "official acts" immunity for IMF employees.

In 1945, the International Organizations Immunity Act of 1945 (IOIA) (22 USC § 288d[b]), became law in the United States. This statute provides that:

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[1] "Because immunity is an exception to jurisdiction, a court's first task is to determine whether personal and subject matter jurisdiction exist with regard to the defendant and the substance of the claim, respectively" (Chimene I. Keitner, *Foreign Official Immunity and the "Baseline" Problem*, 80 Fordham L. Rev. 605, 621 [2011]).

* United Nations, *Treaty Series*, vol. 2, p. 39.

"*representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as* such representatives, officers, or *employees* except insofar as such immunity may be waived by the foreign government or international organization concerned" (emphasis supplied).

The 1940s saw the advent of a new diplomatic order due, in large measure, to the creation of the United Nations (U.N.), and the necessity, in the aftermath of World War II, for the international community to expand global cooperation into more focused fields, resulting in the creation of several international organizations which later became specialized agencies of the U.N. system, among which was the IMF.

Mr. Strauss-Kahn contends that the U.N. inspired Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), approved November 21, 1947, 33 U.N.T.S. 261 (entered into force December 2, 1948), with its absolute immunity protection for the "Executive Head" of specialized agencies, is evidence of an international norm binding on civilized nations as part of customary law. But, as will be shown in greater detail later, the Specialized Agencies Convention never caught on internationally as the U.N. had hoped. For instance, Ethiopia, Switzerland and the United States, nations where major centers of multilateral diplomacy are located (Addis Ababa, Geneva, New York and Washington DC) never even acceded to its terms (see Petrovic, *Privileges and Immunities of U.N. Specialized Agencies in Field Activity, Practical Legal Problems of International Organizations* [2009] [available at http://www.iilj.org/GAL/documents/GALch.Petrovic.pdf] [accessed on April 30, 2012]).

Mr. Strauss-Kahn's Claim of absolute immunity

Confronted with the reality that the IMF's own Articles, the Bretton Woods Agreement and the IOIA bestow only functional immunity on the Managing Director of the IMF, Mr. Strauss-Kahn contends that customary international law requires the court to disregard binding American statutes and apply the provisions of the Specialized Agencies Convention, to which the United States is not a signatory, because its acceptance by 116 countries around the world establishes a customary international norm as to the type and extent of immunity available to the "executive head" of a specialized agency.

Concededly, the Special Agencies Convention, at first glance, provides Mr. Strauss-Kahn with the absolute immunity which he seeks. However, the Convention's provisions are far more extensive than merely bestowing immunities to heads of specialized agencies. The terms of the Convention recognize the prerogative of a State, housing the headquarters of a specialized agency, to enter into "supplemental agreements [with the agency] adjusting the provisions" of the Specialized Agencies Convention to curtail the privileges and immunities granted thereunder (Specialized Agencies Conventions § 39).

Moreover, there is no dispute that the IMF filed, as it was entitled to do under this Specialized Agencies Convention, a document entitled Annex V* which expressly provides that the Specialized Agencies Convention

* United Nations, *Treaty Series*, vol. 33, p. 298.

> "in its application to the International Monetary Fund does not require modification or amendment of [the IMF's] Articles of Agreement" or "impair or limit any of the rights, immunities, privileges or exemptions conferred upon the fund or any of its members" "by the Articles of Agreement of the Fund, or by any statute, law or regulation of any member of the fund . . ."

When pressed by this court during oral argument as to the meaning of Annex V, counsel for Mr. Strauss-Kahn stated the following:

> "[t]he IMF is simply saying by that Convention whatever rights and privileges and immunities are set forth in our Articles, we continue to reserve those. However, if there are greater rights, privileges and immunities contained in the Convention we are signing on then" (official court transcript, at 8–9).

Actually, quite the opposite is true:

> "[t]he convention on the privileges and immunities of the Specialized Agencies (the '1947 Convention') which the U.N. General Assembly approved on 21 November 1947, . . . came into force on 2 December 1948. It has a total of 116 State Parties. The number of State Parties, however, may be misleading. Each State Party has to indicate in its instrument of accession the specialized agency or agencies it undertakes to apply the provisions of this Convention.
>
> Taking into account the specifications of each specialized agency and the fact that they were created by international treaties using different formulations and defining different needs, the 1947 convention has 2 major parts. The first part consists of so-called 'standard clauses', and the second part is composed of 18 annexes relating to particular organizations. While the standard clauses were adopted by the U.N. General Assembly, the text of each annex was approved by the specialized agency concerned in accordance with its constitutional procedure" (Petrovic, *Privileges and Immunities of U.N. Specialized Agencies in Field Activity, supra,* at 4–5).

