

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3  
4 August Term 2003

5  
6 (Argued March 5, 2004 Decided October 6, 2004)

7  
8 Docket Nos. 03-6033(L)  
9 03-6043(XAP)

10  
11 -----x  
12 ADELLA CHIMINYA TACHIONA, on her own  
13 behalf on behalf of her late husband  
14 Tapfuma Chiminya Tachiona, and on  
15 behalf of all others similarly situated,  
16 EFRIDAH PFEBVE, on her own behalf and on  
17 behalf of her late brother Metthew Pfebve,  
18 ELLIOT PFEBVE, on his own behalf and on  
19 behalf of his brother Metthew Pfebve,  
20 EVELYN MASAITI, on her own behalf, MARIA  
21 DEL CARMEN STEVENS, on her own behalf,  
22 on behalf of her late husband David  
23 Yendall Stevens, and on behalf of all  
24 others similarly situated,

25  
26 Plaintiffs-Appellees-Cross-Appellants,

27  
28 ROBERT GABRIEL MUGABE, in his individual  
29 and personal capacity, ZIMBABWE AFRICAN  
30 NATIONAL UNION-PATRIOTIC FRONT, STAN MUDENGE,  
31 JONATHAN MOYO, CERTAIN OTHER UNKNOWN NAMED  
32 SENIOR OFFICERS OF ZANU-PF,

33  
34 Defendants,

35  
36 v.

37  
38 UNITED STATES OF AMERICA,

39  
40 Intervenor-Appellant-Cross-Appellee.

41  
42 -----x  
43  
44 B e f o r e : WALKER, Chief Judge, CARDAMONE, Circuit  
45 Judge, and GLEESON, District Judge.\*

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\* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

1           The United States appeals from a judgment of the United  
2 States District Court for the Southern District of New York  
3 (Victor Marrero, Judge) awarding damages against defendant  
4 the Zimbabwe African National Union-Patriotic Front for  
5 violations of the Alien Tort Claims Act, the Torture Victim  
6 Protection Act, and international human rights norms.  
7 Plaintiffs-appellees-cross-appellants cross-appeal from the  
8 district court's order dismissing for lack of subject-matter  
9 jurisdiction all claims against individual defendants Robert  
10 Mugabe and Stan Mudenge.

11           AFFIRMED in part, REVERSED in part, and REMANDED for  
12 entry of a judgment of dismissal.

13                           DAVID S. JONES, Assistant United  
14 States Attorney, New York, NY  
15 (James B. Comey, United States  
16 Attorney for the Southern District  
17 of New York, and Meredith E.  
18 Kotler, Assistant United States  
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20 Taft IV, Legal Advisor, David P.  
21 Stewart, Assistant Legal Advisor,  
22 and Wynne M. Teel, Attorney-  
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25 and Lewis S. Yelin, Attorneys,  
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27 Justice, Washington, D.C., on the  
28 brief), for Intervenor-Appellant-  
29 Cross-Appellee.

30  
31                           PAUL B. SWEENEY, Hogan & Hartson  
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33 Berg, Hogan & Hartson L.L.P., New  
34 York, NY; William J. Bowman, Mary  
35 Ellen Callahan, Keith J. Benes, and  
36 Nichelle Y. Johnson, Hogan &

1 Hartson L.L.P., Washington, D.C.;  
2 Hamish P.M. Hume, Cooper & Kirk,  
3 P.L.L.C., Washington, D.C., on the  
4 brief), for Plaintiffs-Appellees-  
5 Cross-Appellants.

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29  
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32 England, for Amicus Curiae  
33 Interights the International Centre  
34 for the Legal Protection of Human  
35 Rights.

