SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

NAFISSATOU DIALLO,	:	
	:	Index No. 307065/2011
Plaintiff,	:	
	:	Part IA-19A
v.	:	Hon. Douglas E. McKeon, J.S.C.
	:	
DOMINIQUE STRAUSS-KAHN,	:	
	:	
Defendant.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT DOMINIQUE STRAUSS-KAHN'S MOTION TO DISMISS

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INTRODUCTION

This Court must dismiss the complaint against Defendant Dominique Strauss-Kahn because, under controlling international law that all federal and state courts are bound to apply, Mr. Strauss-Kahn was immune from civil suit when Plaintiff served his counsel with process on August 8, 2011. Mr. Strauss-Kahn is the former Managing Director of the International Monetary Fund (the "IMF"). As Managing Director—which is the chief executive position at the IMF—Mr. Strauss-Kahn enjoyed absolute immunity from civil suit under applicable principles of international law. Those principles recognize that the head of certain international organizations, like the IMF—which are known as "specialized agencies"—are immune from civil process and suit, including for acts done in the executive's personal capacity. This rule of international law is embodied in a multinational convention adopted by the United Nations General Assembly in 1947, known as the Convention on the Privileges and Immunities of Specialized Agencies (the "Specialized Agencies Convention"). The United States is not a party to the Specialized Agencies Convention. Nevertheless, as we explain below, the absolute immunity that the Specialized Agencies Convention affords executive heads of specialized agencies, like Mr. Strauss-Kahn, has received such overwhelming accession from member countries of the United Nations that it has achieved the status of what is known as "customary international law." Both the United States Supreme Court and the New York Court of Appeals have recognized the existence of "customary international law" and have held that it must be applied as federal common law, regardless of whether the United States is a party to a pertinent treaty. Mr. Strauss-Kahn enjoyed absolute immunity under customary international law not only while he was the head of the IMF, but also for the period of time after he had resigned from his post and was ordered to remain in the United States in his criminal matter. That is because,

under applicable and controlling international law, Mr. Strauss-Kahn's absolute immunity persisted until he was able to leave the United States, which occurred only after Plaintiff had filed and served this suit, when the criminal charges against him were dismissed. Accordingly, because Mr. Strauss-Kahn was immune from civil suit and process at the time Plaintiff filed and served the complaint, this case must be dismissed with prejudice.

STATEMENT OF FACTS[1]

A. Mr. Strauss-Kahn Was the Head of the IMF on May 14, 2011.

Mr. Strauss-Kahn, a citizen of the Republic of France, was the Managing Director of the IMF on May 14, 2011, the date on which Plaintiff alleges that he sexually assaulted her. Compl. ¶¶ 3, 16. The IMF, headquartered in Washington, D.C., is a specialized agency of the United Nations with 187 member nations and a staff of almost 2,400 individuals from over 140 nations. IMF Factsheet: The IMF at a Glance at 1, Sept. 2011, attached as Exhibit 1 to the Affirmation of Shawn P. Naunton in Support of Defendant Dominique Strauss-Kahn's Motion to Dismiss ("Naunton Affirmation").[2] The fundamental mission of the IMF is to help ensure stability in the international monetary system. In support of this mission, the IMF promotes international monetary cooperation and exchange rate stability, facilitates the balanced growth of international

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[1] The Court may consider evidence outside of the complaint in considering a motion to dismiss for lack of personal or subject-matter jurisdiction, including one based on an assertion of immunity. *See, e.g.*, *Anonymous v. Anonymous*, 181 A.D.2d 629, 630, 581 N.Y.S.2d 776, 776 (1st Dep't 1992) (considering "Suggestion of Immunity" filed by U.S. State Department in addressing motion to dismiss based on customary rule of international law recognizing absolute immunity for heads of state); *Spatt v. Feinberg*, 18 Misc.2d 925, 928, 183 N.Y.S.2d 659, 663 (Sup. Ct. Kings Co. 1959) (holding that, on motion to dismiss for lack of subject-matter jurisdiction, "the court must consider the affidavits submitted by both sides"); *Baoanan v. Baja*, 627 F. Supp.2d 155, 160 (S.D.N.Y. 2009) (holding that court may consider evidence outside complaint to address claim that diplomatic immunity divested court of jurisdiction) (citing cases).

[2] All citations herein to "Exh. __" refer to the corresponding exhibit to the Naunton Affirmation, filed herewith.

trade, provides financing and other resources to assist members in economic difficulties, and works with developing nations to help them achieve macroeconomic stability and reduce poverty. *See id.* at 1-3.

Mr. Strauss-Kahn held the position of Managing Director of the IMF from November 1, 2007, until his resignation on May 18, 2011. Exh. 2 (IMF Press Release No. 07/211, Sept. 28, 2007); Exh. 3 (Letter from Dominique Strauss-Kahn to IMF Executive Board, May 18, 2011). As Managing Director, Mr. Strauss-Kahn had primary responsibility for conducting the IMF's ordinary business. Exh. 4 (Articles of Agreement of the IMF), art. XII, § 4(b). In that position, he also served as chairman of the IMF's Executive Board and as chief of the IMF's operating staff, with responsibility for appointing and organizing the IMF's staff. *Id.*, art. XII, § 4(a) & (b). In other words, Mr. Strauss-Kahn was the executive head of the IMF.