In other words, a specialized agency, under the express language of the Specialized Agencies Convention, can opt out of the immunity provisions, as the IMF clearly did. Indeed Specialized Agencies Convention § 2 states:

> "each state party to this convention in respect of any specialized agency to which this convention has become applicable in accordance with § 37 shall accord to, or in connexion [sic] with, that agency the privileges and immunities set forth in the standard clauses on the conditions specified therein, subject to any modification of those clauses contained in the provisions of the final (or revised) annex relating to that agency and transmitted in accordance with §§ 36 or 38."

In view of the express rights of a specialized agency to modify and curtail standard immunity clauses, its hard to make the case that the Specialized Agencies Convention is a codification of customary international law on immunity for specialized agency executive heads. Indeed, as the International Court of Justice in the North Sea Continental Shelf Cases, North Sea Continental Shelf (Judgment, I.C.J. Reports 1969, 3, 38-39) aptly stated:

> "[C]ustomary law rules and obligations . . . by their very nature must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour."

Also unpersuasive is Mr. Strauss-Kahn's argument that:

> "The best evidence that absolute immunity for executive heads of specialized agencies has achieved the status of customary international law is the vast number of United Nations' member states that have adopted the Specialized Agencies Convention (citations omitted). Since its adoption in 1947, 116 of the United Nations' 193 member nations have ratified and become parties to the Specialized Agencies Convention." (Defendant's Memorandum at Law at 12–13).

Yes, the numbers are impressive, but as Mr. Strauss-Kahn well knows, *188* countries belong to the IMF and have presumably accepted its Articles, limited immunity *and all*. As a matter of fact, one commentator has described the state of ratification of the Specialized Agencies Conventions as unsatisfactory:

> "The state of ratification of the [specialized agencies convention] is not satisfactory. There are still too many states that are members of the specialized agencies but that failed to ratify this Convention and accede to one of its annexes. While the specialized agencies have almost universal membership, the number of States recognizing their privileges and immunities through the 1947 Convention does not echo this universal character. For some older agencies the number of parties attain almost two thirds of Member States: for the ICAO this number is 106; for the WMO and ITU is 109, for the ILO, FAO, UNESCO is 113; for the UPU 120. However, some other agencies, especially those created later, have their privileges and immunities recognized by fewer less States: UNIDO by 18, IFAD by 29, WIPO by 36, IMO by 47, IDA by 62, IFC by 72, IMRD by 92, and IMF by 95" (Petrovic, *supra*, at 13).

Customary international law in the aftermath of *Erie* v *Tompkins*

In its Report on the need and feasibility of a compensation program for victims of diplomatic crimes, the United States Department of State wrote:

> "Governments have long recognized that diplomatic immunity is essential to the conduct of meaningful foreign relations. The fundamental rules of diplomatic law, such as the personal inviolability of the embassador and the special status of diplomatic communications, have existed among civilized states for centuries. Immunity from a nation's civil and criminal jurisdiction allows members of foreign missions to protect sensitive national security information and to perform their functions without excessive interference from hostile receiving governments. In 1790, the United States enacted into law an unqualified grant of diplomatic immunity. Other nations enacted similar laws and the principle became an important feature of customary international law."

Against his historical backdrop, the United States Supreme Court's decision in *Erie v Tompkins* (304 US 64 [1938]) has sparked a robust debate among legal scholars divided over the issue of whether customary international law is judge-made federal common law requiring Congressional or Constitutional authorization for its continued application in federal courts. (Revisionist View) (*see generally* Bradley and Goldsmith, *Customary International Law as Federal Common Law: a Critique of the Modern Position*, 100 Harv. L. Rev. 815 [1997]) or common law created as a consequence of centuries of custom and tradition and carrying the authority of "the consent of nations reflected in their practice" (*see* Dodgem *Customary International Law and the Question of Legitimacy*, 120 Harv. L. Rev. 19, 23–24 [2007] [The Modern View]. This discourse was re-invigorated, some years ago, by the Supreme Court's decision in *Sosa v Alvarez-Machain* (542 US 692 [2004]) which both sides here embrace as supporting their position.

This court need not endorse either position. However, as to whether customary international law trumps conflicting statute enacted by Congress, the *Sosa* court wrote:

> "[n]othing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such" (*Sosa*, *supra* at 731).

Indeed, the Restatement (Third) of Foreign Relations Law § 115(1)(a) makes clear that:

> "(1)(a) an act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the acts to supercede the earlier rule or provision is clear or if the act and earlier rule or provision cannot be fairly reconciled."

As discussed previously, World War II saw the creation of a United Nations and specialized agencies, many with a significant presence in New York City and Washington, DC. As to the personnel of international organizations, a new type of diplomatic entity, the United States made a decision to bestow limited "official acts" immunity, as evidence by the enactment of the IOIA (*see* United States Department of State, *Diplomatic Consular Immunity Guidance for Law Enforcement and Judicial Authorities* at 8 [August 15, 2011] [available at www.state.gov/documents/organization/150546.pdf] [accessed on April 30, 2012]) and to announce to the diplomatic community that specialized agency employees will be accorded a lower level of immunity than a diplomatic envoy.