36  
37 JOHN M. WALKER, JR., Chief Judge:

38 The United States appeals from a default judgment  
39 entered by the United States District Court for the Southern  
40 District of New York (Victor Marrero, Judge) against  
41 defendant the Zimbabwe African National Union-Patriotic  
42 Front ("ZANU-PF") for violations of the Alien Tort Claims

1 Act ("ATCA"), 28 U.S.C. § 1350 (2001), the Torture Victim  
2 Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat.  
3 73 (1992) (codified at 28 U.S.C. § 1350 note), and  
4 international human rights norms. Plaintiffs cross-appeal  
5 from the district court's dismissal, for lack of subject-  
6 matter jurisdiction, of a host of similar claims brought  
7 against individual defendants Robert Mugabe and Stan  
8 Mudenge. The appeal and cross-appeal both turn on questions  
9 of immunity. The district court held that Mugabe and  
10 Mudenge were entitled to diplomatic and head-of-state  
11 immunity, but that their immunity did not protect them from  
12 service of process as agents for ZANU-PF -- a non-immune,  
13 private entity. Accordingly, in the district court's view,  
14 ZANU-PF was properly served with process and thus subject to  
15 a default judgment upon failure to appear in this  
16 litigation. For the reasons that follow, we affirm the  
17 district court's dismissal of the claims against Mugabe and  
18 Mudenge but reverse its judgment against ZANU-PF and remand  
19 for entry of a judgment dismissing plaintiffs' claims  
20 against ZANU-PF.

#### 21 **BACKGROUND**

22 ZANU-PF is a private political party whose members have  
23 ruled Zimbabwe since 1980. At all relevant times, Robert  
24 Mugabe was the President of Zimbabwe and the President and

1 First Secretary of ZANU-PF, and Stan Mudenge was the  
2 Zimbabwean Foreign Minister and a ZANU-PF official. In  
3 September 2000, Mugabe and Mudenge visited New York City as  
4 delegates to the United Nations ("U.N.") Millennium Summit.  
5 During their visit, they attended (and Mugabe spoke at) a  
6 private political rally and fund-raiser at a church in  
7 Harlem -- an event that was sponsored by a non-governmental  
8 organization called "Friends of ZANU-PF." Just before he  
9 entered the church, Mugabe was served with two copies of the  
10 complaint in this action, one in his personal capacity and  
11 the other on behalf of ZANU-PF. The next day, Mudenge was  
12 served with a copy of the same complaint on the street  
13 outside the Zimbabwe Mission building.

14 The complaint sought redress against Mugabe, Mudenge,  
15 ZANU-PF, and others for alleged violations of the ATCA, the  
16 TVPA, and international human rights norms. Plaintiffs (all  
17 of whom are Zimbabwean nationals) allege that they and/or  
18 their family members were subjected to torture, assault,  
19 execution, and other acts of violence at the hands of ZANU-  
20 PF members and upon the orders of ZANU-PF officials,  
21 including Mugabe and Mudenge. Mugabe and Mudenge were sued  
22 in their individual, not official, capacities. None of the  
23 defendants appeared before the district court at any stage  
24 of the ensuing litigation.

1           Several months after Mugabe and Mudenge were served  
2 with process, the United States filed a "suggestion of  
3 immunity" pursuant to 28 U.S.C. § 517,<sup>1</sup> in which it asserted  
4 that the claims against the two men should be dismissed on  
5 grounds of diplomatic and head-of-state immunity. The  
6 Government further argued that the claims against ZANU-PF  
7 should be dismissed because "under both the head of state  
8 and diplomatic immunity doctrines, [Mugabe and Mudenge] had  
9 'personal inviolability' and could not be served with legal  
10 process in any capacity, including on behalf of ZANU-PF."  
11 J.A. at 326-35 (Suggestion of Immunity Submitted by the  
12 United States of America, dated February 23, 2001).

13           In response to the Government's suggestion, plaintiffs  
14 argued that: (1) the Foreign Sovereign Immunities Act  
15 ("FSIA"), 28 U.S.C. §§ 1330, 1602 to 1611 -- not the  
16 Government's suggestion of immunity -- governs immunity  
17 determinations concerning heads of state; (2) the FSIA does  
18 not afford Mugabe and Mudenge immunity in this case because  
19 the two are alleged to have committed human rights  
20 violations in their non-official capacities; and (3) Mugabe  
21 and Mudenge were not entitled to diplomatic immunity during

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<sup>1</sup> Section 517 provides that "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."

