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Expert Analysis

DSK and Assange: Two Controversial Cases That Test Diplomatic Law

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Outwardly, former IMF head Dominique Strauss-Kahn and WikiLeaks founder Julian Assange have little in common. But during 2012, both of them took actions that have tested the boundaries of the law relating to embassies and diplomatic immunity.

A longstanding body of law has granted special privileges to embassies and diplomats. The premises of embassies, and the residences of diplomats, have long been regarded as inviolate, meaning that the host state cannot invade or search embassy property; furthermore, under the principle of "diplomatic immunity," diplomats cannot be subject to civil or criminal process in the host state.

Much of this law is now codified in treaty through the 1961 Vienna Convention on Diplomatic Relations; it is also reflected in domestic statutes such as the U.S. Diplomatic Relations & Immunities Act of 1967, 22 USC §254a. In the leading international case to address diplomatic immunity, the *Tehran Hostages Case* of 1980, the International Court of Justice remarked that the law of diplomatic relations was "essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions." United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), Judgment, 1980 I.C.J. 3, 25 (May 24).

Assange

Julian Assange, an Australian citizen and sometime resident in the United Kingdom, obtained notoriety over the last few years from his management of the "WikiLeaks" website, one of whose functions has been to publish various diplomatic cables issued by diplomats from the United States and various other countries. (Ironically, given his present predicament, several of the provisions of the Vienna Convention are devoted to ensuring the security and privacy of diplomatic communications, including the right of embassies to send cables in "cipher" and the inviolability of the "diplomatic bag.") Assange's latest interactions with the diplomatic community, however, relate not to the "Wikileaks" affair but to sexual assault charges filed against him in 2010 by Swedish prosecuting authorities. After these charges were filed, and amidst great media attention, the Swedish government petitioned the UK authorities for Assange's extradition.

In June 2012, having lost all appeals against extradition, he took refuge at the Ecuadorian embassy in the Knightsbridge district of London, and in August 2012, the Ecuadorian government announced it was granting "asylum" to Assange. He has since been living at the embassy, albeit under the close watch of the London police.

Ecuador sought to justify its action on the grounds of "diplomatic asylum," a controversial theory advanced by some legal scholars and states that, while not addressed by the Vienna Convention, has been said to derive from the inviolate nature of an embassy. Under this theory, which has not been endorsed by the United States or the United Kingdom, a country may, through its embassy, grant complete "asylum" to a person from arrest and prosecution by the host state.

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The main difficulty with the theory is that, although an embassy's property and premises are generally regarded as inviolate under international law—meaning that the police generally cannot raid the premises and arrest people sheltering there—the host state's permission (or grant of "safe conduct") would still be needed in order to get the refugees out of the country.

The problem was illustrated by the post-war *Haya de La Torre* case. In 1949, following a foiled coup in Peru, the Colombian embassy in Lima granted refuge to the coup leader, Víctor Raúl Haya de la Torre. When Peru refused to allow his safe passage out of the country, Colombia took the case to the International Court of Justice. In a 1952 decision, the ICJ held that, while it was possible that some regional rule of "diplomatic asylum" might be observed in parts of Latin America, there was no general rule of international law mandating that "safe passage" be granted to refugees within an embassy's walls. Relying upon this case, the UK Foreign Office has likewise stated that it is not obligated to grant "safe passage" to allow Assange to leave the United Kingdom.

In seeking shelter at the embassy, Assange finds himself in odd company. The former East German dictator Erich Honecker created headlines in 1991 when he briefly sought refuge in Chile's Moscow embassy, in an unsuccessful effort to resist extradition to Germany. On Christmas 1989, former Panamanian strongman Manuel Noriega famously took refuge at the Vatican embassy in Panama, driving Operation Just Cause. Both cases, however, involved merely temporary refuge: In neither case did the embassy evince a serious interest in harboring the subject on a long-term basis.

Perhaps the most celebrated past case of diplomatic "refuge" was the case of Cardinal József Mindszenty, the Hungarian cleric and opponent of communism. Granted a life sentence for "treason" in 1949, the Cardinal was briefly freed during the Hungarian uprising of 1956, only to face re-arrest and imprisonment when the Soviets invaded. He was granted refuge at the U.S. embassy in Budapest. Unable to leave the embassy premises, he ended up staying there for 15 years. He was finally granted safe conduct out of the country in 1971. If Cardinal Mindszenty's case is any precedent, the Assange saga may well be protracted.

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Strauss-Kahn

The case of Dominique Strauss-Kahn, while also originating from alleged personal misconduct, involved a distinctly different legal issue. Strauss-Kahn (universally known by the acronym DSK) was, until 2011, working as the executive director of the International Monetary Fund (IMF), an international organization affiliated with the United Nations.

The legal status of international organizations is closely related to that of embassies, in that they both involve the grant of certain legal immunities by the host state. In the case of the IMF, immunity has three legal sources. The first is the 1944 Articles of Agreement of the International Monetary Fund (IMF Articles), a treaty forming part of the "Bretton Woods Agreements," to which the United States is party. Article IX of the IMF Articles make certain provision for immunity of the IMF and its officers. The second legal source is the "Bretton Woods Agreement Act" of 1944, now codified at 22 USC §286h et al., which incorporates portions of Article IX into U.S. law and thus enshrines the grant of immunity as per the IMF Articles. See 22 USC §286h (providing that core immunity provisions of the IMF Articles "have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of, the [IMF] and the [World] Bank, respectively").

