

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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MEMORANDUM OF LAW IN SUPPORT OF
THE UNITED STATES' MOTION FOR RECONSIDERATION

Nonparty the United States of America respectfully submits this memorandum of law in support of its motion for reconsideration, pursuant to Local Civil Rule 6.3, of the Court's Decision and Order dated October 31, 2001 and entered November 1, 2001 (the "Decision") insofar as the Decision gave effect to the service of process by delivery of papers to defendants Mugabe and Mudenge.

PRELIMINARY STATEMENT AND PROCEDURAL BACKGROUND

This action alleges egregious misconduct by Zimbabwe's President, Foreign Minister, and ruling party. The United States has made submissions herein solely as a nonparty seeking to vindicate the strong interests of the United States in protecting the conduct of international relations from harms that would result from any erosion of immunities

afforded visiting foreign heads of state and diplomats. Toward that end, the United States filed a Suggestion of Immunity to inform the Court that individual defendants Mugabe and Mudenge enjoy both head-of-state and diplomatic immunity from this action, and that those individuals' immunities under these doctrines render them immune from the service of process, as well as from suit. One result of this immunity from service would have been to invalidate plaintiffs' purported service on ZANU-PF through delivery of papers to Mugabe and Mudenge during those officials' visit to the United States in September 2000.

In its Decision, the Court recognized that defendants Mugabe and Mudenge enjoy both head-of-state and diplomatic immunity from this action. The Court therefore dismissed claims against them. Further, the Court recognized that the immunities held by Mugabe and Mudenge rendered them "inviolable" under international law and treaty obligations of the United States. However, the Court disagreed with the United States' contention that Mugabe and Mudenge were immune from service of process, both by virtue of their head-of-state immunity and pursuant to treaty. Rather, the Court held that service on a head-of-state or diplomat could be effective, at least "where a head-of-state or diplomat would not be

subjected personally to a foreign court's jurisdiction nor exposed to liability in that court." Decision 106. The Court therefore found that the delivery of papers to Mugabe and Mudenge constituted effective service on Zimbabwe's ruling party, ZANU-PF; ordered that default judgment be entered against ZANU-PF; and order that an inquest be held to determine the amount of damages owed by ZANU-PF. Id. at 130.

The United States respectfully submits that the Court should reconsider and amend the Decision insofar as it held that non-immune entities may be served by delivery of papers to individuals who possess inviolability under applicable treaties and who are affiliated with the non-immune entity.¹ The Decision does not cite, and is contrary to, clear and binding authority requiring courts to give "great weight" to the Executive Branch's reading of treaty terms,

¹ The United States also respectfully disagrees with the Court's rejection of the contention that the Court was bound by all aspects of the Suggestion of Immunity, including its advice that Mugabe and Mudenge enjoyed head-of-state immunity from service of process for all purposes. See Decision 98 (rejecting "the further contention that the doctrine requires courts to give conclusive effect to the State Department's advice with regard to the appropriateness of service of process upon a head-of-state as it arises in this case"); Decision 97 (nothing "confer[s] upon the State Department the function of defining the full reach of the concept of inviolability"). The United States expressly reserves all rights of appeal in this regard, but does not seek to relitigate the issue in the present motion.

including the one at issue here. This holding is particularly harmful both because it encroaches on the Executive Branch's authority over matters of treaty interpretation and the conduct of foreign affairs, and because, contrary to the Court's assessment, the Executive Branch anticipates that the Decision will interfere with both the conduct of foreign relations and the dignity of office required to be afforded diplomats and foreign leaders.

DISCUSSION

THE COURT SHOULD RECONSIDER AND CHANGE ITS HOLDING THAT INVIOLEABLE DIPLOMATS AND HEADS-OF-STATE ARE SUBJECT TO SERVICE

Local Civil Rule 6.3 establishes the mechanism for litigants in this district to seek reconsideration through motions "setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Local Civil Rule 6.3. On such a motion, a party may not "advance new facts, issues or arguments not previously presented to the Court." Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Md., 768 F. Supp. 115, 116 (S.D.N.Y. 1991).