1 the course of their U.N.-sponsored trip to New York City  
2 and, thus, could be both sued individually and served with  
3 process as agents for ZANU-PF.

4 On October 30, 2001, the district court issued an order  
5 and decision dismissing the claims against Mugabe and  
6 Mudenge on immunity grounds but entering a default judgment  
7 against ZANU-PF. See Tachiona v. Mugabe, 169 F. Supp. 2d  
8 259 (S.D.N.Y. 2001) ("Tachiona I"). The court concluded  
9 that the executive branch's suggestion of immunity, not the  
10 FSIA, governed immunity for heads of state, and that the  
11 suggestion mandated dismissal of the claims against Mugabe  
12 and Mudenge. See id. at 296-97. It also held, in the  
13 alternative, that diplomatic immunity precluded plaintiffs'  
14 suit against Mugabe and Mudenge. See id. at 297, 302. But  
15 the district court found that neither head-of-state immunity  
16 nor diplomatic immunity shielded foreign officials from  
17 service of process as agents for a private entity and,  
18 therefore, that Mugabe and Mudenge could be served as agents  
19 for ZANU-PF. See id. at 309. Thus, in the district court's  
20 view, ZANU-PF had been properly served and, having failed to  
21 appear in the action, was subject to a default judgment.

22 The Government moved for reconsideration and to  
23 intervene for purposes of appeal. On February 14, 2002, the  
24 district court denied the Government's motion for

1 reconsideration, but granted its motion to intervene. See  
2 Tachiona v. Mugabe, 186 F. Supp. 2d 383, 397 (S.D.N.Y. 2002)  
3 (“Tachiona II”). In a final judgment dated December 19,  
4 2002, following a damages inquest, the court held ZANU-PF  
5 liable for \$20,250,453 in compensatory damages and  
6 \$51,000,000 in punitive damages.

## 7 **DISCUSSION**

8 In its appeal, the Government argues that the district  
9 court erred in determining that neither head-of-state  
10 immunity nor diplomatic immunity protected Mugabe and  
11 Mudenge from service of process as agents for ZANU-PF.  
12 Plaintiffs respond in the alternative, asserting that: (1)  
13 the Government lacks standing to appeal the district court’s  
14 judgment against ZANU-PF in the absence of ZANU-PF’s own  
15 demand for review of the judgment; and (2) on the merits,  
16 the default judgment against ZANU-PF should be upheld.  
17 They also cross-appeal the district court’s dismissal of the  
18 claims against Mugabe and Mudenge. Our authority to review  
19 the merits depends on whether the Government has standing to  
20 appeal; we therefore address that issue first.

### 21 **I. Standing**

22 Because Article III of the Constitution permits the  
23 adjudication of “Cases” or “Controversies” only, litigants  
24 appearing before federal courts must demonstrate that they

1 have standing to invoke the court's jurisdiction. See,  
2 e.g., Arizonans for Official English v. Arizona, 520 U.S.  
3 43, 64 (1997). To claim standing, a litigant must have  
4 suffered "'an invasion of a legally protected interest' that  
5 is 'concrete and particularized' and 'actual or imminent.'" Id.  
6 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555,  
7 560 (1992)) (internal quotation marks omitted). The Article  
8 III standing requirement "must be met by persons seeking  
9 appellate review, just as it must be met by persons  
10 appearing in courts of first instance." Id. (citing Diamond  
11 v. Charles, 476 U.S. 54, 62 (1986)). To have standing at  
12 the appellate stage, however, a litigant must demonstrate  
13 "injury caused by the judgment rather than injury caused by  
14 the underlying facts." 15A Charles Alan Wright, Arthur R.  
15 Miller & Edward H. Cooper, Federal Practice and Procedure  
16 § 3902, at 63 (2d ed. 1992); see also Diamond, 476 U.S. at  
17 62 ("[T]he decision to seek review must be placed 'in the  
18 hands of those who have a direct stake in the  
19 outcome[,]'. . . not . . . in the hands of 'concerned  
20 bystanders[.]'" (citations omitted)).