Under Mr. Strauss-Kahn's leadership, the IMF was actively engaged in responding to the global economic crisis on several fronts in the spring of 2011. Exh. 5 (IMF Factsheet: A Changing IMF—Responding to the Crisis, Mar. 16, 2011). During the previous December, the IMF's Board of Governors had agreed to double the IMF's lending resources—which are funds provided to the IMF by its 187 member nations—to approximately $767 billion dollars. Exh. 1 at 2-3. By March 2011, the IMF's lending commitments had reached a record level of $250 billion. Exh. 5 at 1.

B. Mr. Strauss-Kahn is Jailed, Forced to Resign, and Later Released on House Arrest Pending Trial.

On May 14, 2011, as the IMF continued to respond to the growing economic crisis, Mr. Strauss-Kahn was removed from an Air France flight parked at the terminal at John F. Kennedy International Airport, arrested, and taken into the custody of the New York City Police Department. At the time, Mr. Strauss-Kahn was traveling to Europe on official IMF business in

his capacity as Managing Director—specifically, to meet with German Chancellor Angela Merkel in Berlin on May 15, 2011, and to meet with various European finance ministers in Brussels on May 16, 2011. Exh. 6 (Affirmation of Shawn P. Naunton in Support of Motion for Order Fixing Bail for Release of Dominique Strauss-Kahn) ¶ 22.

On May 16, 2011, Mr. Strauss-Kahn was arraigned before the Criminal Court of the City of New York, County of New York (the "Criminal Court") on a criminal complaint based on the same false allegations that form the basis of the complaint in this action. Exh. 7 (Criminal Complaint). The Criminal Court denied Mr. Strauss-Kahn's application for bail and ordered him remanded to the custody of the New York City Department of Corrections. Exh. 8 (Hr'g Tr., May 16, 2011) at 19-20. Mr. Strauss-Kahn was confined at the Rikers Island jail. Unable to perform his functions as Managing Director of the IMF, Mr. Strauss-Kahn resigned from his post two days later, on May 18, 2011. Exh. 3.

On May 19, 2011, a grand jury indicted Mr. Strauss-Kahn. Exh. 9 (Indictment). The next day, May 20, 2011, The Honorable Michael J. Obus of the Supreme Court of the State of New York, County of New York, granted Mr. Strauss-Kahn's renewed application for bail. Exh. 10 (Order, May 20, 2011). The securing order required Mr. Strauss-Kahn to be placed on 24-hour home detention at a location in Manhattan, with electronic monitoring, video monitoring, and monitoring by a minimum of one armed guard present at all times. *Id.* ¶¶ 4-5. The order also conditioned Mr. Strauss-Kahn's release on the surrender of all of his travel documents, including his personal French government-issued passport and his laissez-passer, an official travel document issued to Mr. Strauss-Kahn by the United Nations in his capacity as Managing Director of the IMF. *Id.* ¶¶ 1-3.

C. Plaintiff's Allegations Are Discredited, and Mr. Strauss-Kahn is Released From Home Confinement, But Ordered to Remain in the United States Pending Trial.

By letter dated June 30, 2011, the Manhattan District Attorney's Office disclosed, among other things, that Plaintiff had admitted to testifying falsely to the grand jury about matters relating to the incident charged in the indictment and had been untruthful with prosecutors "about a variety of additional topics concerning her history, background, present circumstances and personal relationships." Exh. 11 (Letter from Joan-Illuzzi-Orbon and John McConnell to William W. Taylor III and Benjamin Brafman, June 30, 2011). Based on these disclosures, on July 1, 2011, Judge Obus vacated the initial securing order and ordered Mr. Strauss-Kahn released on his personal recognizance, subject to the condition that his travel documents remain surrendered, thereby preventing his travel outside the United States. Exh. 12 (Hr'g Tr., July 1, 2011) at 6-7.

D. Plaintiff Files and Serves Her Complaint While Mr. Strauss-Kahn is Under Court Order to Remain in the United States.

While Mr. Strauss-Kahn was under court order to remain in the United States, on August 8, 2011, Plaintiff filed her complaint in this action and, on that same date, served his counsel with the summons and complaint. Exh. 13 (Letter from Kenneth P. Thompson to Benjamin Brafman, Aug. 8, 2011).

On August 22, 2011, the District Attorney's Office moved to dismiss the indictment against Mr. Strauss-Kahn and filed a Recommendation for Dismissal ("RFD"), which detailed the circumstances warranting dismissal. Exh. 14 (RFD, Aug. 22, 2011). Expanding upon the disclosures provided in the June 30, 2011 letter, the RFD stated that "it has become increasingly clear that the complainant's credibility cannot withstand the most basic evaluation." *Id.* at 2; *see also id.* at 11-17. The RFD also described in detail the absence of physical, medical, scientific,

or other evidence of a forcible or non-consensual encounter and demonstrated how the available evidence contradicted aspects of Plaintiff's multiple versions of the alleged incident. *Id.* at 17-24.

