

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADELLA CHIMINYA TACHIONA, :
et al., :

Plaintiffs, :

v. : 00 Civ. 6666 (VM)

ROBERT GABRIEL MUGABE, STAN :
MUDENGE, JONATHAN MOYO, :
et al., :

Defendants. :

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SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA

The United States of America, by its attorney, Mary Jo White, United States Attorney for the Southern District of New York, pursuant to 28 U.S.C. § 517,¹ hereby respectfully informs the Court of the interest of the United States in the pending lawsuit against defendants Robert Gabriel Mugabe, the President and sitting head of state of Zimbabwe, and Stan Mudenge, the Minister of Foreign Affairs of Zimbabwe, and suggests to the Court the immunity of President Mugabe and Foreign Minister Mudenge.² Regarding defendant Zimbabwe African National Union-

¹ Pursuant to 28 U.S.C. § 517, "any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States. . . ."

² The Complaint also named Jonathan Moyo, Minister of State for Information and Publicity, as a defendant. However, it appears Information Minister Moyo has not been served, and the Motion for Default Judgment does not seek

Patriotic Front ("ZANU-PF"), the United States advises that, during their September 2000 visit to New York City, Messrs. Mugabe and Mudenge had "personal inviolability" and could not be served with legal process in any capacity, including as representatives of ZANU-PF. In support of its interest and suggestion, the United States asserts as follows:

1. The United States has an interest in this action against the President of Zimbabwe and his Foreign Minister insofar as the case involves the question of immunity from the Court's jurisdiction of the head of state and the foreign minister of a foreign country. The interest of the United States arises from a determination by the Executive Branch of the Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against the President and the Foreign Minister would be incompatible with the United States' foreign policy interests. As discussed below, this Court should give effect to this determination.

2. The Acting Legal Adviser of the United States Department of State has informed the Department of Justice that the Government of Zimbabwe on November 1, 2000 formally requested

judgment against him. In these circumstances, the United States does not address his immunity from suit, if any, at this time.

the Government of the United States to suggest the immunity of the President and the Foreign Minister from this lawsuit. Letter from James H. Thessin to Stuart E. Schiffer, dated February 21, 2001 (copy attached as Exhibit 1). The Acting Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Mugabe and Foreign Minister Mudenge from this suit." Id.

3. Under customary rules of international law recognized and applied in the United States, and pursuant to this Suggestion of Immunity, President Mugabe, as the head of a foreign state, is immune from the Court's jurisdiction in this case. See, e.g., First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996); Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994), aff'd, 79 F.3d 1145 (5th Cir. 1996); Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994). In addition, Foreign Minister Mudenge also is immune from the Court's jurisdiction in this case.³ See The Schooner Exchange v.

³ In dicta, some courts have used language that might be read out of context to suggest that immunity can only apply to the person who is the recognized head of state. See, e.g., El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp. 2d 69, 82 n.10 (D.D.C. 1999), rev'd in part, 216 F.3d 29 (D.C. Cir. 2000); Jungquist v. Hahyan, 940 F. Supp. 312, 321 (D.D.C. 1996), rev'd on other grounds, 115 F.3d 1020 (D.C. Cir. 1997). In these cases, however, the courts did not have occasion to consider the applicability of the

McFaddon, 11 U.S. (7 Cranch) 116, 138 (1812) (Marshall, C.J.) (recognizing that, under customary international law, "the immunity which all civilized nations allow to foreign ministers" is coextensive with the immunity of the sovereign); Kim v. Kim Yong Shik, Civ. No. 12565 (Cir. Ct., 1st Cir., Hawaii 1963), cited at 58 Am. J. Int'l L. 186 (1964) (recognizing immunity of foreign minister) (copy attached as Exhibit 2).

4. The Supreme Court has mandated that the courts of the United States are bound by suggestions of immunity, such as this one, submitted by the Executive Branch. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); Ex Parte Peru, 318 U.S. 578, 588-89 (1943). In Ex Parte Peru, the Supreme Court, without further review of the Executive Branch's determination of immunity, declared that the Executive Branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that the courts' retention of jurisdiction would jeopardize the conduct of foreign relations. Ex Parte Peru, 318 U.S. at 589. See also

doctrine to a foreign minister, or to address customary international law that traditionally has recognized the immunity of foreign ministers. See The Schooner Exchange, 11 U.S. (7 Cranch) at 138; see also Kline v. Kaneko, 141 Misc. 2d 787, 789, 535 N.Y.S.2d 303, 305 (Sup. Ct. N.Y. Co. 1988) (immunity for spouse of head of state), aff'd w/o op., 154 A.D.2d 959, 546 N.Y.S.2d 504 (1st Dep't 1989); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (immunity for head of government rather than head of state), aff'd in part and rev'd in part on other grounds, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990).

Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974).