21 The Government sought the district court's permission  
22 to intervene for purposes of appeal pursuant to Rule 24(a)  
23 of the Federal Rules of Civil Procedure, and the district  
24 court granted that request. Although the Government's

1 motion was both proper and prudent, see Marino v. Ortiz, 484  
2 U.S. 301, 304 (1988) (per curiam) (a non-party seeking to  
3 appeal a judgment of the district court should first seek  
4 leave to intervene for purposes of appeal in the district  
5 court), a district court's grant of a motion to intervene  
6 for purposes of appeal does not, by itself, confer standing  
7 on the intervenor to appeal "in the absence of the party on  
8 whose side intervention was permitted." Diamond, 476 U.S.  
9 at 68. (Here, of course, ZANU-PF is not appealing.)  
10 Resolution of the standing question entails a separate  
11 inquiry into whether the Government's asserted injury and  
12 interest "fulfill[] the requirements of [Article] III." Id.  
13 \_\_\_\_\_Plaintiffs argue that the Government has no standing to  
14 bring this appeal because it is not "bound" by the judgment  
15 of the district court and because, even if res judicata  
16 effect is not a prerequisite to standing, the Government's  
17 purported interests are too amorphous to confer standing.<sup>2</sup>  
18 Although plaintiffs' arguments are not without some force,  
19 we ultimately find them to be unpersuasive.

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<sup>2</sup> Plaintiffs also contend that the Government cannot "interfere with litigation brought by and against private parties" unless "Congress has expressly authorized such action." Rep. Br. of Plaintiffs-Appellees-Cross-Appellants, at 7. But the only authority cited in support of this proposition, Ruotolo v. Ruotolo, 572 F.2d 336 (1st Cir. 1978), expressly acknowledges that "the United States may sometimes sue without statutory authority," for example, when the case involves a "national issue of great moment or urgency." Id. at 339.

1           As plaintiffs note, it is well established that a party  
2 not bound by a judgment cannot appeal a district court's  
3 decision on the sole ground that the decision sets a  
4 precedent unfavorable to the would-be appellant. See Boston  
5 Tow Boat Co. v. United States, 321 U.S. 632, 633 (1944).  
6 More generally, a party not bound by a judgment will, in the  
7 usual case, have difficulty showing that it meets the  
8 Article III standing requirement. See, e.g., Arizonans for  
9 Official English, 520 U.S. at 66 (expressing "grave doubts"  
10 as to whether parties who "were not bound by the judgment"  
11 of the district court had Article III standing to appeal).  
12 But that is not because there is a per se bar against  
13 appeals by parties not bound by the judgment; rather, it is  
14 because such parties normally will not have sustained a  
15 "legal injury, actual or threatened," as a result of the  
16 judgment. See Edward Hines Yellow Pine Trs. v. United  
17 States, 263 U.S. 143, 148 (1923) (cited in Boston Tow Boat,  
18 321 U.S. at 634). By contrast, we think the asserted injury  
19 to the Government's interests in this case, caused by the  
20 district court's judgment, is sufficiently concrete to give  
21 it standing to bring this appeal.

22           The Government claims that the district court's  
23 judgment invaded its legally protected interests in two  
24 ways: (1) it placed the United States in violation of

1 certain international treaties; and (2) it usurped the  
2 executive branch's exclusive authority to set the terms upon  
3 which the United States receives foreign ambassadors. As to  
4 the first, the Government argues that the district court's  
5 decision interferes with its obligation to ensure that the  
6 United States complies with the Vienna Convention on  
7 Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227,  
8 T.I.A.S. No. 7502 (entered into force in U.S. Dec. 13, 1972)  
9 [hereinafter Vienna Convention], and the Convention on the  
10 Privileges and Immunities of the United Nations, Feb. 13,  
11 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 (ratified by the  
12 U.S. Apr. 29, 1970) [hereinafter U.N. Convention on  
13 Privileges and Immunities]. The existence of the asserted  
14 interest can hardly be disputed; pursuant to Article II of  
15 the Constitution, the President has "the Power, by and with  
16 the Advice and Consent of the Senate, to make Treaties."  
17 U.S. Const. art. II, § 2, cl. 2. A corollary to the  
18 executive's power to enter into treaties is its obligation  
19 to ensure that the United States complies with them.