Judge Obus granted the District Attorney's motion and dismissed the indictment on August 23, 2001, thereby releasing Mr. Strauss-Kahn from the sole remaining condition of pre-trial release—the surrender of his travel documents. Exh. 15 (Hr'g Tr., Aug. 23, 2011) at 7-9. The District Attorney's Office released Mr. Strauss-Kahn's travel documents to his counsel on August 25, 2011, enabling Mr. Strauss-Kahn to leave the United States for the first time since his arrest. Naunton Affirmation ¶ 29.

ARGUMENT

At the time Mr. Strauss-Kahn was served with the summons and complaint in this matter, he was immune from civil process and suit in the United States under established norms of customary international law. As a result, this Court does not have jurisdiction over this action, and must dismiss it. *See De Luca v. United Nations Org.*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994) ("Properly invoked immunity shields a defendant not only from the consequences of litigation's results, but also from the burden of defending themselves.") (internal quotation marks and citation omitted), *aff'd*, 41 F.3d 1502 (2d Cir. 1994); *see also Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("This shield would be lost if the merits of a complaint were fully tried before the immunity question presented was addressed."); *Matter of Terrence K.*, 138 Misc.2d 611, 616, 524 N.Y.S.2d 996, 1000 (Fam. Ct. Queens Co. 1988) (recognizing that assertion of diplomatic immunity is a threshold jurisdictional question); *cf. NYSA-ILA Pension Trust Fund ex rel. Bowers v. Garuda Indonesia*, 7 F.3d 35, 39 (2d Cir. 1993) (holding that, before applying "any other rule of law in a case involving a foreign state," the foreign state's immunity must be addressed as a threshold matter).

I. CUSTOMARY INTERNATIONAL LAW APPLIES AS A MATTER OF FEDERAL COMMON LAW.

This Court, like all state and federal courts, must recognize and apply customary international law. As the Court of Appeals of New York has observed: "It is settled that, where there is neither a treaty, statute nor controlling judicial precedent, all domestic courts must give effect to customary international law." *Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 259, 250 N.E.2d 698, 700 (1969). *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that domestic law of the United States recognizes the law of nations."); *The Paquette Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination."); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 n.26 (2d Cir. 2010) ("The Supreme Court has long recognized that where there no treaty and no controlling executive or legislative act or judicial decision, customary international law is part of our law.") (internal quotation marks and alterations omitted).

Indeed, it is now settled that customary international law has been incorporated into, and become a part of, federal common law and is thereby binding on state courts. *See, e.g.*, *Republic of Argentina*, 25 N.Y.2d at 259, 250 N.E.2d at 700; *Kadic v. Karadzik*, 70 F.3d 232, 246 (2d Cir. 1995) (recognizing the "settled proposition that federal common law incorporates international law"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) ("[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law."); Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") § 111 reporters' note 3 (1987) ("[C]ustomary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.").

II. LEGAL STANDARDS REGARDING CUSTOMARY INTERNATIONAL LAW.

To determine whether a legal rule or principle has achieved the force of customary international law, the court must look to whether the rule or principle is "a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2); *see Paquette Habana*, 175 U.S. at 694 (characterizing customary international law as practice that "grow[s], by the general assent of civilized nations, into a settled rule"). An examination of state practice is therefore paramount to determining the existence and content of customary international law. *See Republic of Argentina*, 25 N.Y.2d at 259, 250 N.E.2d at 700 ("To ascertain what it is, 'resort must be had … to the customs and usages of civilized nations.'") (quoting *Paquette Habana*, 175 U.S. at 700); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (holding that the "law of nations 'may be ascertained … by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law'") (quoting *United States v. Smith*, 18 U.S. 153, 160-61 (1820)). State practice "includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states." Restatement § 102 cmt. b. The "most authoritative" evidence of state practice "are international conventions, codifying or declaring existing law." *Republic of Argentina*, 25 N.Y.2d at 259, 250 N.E.2d at 700-01; *see Filartiga*, 630 F.2d at 883 (stating that the court had "little difficulty discerning" that the practice of torture had received "universal renunciation in the modern usage and practice of nations," because "[t]he international consensus surrounding torture has found expression in numerous international treaties and accords"); *767 Third Ave. Assocs. v. Permanent Mission*, 988 F.2d 295, 300 (2d Cir. 1993) (recognizing that "the Vienna Convention codified longstanding principles of customary international law with respect to diplomatic relations"); Restatement

§ 102 cmt. i ("International agreements constitute practice of states and as such can contribute to the development of customary law.").

While state practice must be "general and consistent," such practice "may be of comparatively short duration" and need not be "universally followed" to create a norm of customary international law. Restatement § 102 cmt. b. States that do not persistently object to an emerging rule of customary international law become bound by the rule once it ripens into an established norm. *See id.* cmts. b, d & i; *North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, 38-39 (Feb. 20) (holding that rules of customary international law "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"), excerpts attached as Exh. 16.

III. THE PRIVILEGES AND IMMUNITIES ACCORDED TO MR. STRAUSS-KAHN UNDER CUSTOMARY INTERNATIONAL LAW REQUIRE DISMISSAL OF THE COMPLAINT.

A. The Specialized Agencies Convention Provides the Executive Heads of Specialized Agencies of the United Nations Absolute Immunity From Civil Process and Suit.