Thus, the IOIA, with its official acts immunity, not customary international law, controls the nature of immunity relative to Mr. Strauss-Kahn. The United States of America, through its political processes can make laws, ratify treaties or issue judicial pronouncements which require a non-citizen employee of a specialized agency, here on our soil as part of the fabric of international governance, to behave, in their private conduct, in a lawful way, failing which to be answerable in courts of law or other tribunals under the same standards as their next door American neighbors. At a time when issues significantly shape today's international law, customary or otherwise, it is hardly an assault on long standing principles of comity among nations to require those working in this country to respect our laws as Americans working elsewhere must request theirs.

Finally, lest there be any confusion as to the type of immunities enjoyed by employees of the IMF, one need only read the IMF prepared document entitled *Overview Of The Rules On Conduct And Ethics At The IMF* (May 12, 2002),* prepared by its then Assistant General Counsel Joan S. Powers, who wrote:

> "Perhaps another reason for the adoption of rather comprehensive codes of staff conduct by international organizations stems from the fact that these organizations and their officials enjoy certain privileges and immunities under their growing governing charters. At the IMF, these privileges and immunities are provided in the Articles of Agreement. In particular, officials are immune from judicial process with respect to acts performed in their official capacities. *[O]fficials do not have immunity with respect to their personal conduct outside the workplace . . .*

* Available from: http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/powers.pdf (accessed on 31 December 2012).

These types of measures are intended to allow the IMF to demonstrate to its membership and the public that there are standards of conduct to which its staff will be held and that these standards are taken seriously and enforced" (emphasis supplied) (available at http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/powers.pdf [accessed on April 30, 2012].

Mr. Strauss-Kahn's resignation

Confronted with well settled law that his voluntary resignation from the IMF terminated any immunity which he enjoyed save, of course, for acts pre-resignation in furtherance of the business of the IMF, Mr. Strauss-Kahn throws (legally speaking, that is) his own version of a "Hail Mary" pass by asserting that once he was arrested and confined to a New York home as a condition of bail he became a beneficiary of Article 39 of the Vienna Convention on Diplomatic Relations (Vienna Convention) (23 USG 3227, Article 39[2] [April 18, 1961]) which states as follows:

> "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period of which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

In its preamble, the Vienna Convention recalls "that people from all nations from ancient times have recognized the status of diplomatic agents . . ." But, that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States. Vienna Convention Article 3(1)(a) provides that "[t]he functions of a diplomatic mission consists *inter alia* in: (a) representing the sending State in the receiving State . . ."

Assuming *arguendo*, that Mr. Strauss-Kahn was a beneficiary of the Specialized Agencies Convention, more particularly § 21, he would have been entitled to the same "privileges and immunities, exemptions and facilities accorded to *diplomatic envoys* in accordance with international law" (emphasis supplied). However, to claim the "extension" provided by the Vienna Convention Article 39(2) Mr. Strauss-Kahn had to be more than a diplomatic envoy (which assumes that enjoying the immunities of a diplomatic envoy permits Mr. Strauss-Kahn to claim to be one—a conclusion to which this court does not subscribe) or "*diplomatic agent*" (the term used in the Vienna Convention), he had to be "*a member of [a] mission*", which clearly he was not; indeed he was not even in the employ of the IMF when the civil action was commenced. This is significant because the purpose of Article 39(2) is to protect members of a mission whose diplomatic tour has ended but whose return home has been delayed. As the expression goes, Mr. Strauss-Kahn "up and quit" months before service was effectuated in this action. He was neither an employee of the IMF, a diplomatic envoy or diplomatic agent let alone a member of a diplomatic corps after May 18, 2011. Thus, Mr. Strauss-Kahn enjoyed no immunity other than residual immunity from pre-resignation acts in furtherance of the business of the IMF after the date of the resignation.

But there is more. If Mr. Strauss-Kahn was entitled to absolute immunity, as he contends, there was ample opportunity before now to assert it. If he's correct (and the IMF

didn't ultimately waive the immunity), the need for a criminal prosecution would have been obviated, with little likelihood of a civil action. But his explanation for not raising immunity during the criminal proceedings, conveyed to this court by his esteemed counsel during oral argument, concerned his desire to clear his name. This court has no reason to question his motives; however, Mr. Strauss-Kahn's decision to deliberately forebear from asserting available immunities should not, as a matter of customary international law or fundamental fairness, be used to prevent another from exercising legal rights otherwise available. In other words, Mr. Strauss-Kahn cannot eschew immunity in an effort to clear his name only to embrace it now in an effort to deny Ms. Diallo the opportunity to clear hers.

Mr. Strauss-Kahn's motion for dismissal is denied.

[*Signed*] Douglas E. Mckeon, J.S.C.