20 Here, the district court was called upon to interpret  
21 the U.N. Convention on Privileges and Immunities and the  
22 Vienna Convention. The Government's claim that the district  
23 court's interpretation contravenes the intent of the  
24 treaties' signatories, placing the United States in breach

1 of its international obligations, alleges a concrete  
2 invasion of the executive's legal interest. See, e.g.,  
3 Roeder v. Iran, 333 F.3d 228, 233-34 (D.C. Cir. 2003), cert.  
4 denied, 124 S. Ct. 2836 (2004). In Roeder, the District of  
5 Columbia Circuit considered whether the United States had  
6 standing to intervene as a defendant in a lawsuit against  
7 the Iranian government. Although the court questioned  
8 whether a defendant-intervenor must satisfy the Article III  
9 standing requirement, see id. at 233-34, it assumed the  
10 requirement applied, and concluded that because the  
11 Government had "established that it was in imminent danger  
12 of suffering injury in fact -- a breach of its obligations  
13 under the [Algiers] Accords," it had standing, id. at 233-  
14 34. See also, e.g., Sanitary Dist. v. United States, 266  
15 U.S. 405, 425 (1925) ("[The United States] has a standing in  
16 this suit . . . to carry out treaty obligations to a foreign  
17 power . . . , and no statute is necessary to authorize the  
18 suit [by the Attorney General]."); United States v. County  
19 of Arlington, 669 F.2d 925, 929-30 (4th Cir. 1982) (United  
20 States had standing to initiate action to seek relief from  
21 conduct that would, inter alia, cause treaty violation).  
22 The only apparent distinction between the foregoing cases  
23 and this one is that here it is the district court's  
24 decision, and not the action of any party, that threatens a

1 breach of the United States's treaty obligations. For  
2 purposes of standing, that is a distinction without a  
3 difference.

4 The Government next argues that the district court's  
5 decision upholding service of process on Mugabe and Mudenge  
6 as agents for ZANU-PF usurped the executive branch's  
7 constitutional authority to conduct foreign affairs and to  
8 send and receive ambassadors. Plaintiffs do not dispute  
9 that the power to conduct foreign affairs is vested  
10 principally in the executive branch. Indeed, Article II,  
11 section 3 of the Constitution assigns to the President the  
12 authority to "receive Ambassadors and other public  
13 Ministers," while (as discussed above) Article II, section 2  
14 gives the President the power to make treaties, albeit with  
15 the advice and consent of the Senate.

16 Taken together with the command of Article II,  
17 [section] 3 that the President "shall take Care that  
18 the Laws be faithfully executed," these constitutional  
19 provisions have come to be regarded as explicit textual  
20 manifestations of the inherent presidential power to  
21 administer, if not necessarily to formulate . . . , the  
22 foreign policy of the United States.

23  
24 Lawrence H. Tribe, American Constitutional Law § 4-3, at 638  
25 (3d ed. 2000); see, e.g., Dep't of Navy v. Egan, 484 U.S.  
26 518, 529 (1988) ("The Court . . . has recognized 'the  
27 generally accepted view that foreign policy was the province  
28 and responsibility of the Executive.'" (quoting Haig v.

1        Agee, 453 U.S. 280, 293-94 (1981)). Courts have long  
2        construed this executive authority to encompass a near-  
3        exclusive power to dictate the terms upon which foreign  
4        diplomats are received in this country. See, e.g., Nat'l  
5        Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d  
6        551, 553 (2d Cir. 1988) (noting that an incident to the  
7        executive's constitutional powers is the President's  
8        "exclusive authority to recognize or refuse to recognize a  
9        foreign state or government and to establish or refuse to  
10       establish diplomatic relations with it"); see also United  
11       States v. Al-Hamdi, 356 F.3d 564, 572-73 (4th Cir. 2004)  
12       (holding that State Department's certification that an  
13       individual was not entitled to diplomatic immunity was  
14       "conclusive evidence" of lack of entitlement because of the  
15       executive's power to send and receive ambassadors) (citing  
16       In re Baiz, 135 U.S. 403, 421 (1890), and Ex Parte Hitz, 111  
17       U.S. 766, 767 (1884)).