The clearest articulation of Mr. Strauss-Kahn's entitlement to absolute immunity under customary international law is embodied in the Specialized Agencies Convention, approved by the General Assembly of the United Nations in 1947. 33 U.N.T.S. 261 (entered into force Dec. 2, 1948), attached as Exh. 17. Modeled after the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), *adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 (entered into force Sept. 17, 1946; entered into force for the United States Apr. 29, 1970), attached as Exh. 18,[3] the Specialized Agencies Convention sets forth the privileges and

[3] Relevant provisions of the General Convention are discussed below in Section III.B.2.

immunities enjoyed by specialized agencies of the United Nations—that is, certain designated multinational organizations critical to the international political landscape, such as the World Bank and the World Health Organization—and by officials of such bodies. The Specialized Agencies Convention expressly designates the IMF as a specialized agency governed by the Convention. Exh. 17, art. I, § 1(ii)(e).[4]

The Specialized Agencies Convention provides a two-tiered structure. The top official at each specialized agency is absolutely immune from civil process and suit, irrespective of whether the claims against the top official arise from his or her official duties. *Id.*, art. VI, § 21. Lesser officials, on the other hand, are entitled only to "functional immunity," or immunity arising from official acts. *Id.*, art. VI, § 19(a) (providing such officials with immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity"). With respect to executive heads of specialized agencies, the Convention expressly provides: "[T]he executive head of each specialized agency ... [enjoys] the privileges and immunities ... accorded to diplomatic envoys, in accordance with international law." *Id.*, art. VI, § 21.

The "privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law" are, in turn, embodied and defined in the Vienna Convention on Diplomatic Relations (the "Vienna Convention"), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972), attached as Exh. 19. *See Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) (recognizing that the privileges and immunities

[4] Pursuant to Article X, Section 37, the Specialized Agencies Convention became effective as to the IMF on May 9, 1949, when the Secretary-General of the United Nations received (1) notification that the IMF had accepted the standard clauses of the Specialized Agencies Convention and (2) the final text of Annex V relating to the IMF. The "standard clauses" accepted by the IMF include the provisions of Article VI, which set forth the privileges and immunities of officials of the specialized agencies. Exh. 17, art. I, § 1(i) ("The words 'standard clauses' refer to the provisions of articles II to IX.").

accorded to diplomatic envoys under international law are set forth in the Vienna Convention); *767 Third Ave. Assocs.*, 988 F.2d at 300 (recognizing that "the Vienna Convention codified longstanding principles of customary international law with respect to diplomatic relations"). Under the Vienna Convention, diplomatic envoys enjoy absolute immunity from the receiving state's criminal, civil, and administrative jurisdiction. Exh. 19, art. 31.1[5]; *see Brzak*, 597 F.3d at 113 (recognizing that "current diplomatic envoys enjoy absolute immunity from civil and criminal process"); Statement of Interest of the United States at 4, *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009) (No. 08-5692) ("Under the [Vienna Convention], during the period of their accreditation, diplomatic agents enjoy near absolute immunity from civil jurisdiction."), attached as Exh. 20. The Vienna Convention also provides that "[t]he person of a diplomatic agent shall be inviolable." Exh. 19, art. 29; *see Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004) (recognizing that the principle of inviolability protects persons entitled to diplomatic immunity from service of process). Applying these principles, United States courts uniformly have dismissed civil actions against individuals entitled to immunity under the Vienna Convention, *see, e.g.*, *Tachiona*, 386 F.3d at 220; *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 130 (D.D.C. 2009); *Gonzalez Paredes v. Villa*, 479 F. Supp. 2d 187, 195 (D.D.C. 2007), and/or held that such individuals are not otherwise subject to legal process, *see, e.g.*, *Tachiona*, 386 F.3d at 224; *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980-81 (D.C. Cir. 1965); *Sabbithi*, 605 F. Supp. 2d at 130; *Gonzalez Paredes*, 479 F. Supp. 2d at 195; *Aidi v. Yaron*, 672 F. Supp. 516,

[5] The only exceptions to the otherwise absolute immunity accorded to diplomatic envoys under the Vienna Convention are civil or administrative actions relating to "private immovable property," "succession," or "professional or commercial" activities. Exh. 19, art. 31.1(a)-(c). None apply here.

517-18 (D.D.C. 1987); *Vulcan Iron Works, Inc. v. Polish Am. Machinery Corp.*, 472 F. Supp. 77, 78-79 (S.D.N.Y. 1979).[6]

In summary, with respect to the privileges and immunities enjoyed by an executive head of a specialized agency, the Specialized Agencies Convention incorporates the absolute privileges and immunities accorded to diplomatic envoys under the Vienna Convention. At the IMF, the Managing Director—the position held by Mr. Strauss-Kahn—is the IMF's "executive head." *See* Exh. 4 (Articles of Agreement of the IMF), §§ 4(a) & (b) (stating the Managing Director "shall be chairman of the Executive Board," "shall be the chief of the operating staff of the Fund," "shall conduct … the ordinary business of the Fund," and "shall be responsible for the organization, appointment, and dismissal of the staff of the Fund"). Thus, under its plain terms, the Specialized Agencies Convention grants the Managing Director of the IMF the absolute immunity accorded to diplomatic envoys under international law.