The third is the International Organizations Immunities Act, 22 USC §§288, et seq. (IOIA), which provided that "international organizations," if designated by the president, would enjoy immunity from legal process in the United States (the IMF was so designated in 1946). Despite these broad bases for applying immunity, however, the IMF Articles themselves circumscribe the immunity afforded to IMF executives and officers.

Importantly, though, the IMF Articles do not provide for complete civil and criminal immunity for its officers and directors. Article IX.8 of the IMF Articles simply state that IMF directors enjoy "immun[ity] from legal process with respect to acts performed by them in their official capacity…." In limiting immunity to "acts performed" in an "official capacity," the IMF Articles thus created a potentially more limited immunity for IMF officials than that afforded to diplomats under the Vienna Convention.

In May 2011, DSK was arrested and charged with criminal sexual assault by New York police, following an alleged incident involving a maid

at the New York Sofitel. While those charges were pending, DSK resigned his position at the IMF. Some months later in 2011, the criminal charges were dropped, and DSK returned to France. Nevertheless, the complainant, Nafissatou Diallo, brought a civil tort claim against DSK in the Supreme Court of New York (Bronx County) seeking damages for the alleged incident.

In seeking to dismiss the claims, DSK did not seek to argue that the limited ("functional") immunity set forth in Article IX.8 of the IMF Articles could have applied to the events at the Sofitel. Instead, DSK unveiled a new theory of immunity, based upon "customary international law." Specifically, DSK cited a relatively obscure treaty from 1947, the "Convention on the Privileges and Immunities of Specialized Agencies of the United Nations," under which, he argued, heads of UN organizations like the IMF were granted "absolute" immunity. While conceding that the United States has never become a party to the 1947 Specialized Agencies Convention, DSK nevertheless argued that the terms of the convention had crystallized into a rule of "customary international law" that was binding on the United States despite its non-signatory status.

In a thoughtful and thorough opinion issued in mid-2012, Justice Douglas McKeon of the Bronx County Supreme Court rejected this contention. McKeon observed that the 1947 Specialized Agencies Convention had "never caught on internationally as the U.N. had hoped" and had not been accepted by "centers of multilateral diplomacy" like the United States, Switzerland and Ethiopia. McKeon held that no rule of "absolute immunity" could be inferred from this treaty.

Indeed, he found that the 1947 Specialized Agencies Convention, by its terms, undermined any such claim; although it created a default rule of absolute immunity, it also empowered agencies to "opt out" of the immunity provisions—which the IMF itself "clearly did" when it filed a statement, for purposes of the treaty, that the IMF's representatives would enjoy only the functional immunity envisaged in Section 8 of the IMF's Articles. Thus, "[i]n view of the express right of a specialized agency to modify and curtail standard immunity clauses, it [was] hard to make the case that the Specialized Agencies Convention is a codification of customary international law on immunity for specialized agency executive heads." *Diallo v. Strauss-Kahn*, Index No. 307065/11, slip op. at 5-6 (Sup. Ct. Bronx County, May 1, 2012).

Assange and DSK are very different personalities—DSK was an 'inside player' in economic relations, whereas Assange remains a vigorous opponent of 'closed-door' diplomacy. It is ironic indeed that, amidst their legal travails, they found themselves both urging a robust and expansive view of diplomatic prerogatives.

The court indicated, moreover, that it would have difficulty accepting that customary international law would have any role to play, given that the issue of immunity appeared to be covered by statute, i.e., the International Organizations Immunities Act of 1945, as well as the IMF Articles of Association, and neither instrument conferred the "absolute" immunity urged by DSK. Id. at 7-9. In any event, the court held that any immunity DSK may have had was lost when DSK resigned from the IMF on May 18, 2011, months prior to the lawsuit in question. Id. at 10-12.

McKeon also quoted a Japanese proverb: "The reputation of a thousand years may be determined by the conduct of one hour"—which, he noted, appears in a recent ethics report issued by the IMF.

The DSK case has now reportedly been resolved through a civil settlement between Strauss-Kahn and Diallo. As a result, the correctness of McKeon's opinion will not be tested in the appellate courts. Even so, the unique posture of DSK's case, particularly his abrupt resignation from the IMF prior to being served with civil process, means that his was not the best legal vehicle for testing the limits of legal immunity for international organizations. Future cases will determine whether the organizing charter of an international organization (such as the IMF Agreement) can "waive" the immunities otherwise afforded by the IOIA, and if so, to what extent.

Conclusion

On any view, Assange and DSK are very different personalities—DSK was an "inside player" in economic relations, whereas Assange remains a vigorous opponent of "closed-door" diplomacy. It is ironic indeed that, amidst their legal travails, they found themselves both urging a robust and expansive view of diplomatic prerogatives. Because DSK's civil suit has now been settled, the issues in his case might not receive further judicial attention. The Assange situation, however, remains a stand-off, and will likely give rise to a protracted debate over the "diplomatic asylum" doctrine. He may remain a guest of the Ecuadorean ambassador for some time.