Accordingly, where, as here, immunity has been recognized by the Executive Branch and a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction. Ex Parte Peru, 318 U.S. at 588. See also Hoffman, 324 U.S. at 35.⁴

5. The courts of the United States have heeded the Supreme Court's direction regarding the binding nature of suggestions of immunity submitted by the Executive Branch. See, e.g., First American Corp., 948 F. Supp. at 1119 (suggestion by executive branch of the United Arab Emirates' Sheikh Zayed's immunity determined conclusive and required dismissal of claims alleging fraud, conspiracy, and breach of fiduciary duty); Alicog, 860 F. Supp. at 382 (suggestion by Executive Branch of King Fahd's immunity as head of state of Saudi Arabia held to require

⁴ The conclusive effect of the Executive Branch's suggestion of immunity in this case is not affected by enactment of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602, et seq. Prior to passage of the FSIA, the Executive Branch filed suggestions of immunity with respect to both heads of state and foreign states themselves. The FSIA transferred the determination of the immunity of foreign states from the Executive Branch to the courts. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610. The FSIA, however, did not alter Executive Branch authority to suggest head of state immunity for foreign leaders, or affect the binding nature of such suggestions of immunity. See, e.g., First American Corp., 948 F. Supp. at 1119; see also Gerritsen v. De la Madrid, No. CV 85-5020-PAR, slip op. at 7-9 (C.D. Cal. Feb. 21, 1986) (copy attached as Exhibit 3); Estate of Domingo v. Marcos, No. C82-1055V, slip op. at 3-4 (W.D. Wash. July 14, 1983) (copy attached as Exhibit 4).

dismissal of complaint against King Fahd for false imprisonment and abuse); Lafontant, 844 F. Supp. at 132-33 (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging President Aristide ordered murder of plaintiff's husband); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (suggestion by Executive Branch of Prime Minister Thatcher's immunity conclusive in dismissing suit that alleged British complicity in U.S. air strikes against Libya), aff'd in part and rev'd in part on other grounds, 886 F.2d 438, 441 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990); Gerritsen, slip op. at 7-9 (in suit against Mexican President De la Madrid and others for conspiracy to deprive plaintiff of constitutional rights, action against President De la Madrid dismissed pursuant to suggestion of immunity); Domingo, slip op. at 2-4 (action alleging political conspiracy by, among others, then President Ferdinand Marcos and then First Lady Imelda Marcos of the Republic of the Philippines dismissed against them pursuant to suggestion of immunity); Psinakis v. Marcos, No. C-75-1725-RHS (N.D. Cal. 1975), result reported in Sovereign Immunity, 1975 Digest of U.S. Practice in Int'l Law § 7, at 344-45 (copy attached as Exhibit 5) (libel action against then President Marcos dismissed pursuant to suggestion of immunity); Anonymous v. Anonymous, 581 N.Y.S.2d 776, 777 (1st Dep't 1992) (divorce

suit against head of state dismissed pursuant to suggestion of immunity); Guardian F. v. Archdiocese of San Antonio, Cause No. 93-CI-11345 (Tex. Dist. Ct. 1994) (copy attached as Exhibit 6) (suggestion of immunity required dismissal of suit against Pope John Paul II).

6. Judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the conduct of our foreign relations. Spacil, 489 F.2d at 619. First, as the court in Spacil explained,

[s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy.

Id. (citing United States v. Lee, 106 U.S. 196, 209 (1882)); see also Ex Parte Peru, 318 U.S. at 588. Second, the Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. See Spacil, 489 F.2d at 619. By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. Id. Finally, and "[p]erhaps more importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." Id.

7. In addition to head of state immunity, in this case, as representatives of the Government of Zimbabwe to the United Nations Millennium Summit, President Mugabe and Foreign Minister Mudenge are also entitled to diplomatic immunity under the Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, United States accession, April 29, 1970, 21 U.S.T. 1418 (the "UN General Convention"), and the Vienna Convention on Diplomatic Relations, done April 18, 1961, United States accession, December 13, 1972, 23 U.S.T. 3227 (the "Vienna Convention"). Article IV, Section 11, of the UN General Convention provides that representatives of Member States to United Nations conferences are entitled to the privileges and immunities enjoyed by diplomatic envoys, subject to exceptions not applicable here. Article 31(1) of the Vienna Convention provides that diplomatic agents enjoy comprehensive immunity from civil jurisdiction, again subject to narrow exceptions not applicable here. Immunity extends to such representatives throughout the course of their U.N. visit, and would apply from the time of entry into the United States until departure or expiry of a reasonable period following conclusion of their U.N. business. See Vienna Convention, article 39(1) and (2). The Diplomatic Relations Act, 22 U.S.C. § 254a, et seq., provides that an action against an individual who is entitled to immunity shall be dismissed where immunity is established "upon motion or

suggestion by or on behalf of the individual." 22 U.S.C. § 254d.

8. Finally, the Motion for Default Judgment in this case seeks judgment against defendant Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), the ruling political party in Zimbabwe. Plaintiffs assert service of the suit on ZANU-PF through service on President Mugabe and Foreign Minister Mudenge as officers and representatives of ZANU-PF. However, under both the head of state and diplomatic immunity doctrines, President Mugabe and Foreign Minister Mudenge had "personal inviolability" and could not be served with legal process in any capacity, including on behalf of ZANU-PF. As a leading commentator on diplomatic law states, "serving process on the diplomat . . . cannot be done by the authorities of the receiving State because of his inviolability." Eileen Denza, Diplomatic Law, 2d Ed., at pp. 265-66 (copy attached as Exhibit 7). Thus, neither President Mugabe nor Foreign Minister Mudenge could be served with legal process as representatives of ZANU-PF.

Conclusion

For the foregoing reasons, the United States respectfully suggests the immunity of President Mugabe and Foreign Minister Mudenge in this action.

Dated: New York, New York
February 23, 2001

Respectfully submitted,

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