B. The Specialized Agencies Convention's Grant of Absolute Immunity to the Executive Heads of Specialized Agencies Has Developed Into a Rule of Customary International Law.

1. State Practice on the Issue Has Become General and Consistent.

The United States is not a party to the Specialized Agencies Convention. Nevertheless, as we explain below, the absolute immunity accorded to executive heads of specialized agencies has achieved the status of customary international law, which must be applied in United States courts, notwithstanding the United States' non-ratification of the Convention.

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

[6] Indeed, dismissal of such actions is mandated by the Diplomatic Relations Act of 1978. *See* 22 U.S.C. § 254d ("Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention …, or under any other laws extending diplomatic privileges and immunities, shall be dismissed.").

states that have adopted the Specialized Agencies Convention. *See Paquete Habana*, 175 U.S. at 694 (recognizing that customary international law can emerge "by the general assent of civilized nations, into a settled rule"); *Filartiga*, 630 F.2d at 881 ("[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."). Since its adoption in 1947, 116 of the United Nations' 193 member nations have ratified and become parties to the Specialized Agencies Convention. Exh. 21 (U.N. Data Sheet Regarding Status of Specialized Agencies Convention, as of Sept. 25, 2011); *see Republic of Argentina*, 25 N.Y.2d at 259-60, 250 N.E.2d at 700-01 (describing "international conventions" as the "most authoritative" evidence of state practice and holding that treaty, "which has already been ratified by 33 nations," "most clearly sets forth the applicable international standards of conduct). Among the nations to have acceded to the Convention include Great Britain, Germany, France, Italy, Japan, India, Brazil, China, and Australia. *See* Exh. 21. Moreover, eighteen specialized agencies of the United Nations have adopted the Specialized Agencies Convention and agreed to be governed by its standard clauses. *See* Exh. 17 (Specialized Agencies Convention), Annexes I-XVIII.

Equally significant, our research has uncovered not a single instance—in the United States or elsewhere—in which the executive head of a specialized agency sought and was denied a privilege or immunity accorded to diplomatic envoys under international law. That is not surprising, considering how narrow the rule at issue is—diplomatic status for only a single official at each of the specialized agencies. Indeed, we have uncovered no judicial decisions in which a nation that is not a party to the Specialized Agencies Convention has challenged the diplomatic status of the executive head of a specialized agency. *See* Restatement § 102 cmt. b ("Inaction may constitute state practice, as when a state acquiesces in acts of another state that

affect its legal rights."); *id.* cmt. d (stating that "customary law may be built by the acquiescence as well as by the actions of states … and become generally binding on all states" and that only "a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule … after it matures").

Further confirmation that absolute immunity for executive heads of specialized agencies has achieved customary international law is the general and consistent state practice of recognizing and accepting as a valid travel document the red-covered laissez-passer, issued by the United Nations to executive heads, including Mr. Strauss-Kahn.[7] Page five of Mr. Strauss-Kahn's laissez-passer, which is signed on behalf of the Secretary-General and stamped "DIPLOMATIC" in bright red lettering diagonally across the entire page, recites the following (in six languages):

> The bearer of this laissez-passer is entitled under Section 21 of the Convention on the Privileges and Immunities of the Specialized Agencies to the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law.

Exh. 22 (Dominique-Strauss-Kahn Laissez-Passer) at 5; *see also id.* at 3 (indicating that the laissez-passer has been issued pursuant to the Specialized Agencies Convention and stating that the "Secretary-General of the United Nations requests all those whom it may concern to extend

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[7] A United Nations-issued laissez-passer is a valid travel document, which can be used like a national passport. The United Nations issues laissez-passers to United Nations officials and officials of specialized agencies pursuant to the authority vested to it under Article VII of the General Convention and Article VIII of the Specialized Agencies Convention, respectively. Under Article VIII, Section 26 of the Specialized Agencies Convention, "[o]fficials of the specialized agencies shall be entitled to use the United Nations laissez-passer in conformity with administrative arrangements to be concluded between the Secretary-General of the United Nations and the competent authorities of the specialized agencies, to which agencies special powers to issue laissez-passer may be delegated." Exh. 17, art. VIII, § 26. Most officials hold a blue-covered laissez-passer, which can be used like a national passport. Red laissez-passers, on the other hand, like that issued to Mr. Strauss-Kahn, are issued to high officials and can confer diplomatic privileges. *See generally* http://en.wikipedia.org/wiki/United_Nations_laissez-passer.

to the bearer the courtesies, facilities, privileges and immunities which pertain to his (or her) office"). Section 21 of the Specialized Agencies Convention, of course, is the section that recognizes absolute immunity for executive heads of specialized agencies. Thus, while he served as Managing Director of the IMF, Mr. Strauss-Kahn carried with him, as he traveled throughout the world, an official travel document issued by the United Nations that clearly stated he was absolutely immune from suit and requested that states accepting the laissez-passer extend absolute immunity to Mr. Strauss-Kahn. *See generally* Exh. 22. We are aware of no nation that denied Mr. Strauss-Kahn entry because of his absolute immunity, objected to such immunity, or conditioned Mr. Strauss-Kahn's passage to and from its borders on his acquiescing to lesser immunity. The worldwide recognition of Mr. Strauss-Kahn's immunities conferred in his red-covered laissez-passer is strong evidence that state practice has been to recognize his absolute immunity pursuant to customary international law.