18        Plaintiffs contend nevertheless that the alleged injury  
19       to the Government's authority to receive foreign ambassadors  
20       is too abstract to permit the Government to appeal the  
21       decision below. To support this proposition, they rely on  
22       the Supreme Court's decision in Raines v. Byrd, 521 U.S. 811  
23       (1997), in which individual members of Congress were held to  
24       lack standing to challenge a line-item veto statute because

1 they "alleged no injury to themselves as individuals [and]  
2 the institutional injury they alleg[ed] [was] wholly  
3 abstract and widely dispersed." Id. at 829. But Raines is  
4 distinguishable in crucial respects from the instant case.  
5 First, Raines involved a constitutional challenge to an  
6 action taken by one of the other two branches of the Federal  
7 Government -- a fact that the Court believed merited an  
8 "especially rigorous" standing inquiry because it implicated  
9 the "overriding and time-honored concern about keeping the  
10 Judiciary's power within its proper constitutional sphere."  
11 Id. at 819-20. Here, by contrast, we are not being asked to  
12 review the actions taken by another branch, but rather to  
13 determine whether a component of our own branch of  
14 government, i.e., the district court, has overstepped its  
15 bounds. That kind of review is the standard grist of  
16 appellate courts.

17 Second, the basis for the Supreme Court's denial of  
18 standing in Raines was that the individual members of  
19 Congress had not alleged any personal injury to themselves,  
20 and their alleged institutional injury -- viz., that the  
21 line-item veto, irrespective of whether it was used by the  
22 President, altered the "'meaning'" and "'effectiveness'" of  
23 the members' votes, id. at 817, 825-26 -- was "wholly

1 abstract and widely dispersed.”<sup>3</sup> Here, the executive  
2 branch’s institutional interest in protecting its authority  
3 to conduct foreign affairs and receive foreign ambassadors  
4 is not “abstract” because the direct effect of the district  
5 court’s ruling would be to permit service of process upon  
6 Mugabe and Mudenge -- a result that, if the Government is  
7 correct, would violate executive norms and treaty  
8 obligations.

9 The Court in Raines was careful to distinguish the  
10 situation in which, for example, a legislator’s vote is  
11 nullified, see Coleman v. Miller, 307 U.S. 433, 446-47  
12 (1939) (state senators had standing to challenge  
13 ratification of a constitutional amendment which had been  
14 effected, despite senate deadlock, when the lieutenant  
15 governor cast the deciding vote), from a situation, like the  
16 one in Raines, where the only injury claimed is an “abstract  
17 dilution of institutional legislative power” that resulted  
18 from the President’s discretion to exercise a line-item  
19 veto. Raines, 521 U.S. at 826. The executive’s interest in  
20 this case is more akin to that in Coleman; the allegation is  
21 not that the district court’s decision may have resulted in  
22 dilution of the executive’s constitutional authority to

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<sup>3</sup> Id. at 829. Both Houses of Congress “actively oppose[d]”  
the plaintiffs’ lawsuit, a fact to which the Court “attach[ed]  
some importance.” Id.

1           conduct foreign affairs, but that it interfered in a direct,  
2           articulable way with that authority. See also United States  
3           ex rel. Chapman v. Fed. Power Comm'n, 345 U.S. 153, 155-56  
4           (1953) (holding that the Secretary of Interior had standing  
5           to bring an action challenging the Federal Power  
6           Commission's authority to grant a license because the  
7           license conflicted with the Secretary's statutory duties).

8           We conclude that the asserted adverse effects of the  
9           district court's decision on the Government's interests in  
10          (1) ensuring that the United States does not violate its  
11          treaty obligations, and (2) guarding its authority to set  
12          the terms upon which foreign ambassadors are received, are  
13          sufficient to confer standing on the Government to appeal  
14          the district court's ruling upholding the service of process  
15          on Mugabe and Mudenge as agents for ZANU-PF. Assuming  
16          arguendo that the Government must also establish that it has  
17          standing to defend the district court's ruling concerning  
18          Mugabe and Mudenge's immunity from suit, cf. Roeder, 333  
19          F.3d at 233, the two interests it has asserted suffice for  
20          that purpose as well; the cross-appeal, no less than the  
21          appeal, implicates the executive branch's constitutional  
22          powers and responsibilities in the arena of international  
23          relations. The threshold standard having been met, we now  
24          turn to the merits of the appeal and cross-appeal.