The Government respectfully submits that the Court "overlooked" and failed to give the legally-required "great weight" to the Executive Branch's construction of "inviolability" as that term is used in the Vienna Convention

on Diplomatic Relations. The Government informed the Court that "the State Department considers that personal inviolability under Article 29 of the Convention precludes the service of compulsory legal process on diplomatic agents," Gov't Reply Mem. 34, and, further, observed settled precedent that "the meaning given [treaty provisions] by the departments of government particularly charged with their negotiation and enforcement is given great weight." Id. at 34 (citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)); see also Gov't Reply Mem. at 31-32 (citing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) (where parties to treaty agree to meaning of a treaty provision, and interpretation "follows from the clear treaty language[, the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation"), and citing 767 Third Avenue Associates v. Permanent Mission of Zaire, 988 F.2d 295, 301-02 (2d Cir. 1993) ("federal courts must defer" to treaty interpretation advanced by United States and not contradicted by any signatory to treaty)). This authority reflects clear and binding rules of judicial construction of treaty terms, including the applicable Article 29 of the Vienna Convention, by which courts are required to give an extremely high degree of deference to Executive Branch treaty constructions.

The Decision neither cites this authority nor exhibits any deference whatsoever to the Executive Branch's construction of the relevant provision, in contrast to its explicit discussion and rejection of the Government's separate contention that the Court was bound to follow the Executive Branch's political foreign policy determination embodied in the Suggestion of Immunity as to the effectiveness of service on Mugabe and Mudenge. The Court's failure to take into account the separate basis for decision, namely that courts must give "great weight" to Executive Branch treaty interpretations, likely controlled the outcome of the Decision as to the effectiveness of any service of process on Mugabe and Mudenge.

The Executive Branch's construction of "inviolability" is logical, and is fully consistent both with the applicable treaty provision, and with the Vienna Convention as a whole. Moreover, as the Decision recognizes, there is "limited case law" construing inviolability as it relates to service of process, Decision 95-96, and what case law there is indicates that service may not be effected on inviolable officials. See Gov't Reply Mem. 33-34 (citing Aidi v. Yaron, 672 F. Supp. 516, 517 (D.D.C. 1987); Lafontant v. Aristide, 844 F. Supp. 128, 130 (E.D.N.Y. 1994); Vulcan Iron

Works v. Polish Am. Machinery Corp., 472 F. Supp. 77, 78 (S.D.N.Y. 1979)); see also Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 980-81 (D.C. Cir. 1965) ("the purposes of diplomatic immunity forbid service" on an ambassador even where summons at issue did not purport to join action against ambassador personally, but rather purported to join action against foreign sovereign state which the ambassador represented) (citing Vienna Convention, Art. 29); Greenspan v. Crosbie, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976) (service of entity through immune officials "patently improper") (citing Hellenic Lines).

The decisions in Hellenic Lines and Greenspan are particularly significant in light of the Court's distinction of the "limited case law" on point on the basis that here the defendant to be bound by the service of process is a non-immune entity whose representative happens to enjoy immunity and inviolability. See Decision 95-96. The plaintiff in Hellenic Lines was a shipper who sought to sue the government of Tunisia for damages arising out of an alleged delay in transit caused by that nation. The plaintiff secured a summons to be served on a Tunisian ambassador, who was not a defendant, with the intended effect of joining issue against Tunisia itself. As noted above, the D.C. Circuit squarely

held that the ambassador's diplomatic immunity "forbid[s] service" on him, even for the limited purpose of giving notice to a separate entity with which the ambassador unquestionably was affiliated. Hellenic Lines, 345 F.2d at 981. Similarly, in Greenspan plaintiffs sought to sue a Canadian province, and attempted to serve process on visiting Canadian officials. The Court held that such service of process was "patently improper." 1976 WL 841 at *2 (citing Hellenic Lines).