2. The General Convention, to Which the United States is a Party, Supports Recognition of the Customary Rule.

Further support for recognizing absolute immunity for executive heads of specialized agencies can be drawn by analogy to another international convention, whose privileges and immunities provisions have been recognized as customary international law. The Specialized Agencies Convention is modeled after the General Convention, which sets forth the privileges and immunities accorded to the United Nations and to its officials. General Convention, *adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 (entered into force Sept. 17, 1946; entered into force for the United States Apr. 29, 1970), attached as Exh. 18. The General Assembly of the United Nations adopted the General Convention at its first session on February 13, 1946. That same day, the General Assembly adopted a resolution expressly contemplating the "unification as far as possible of the privileges and immunities enjoyed by the United Nations and the various

specialized agencies." G.A. Res. 22(I) U.N. Doc. A/RES/22(I)(D) (Feb. 13, 1946), restated in Exh. 17 (Specialized Agencies Convention), at 1.

Reflecting that stated goal, the Specialized Agencies Convention's privileges and immunities mirror those in the General Convention. The General Convention, like the Specialized Agencies Convention, provides a two-tier approach to privileges and immunities. For "Officials" of the United Nations, the General Convention provides only functional immunity, that is, such persons are "immune from legal process in respect of words spoken and all acts performed by them in their official capacity." Exh. 18, art. V, § 18(a). By contrast, high United Nations officials receive absolute immunity under the General Convention. The Secretary-General and all Assistant Secretaries-General are granted "the privileges and immunities … accorded to diplomatic envoys, in accordance with international law." *Id.*, art. V, § 19.[8]

The General Convention's grant of absolute immunity to the top officials of the United Nations, which is analogous to the absolute immunity granted to heads of specialized agencies, developed into a binding rule of customary international law—even before the United States became a party to the General Convention in 1970. During a December 6, 1967 meeting of the United Nations Sixth (Legal) Committee—although it was recognized "that the host State [*i.e.*, the United States] was not yet a party" to the General Convention—the unopposed "view was expressed that the contents of the [General Convention] now formed part of general international law as between the Organization and its Members and were accordingly binding on States, even

[8] Pursuant to the General Convention's command, United States courts consistently have applied principles of diplomatic immunity to dismiss civil actions against the Secretary-General and Assistant Secretaries-General of the United Nations. *See, e.g.*, *Brzak*, 597 F.3d at 113; *Van Aggelen v. United Nations*, No. 07-2523, 2009 WL 424175, at *1 (2d Cir. Feb. 20, 2009); *De Luca*, 841 F. Supp. at 534, *aff'd*, 41 F.3d 1502 (2d Cir. 1994).

in the absence of an express act of accession." 1967 U.N. Jurid. Y.B. 260, excerpts attached as Exh. 23. At the conclusion of the meeting, the United Nations Legal Counsel concurred with this view by issuing the following statement:

> While it may be true that in 1946 many of the provisions of the [General Convention] had the character of *lege ferenda*, in the nearly twenty-two years since the adoption of the Convention by the Assembly its provisions have become the standard and norm for governing relations between States and the United Nations throughout the world. I doubt that I am being over-bold in suggesting that the standards and principles of the [General Convention] have been so widely accepted that they have now become a part of the general international law governing the relations of States and the United Nations.

Id. at 314. To our knowledge, the United States did not dissent from this statement.

By analogy and in parallel development, just as the absolute immunity of high United Nations officials has developed into customary international law, and achieved such status even before the United States became a signatory to the Convention, so too has the absolute immunity of executive heads of specializes agencies.

3. The Purposes of Absolute Immunity Support Its Application Here.

This case provides the perfect example of why customary international law accords absolute immunity to the executive heads of specialized agencies—to permit the independent exercise of their functions in fulfillment of the purposes of the agencies they lead. The near universal acceptance of this rule is not surprising, considering "the modern reality that international organizations are critical fora for the conduct of foreign affairs." Brief for United States as Intervenor at 17, *Veiga v. World Meteorological Org.*, No. 08-3999, 2010 WL 726518 (2d Cir. Mar. 3, 2010), attached as Exh. 24; *see* Exh. 19 (Vienna Convention) at 1 (purpose of absolute immunity for diplomatic envoys is "to ensure the efficient functions of diplomatic missions"); *Hellenic Lines, Ltd.*, 345 F.2d at 980 n.5 (recognizing that diplomatic officer would

be "hampered in the performance of his duties if" he "felt obliged to restrict his movements to avoid finding himself in the presence of a process server," was "diverted from the performance of his foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances," or "the manner of service had been publicly embarrassing to him and called attention to the infringement of his personal inviolability") (quoting letter from the State Department to the Court).

As a direct result of Plaintiff's false charges of sexual assault, the IMF's ability to serve its critical function in the international economy was significantly impaired at a time of worldwide financial crisis and instability. *See* Exh. 5 (IMF Fact Sheet: Responding to the Crisis, Mar. 16, 2011). Mr. Strauss-Kahn was arrested while traveling to Europe on official IMF business to meet with German Chancellor Angela Merkel and other high level officials of several countries. Exh. 6 (Affirmation of Shawn P. Naunton in Support of Motion for Order Fixing Bail for Release of Dominique Strauss-Kahn) ¶ 22. His subsequent confinement and the pendency of serious criminal charges precluded him from performing his functions at the IMF and forced him to resign his post as the agency's Managing Director. Thus, because of Plaintiff's false accusations, the IMF was forced to operate without its chief executive at a critical time in the world economic crisis. Recognition of absolute immunity for a specialized agency head is therefore imperative to ensure the proper functioning of critical international organizations, like the IMF, and to protect their top officials from false charges, like those made against Mr. Strauss-Kahn by Plaintiff. It also serves the interest of the United States in "ensur[ing] that similar protections will be accorded those that we send abroad" to lead specialized agencies.

Boos v. Barry, 485 U.S. 312, 323 (1988) (recognizing "the concept of reciprocity that governs much of international law in this area").

4. The United States' Non-Ratification of the Specialized Agencies Convention Does Not Mean That Absolute Immunity for Executive Heads Has Not Achieved the Status of Customary International Law.

As noted, the United States has not acceded to the Specialized Agencies Convention. That fact does not, however, mean that absolute immunity for executive heads for specialized agencies—as embodied in the Specialized Agencies Convention—is not recognized as customary international law; nor does it mean that United States courts are not bound by the rules of customary international law that the Specialized Agencies Convention has generated or codified. *See Republic of Argentina*, 25 N.Y.2d at 259-60, 250 N.E.2d at 701 (holding that, even though the United States had not yet ratified the Vienna Convention on Consular relations, it nevertheless was "the document which most clearly sets forth the applicable international standards of conduct"). To the contrary, it is well recognized that a multilateral agreement, such as the Specialized Agencies Convention, can generate a rule of customary international law, "which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by *opinion juris*, so as to have become binding even for countries which have never, and do not, become parties" to the agreement. *North Sea Continental Shelf Cases*, 1969 I.C.J. at 41, excerpts attached as Exhibit 16; *see* Restatement § 102 cmt. i ("Some multilateral agreements may come to be law for non-parties that do not actively dissent. That may be the effect where a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states.").

That was precisely the position taken by the United States and adopted by the court in *Weixum v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008), a case involving the application of immunity

addressed in a convention that has had far less international accession than the Specialized Agencies Convention. In *Weixum*, practitioners of the Falun Gong spiritual movement brought suit against a former Minister of Commerce for the People's Republic of China for human rights abuses and served him with the summons and complaint while he was participating in a joint United States-China trade meeting as a member of the Chinese delegation. *Id.* at 35-36. At issue was whether the defendant enjoyed special missions immunity—a form of immunity addressed in the Convention on Special Missions, a treaty, like the Specialized Agencies Convention, to which the United States is not a party. 1400 U.N.T.S. 231, *adopted* Dec. 8, 1969 (entered into force June 21, 1985) At the district court's request, the United States filed a Statement of Interest, and took the position that "special missions immunity is recognized both in customary international law and domestically ... *notwithstanding the fact that the United States has not joined the Special Missions Convention*." Further Statement of Interest of the United States in Support of the United States' Suggestion of Immunity at 1, 7 (emphasis added), attached as Exh. 25. The United States further stated, even though the Special Missions Convention "has only 22 States as parties," it nevertheless codified customary international law on the question at issue. *Id.* at 5. Deferring to the position of the Executive Branch, the court held that service of process on the defendant was legally void and dismissed the case for lack of jurisdiction. *Weixum*, 568 F. Supp. 2d at 38, 39. Thus, just as in *Weixum*, this Court's application of controlling customary international law to recognize Mr. Strauss-Kahn's absolute immunity is not foreclosed by the United States' non-ratification of the Specialized Agencies Convention.

IV. MR. STRAUSS-KAHN REMAINED IMMUNE FROM SUIT AT THE TIME HE WAS SERVED WITH THE COMPLAINT.

Although Mr. Strauss-Kahn was no longer the Managing Director of the IMF when the complaint in this action was filed and served on his counsel on August 8, 2011, he still continued

to enjoy absolute immunity at that time, because he was not permitted to leave the United States by court order. International law is clear that immunity does not cease immediately upon termination from a diplomatic post; rather, termination of immunity has both temporal and geographic components. The Vienna Convention provides that "[w]hen 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 in which to do so, but shall subsist until that time*, even in case of armed conflict." Exh. 19, art. 39(2) (emphasis added). In other words, as applicable here, Mr. Strauss-Kahn maintained his absolute immunity from civil suit and process following his resignation from the IMF for a reasonable period of time for him to leave the country.