Indeed, the Second Circuit, in interpreting "inviolability" as the term is used in treaty provisions concerning the premises of diplomatic missions, characterized the term as "advisedly categorical" and "strong." 767 Third Avenue Associates, 988 F.2d at 298. Further, the Circuit held it was error for a district court to read into "the deliberately spare text of the Vienna Convention . . . an exception of its own making." Id. The Decision makes an identical error, and should be amended to cure it.²

² The Government is also concerned that the Court may have misconstrued the Government as having supported an interpretation of the treaty that would permit personal service on diplomats who do not have substantive underlying immunity (e.g., the Article 31(1) exceptions). The United States submission does advise that a diplomat who is not immune from the civil jurisdiction of United States courts by virtue of the limited exceptions to immunity under Article 31(1) is subject to compulsory legal process. However, because that situation was not presented here, the United

Finally, even setting aside - without waiving for purposes of appeal - the Government's disagreement with the Court's conclusion that it had authority to assess foreign policy judgments encompassed in the Suggestion of Immunity, we note that the Court's failure to give deference to the Executive Branch's treaty interpretation is likely to interfere with the conduct of foreign affairs, contrary to the Court's conclusion that deeming service effective here serves an "overarching end . . . at negligible sacrifice of the leader's public dignity . . . , and without hindrance to the performance of governmental roles." Decision 107.

On a practical level, the ruling will give rise to vexatious and embarrassing assaults on the dignity of foreign leaders and diplomats, as individuals who wish to protest or humiliate such officials will be able through simple artifice to plead a complaint against a nongovernmental entity with

States expressed no view as to what method of service (e.g., by certified mail or through the diplomatic channel) would be consistent with the diplomat's personal inviolability. Rather, because Mugabe and Mudenge have immunity without exception, the United States informed the Court that no form of service upon them is permissible under the treaty.

which an official allegedly is affiliated, and then to publicize and stage a highly-visible service of process on the visiting dignitary. Contrary to the Decision's suggestion that such a service of process would cause minimal inconvenience, the diplomat or other official would be significantly diverted from performance of his or her foreign relations functions. At a minimum, he or she would need to take the time needed to ascertain the significance of the documents, to decide whether local counsel should be consulted, both on the validity of service on an inviolable individual under local law, and on any other issues arising under the local legal system, to determine what action on his part, if any, the papers required, and finally to take such action as might be required in the circumstances.

Moreover, the United States anticipates that such a practice would give rise to sharp diplomatic protest, not only from nations whose leaders are targeted with such incidents, but from other nations which will be apprehensive about their officials being subjected to similar incidents, and even from the United Nations if representatives to that organization are involved. Such incidents also raise serious security issues, a critical and undeniable aspect of the conduct of diplomacy. Finally, the United States has grave concerns about the

Decision's possible implications for the United States's conduct of foreign affairs overseas, by creating a justification for other nations to subject United States officials to service of process when functioning abroad.³

For these reasons, the Government's motion for reconsideration should be granted, and the Decision amended to quash all purported service on defendants Mugabe and Mudenge.

CONCLUSION

³ The United States expressly disavows the Court's characterization of ZANU-PF as an "intended beneficiary" of the Government's position here. Decision 99. It is of course true that, in the unique posture of this case, ZANU-PF stands to benefit from the Government's position, assuming plaintiffs cannot accomplish service by other means. However, as the United States has made clear throughout these proceedings, its purpose in making submissions in this matter has been solely to protect the United States' vital interests in ensuring the unfettered conduct of bilateral and multilateral diplomacy; in pursuing comity among nations and, through principles of reciprocity, proper treatment of our representatives abroad; and in complying with treaty requirements to which we are a signatory.

For the reasons stated above, the Court should
reconsider and amend its decision, and should quash service of

process on defendants Mugabe and Mudenge for all purposes.

Dated: New York, New York
November 16, 2001

Respectfully submitted,

MARY JO WHITE
United States Attorney
Attorney for the
United States of America

By:

DAVID S. JONES (DJ-5276)
Assistant United States Attorney
100 Church Street, 19th Floor
New York, New York 10007
Tel. (temporary): (718) 422-5648

Of Counsel:

Linda Jacobson, Assistant Legal Adviser
Stephen D. McCreary, Attorney-Adviser
Office of Diplomatic Law
and Litigation
Office of the Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Attorneys for the United States
Department of State