No reasonable period of time to leave the United States had passed at the time Mr. Strauss-Khan was served with the summons and complaint in this case. His counsel accepted service on August 8, 2011, while Mr. Strauss-Kahn remained under court order to stay in the United States. It was not until August 25, 2011, three days after Judge Obus dismissed the criminal case and Mr. Strauss-Kahn received his passport back from the Manhattan District Attorney's Office, that Mr. Strauss-Kahn was able to leave the country. Naunton Affirmation ¶ 29. Thus, when Plaintiff filed suit in this matter and served Mr. Strauss-Kahn with the summons and complaint, he continued to be protected by the absolute immunity from civil suit and process that he enjoyed while he was the Managing Director of the IMF. *See* Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 437 (3d ed. 2008) (diplomatic immunity continues where delay in departure results from circumstances beyond the control of the diplomatic official) (citing cases).

V. THERE IS NO CONFLICT BETWEEN APPLYING ABSOLUTE IMMUNITY AND UNITED STATES LAW.

This Court is obligated to apply customary international law, unless its application would create a direct conflict with the law of the United States. *Republic of Argentina*, 25 N.Y.2d at 259, 250 N.E.2d at 700. Indeed, this Court is obligated to interpret United States law in a manner that avoids conflict with international law. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (recognizing the "maxim of statutory construction" that "'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains'") (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *accord United States v. Weingarten*, 632 F.3d 60, 65 (2d Cir. 2011). Here, there is no such conflict.

A. The International Organizations Immunity Act of 1945.

There is no direct conflict between the customary rule and the International Organizations Immunity Act of 1945 (the "IOIA"), which provides that "officers and employees" of recognized international organizations "shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions." 22 U.S.C. § 288d(b). First, while the statute generally recognizes that officers and directors of international organizations possess functional, or official acts, immunity, it contains no prohibition against applying a customary or other rule of international law that provides executive heads of international organizations additional privileges and immunities. As recognized in *United States v. Melekh*, 190 F. Supp. 67, 84 (S.D.N.Y. 1960), in connection with a discussion of the interrelationship between the IOIA and the United Nations Charter, the provisions of the IOIA "do not limit the privileges and immunities referred to in … the Charter. On the contrary, they implement this country's obligation to provide the necessary privileges and immunities for representatives to the United Nations and United Nations officials." *Id.* at 84. In other words,

the IOIA sets a floor, not a ceiling, with respect to immunities of international representatives in the United States.

Second, the IOIA was signed into law in 1945—that is, prior to the emergence of the customary norm embodied in the Specialized Agencies Convention. At that time, the rules of international law with respect to the privileges and immunities to be accorded to international organizations and to their officials had not yet crystalized. Indeed, the July 11, 1946, Executive Order designating the IMF and other entities as international organizations governed by the IOIA expressly provided that such designation "is not intended to abridge in any respect privileges and immunities which such organizations have acquired *or may acquire* by treaty or Congressional action. Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946) (emphasis added), attached as Exh. 26.

Third, in addressing the policies underlying the IOIA, courts have recognized that "[t]the strong foundation in international law for the privileges and immunities accorded to international organizations denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action through multinational organizations with specific missions." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). The Executive Branch similarly has asserted in litigation that "[t]he extension of such privileges [in the IOIA] is a logical one given the function of international organizations to serve as the instrumentalities of many nations, and given the modern reality that international organizations are critical fora for the conduct of foreign affairs." Brief for United States as Intervenor at 17, *Veiga v. World Meteorological Org.*, No. 08-3999, 2010 WL 726518 (2d Cir. Mar. 3, 2010), attached as Exh. 24. Thus, not only is there no direct conflict between international law and the IOIA, but application of the absolute immunity rule here serves the underlying purposes of the Act.

B. The Bretton Woods Agreement Act of 1945.

There likewise is no direct conflict between applying absolute immunity here and the IMF's governing documents—the Articles of Agreement of the IMF—which have been codified in relevant part into federal law pursuant to the Bretton Woods Agreements Act of 1945, 22 U.S.C. § 286h. Among the IMF's Articles codified into United State law is Article IX, Section 8, which sets forth the immunities and privileges of IMF officials. Specifically, it provides that "[a]ll Governors, Executive Directors, Alternates, members of committees, representatives appointed under Article XII, Section 3(j), advisors of any of the foregoing persons, officers, and employees of the Fund … shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity." Exh. 4, art. IX, § 8. Thus, just like IOIA, the Articles of Agreement of the IMF generally recognize that IMF personnel have functional immunity, that is, immunity arising only from their official acts. But also just like the IOIA, the Articles of Agreement contain no prohibition on the Managing Director of the IMF acquiring additional privileges and immunities by the operation of a customary rule of international law or otherwise.

That the Articles of Agreement of the IMF set a floor, and not a ceiling, on the privileges and immunities to be accorded to the Managing Director finds support in the specific terms used in Article IX, Section 8. While that provision enumerates several IMF officials by title or position who enjoy functional immunity, it does not expressly list the "Managing Director." *See, e.g.* Exh. 4, art. XII, § 4(a) (stating that the Managing Director shall not be a "Governor" or an "Executive Director"). Thus, with respect to the Managing Director, the Articles of Agreement, as codified at 22 U.S.C. § 286h, readily can be construed in harmony with a customary rule of international law requiring application of absolute immunity here.

CONCLUSION

For the foregoing reasons, Defendant Dominique Strauss-Kahn respectfully requests that the Court grant his motion and dismiss the complaint with prejudice.

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Respectfully submitted,

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