1           **II. The Merits**

2           The Government's argument on appeal -- that Mugabe and  
3           Mudenge were shielded from service of process as agents for  
4           ZANU-PF -- presupposes the correctness of the district  
5           court's ruling that the two individuals enjoyed diplomatic  
6           and/or head-of-state immunity; if the two were not immune  
7           from suit, then they could not claim that their protected  
8           status also shielded them from service of process as agents  
9           for a non-immune entity. Logic therefore compels us to  
10          first consider the merits of plaintiffs' cross-appeal  
11          challenging the district court's immunity finding before  
12          addressing the Government's appeal.

13                   A. *Diplomatic Immunity*

14          The district court dismissed plaintiffs' claims against  
15          Mugabe and Mudenge because, inter alia, it concluded that  
16          the two were entitled to diplomatic immunity under the U.N.  
17          Convention on Privileges and Immunities and the Vienna  
18          Convention. We affirm for substantially the same reasons  
19          articulated by the district court.

20          The immunities afforded temporary representatives like  
21          Mugabe and Mudenge who visit the United States for a U.N.  
22          conference are set forth in Article IV, section 11 of the  
23          U.N. Convention on Privileges and Immunities:

24                   Representatives of Members to the principal and  
25                   subsidiary organs of the United Nations and to

1 conferences convened by the United Nations, shall,  
2 while exercising their functions and during their  
3 journey to and from the place of meeting, enjoy the  
4 following privileges and immunities:  
5

- 6 a. immunity from personal arrest or detention and  
7 from seizure of their personal baggage, and, in  
8 respect of words spoken or written and all acts  
9 done by them in their capacity as representatives,  
10 immunity from legal process of every kind;  
11
- 12 b. inviolability for all papers and documents;  
13
- 14 c. the right to use codes and to receive papers or  
15 correspondence by courier or in sealed bags;  
16
- 17 d. exemption in respect of themselves and their  
18 spouses from immigration restrictions, alien  
19 registration or national service obligations in  
20 the state they are visiting or through which they  
21 are passing in the exercise of their functions;  
22
- 23 e. the same facilities in respect of currency or  
24 exchange restrictions as are accorded to  
25 representatives of foreign governments on  
26 temporary official missions;  
27
- 28 f. the same immunities and facilities in respect of  
29 their personal baggage as are accorded to  
30 diplomatic envoys, and also;  
31
- 32 g. such other privileges, immunities and facilities  
33 not inconsistent with the foregoing as diplomatic  
34 envoys enjoy, except that they shall have no right  
35 to claim exemption from customs duties on goods  
36 imported (otherwise than as part of their personal  
37 baggage) or from excise duties or sales taxes.  
38

39 U.N. Convention on Privileges and Immunities, supra, 21

40 U.S.T. 1418, art. IV, § 11. The only part of this section  
41 that expressly addresses the immunity from legal process  
42 afforded temporary U.N. representatives is section 11(a).

43 Standing alone, section 11(a) would not protect Mugabe and

1 Mudenge from suit based on any acts of violence they  
2 perpetrated in Zimbabwe, because such acts are not "acts  
3 done by them in their capacity as representatives."  
4 Section 11(g), however, extends to temporary U.N.  
5 representatives "such other privileges, immunities and  
6 facilities not inconsistent with [sections 11(a) to (f)] as  
7 diplomatic envoys enjoy."

8 The Vienna Convention, which governs the privileges and  
9 immunities that are extended to diplomatic envoys, provides  
10 for a much more robust form of immunity from legal process  
11 than that afforded by section 11(a) of the U.N. Convention  
12 on Privileges and Immunities. With limited exceptions, it  
13 broadly immunizes diplomatic representatives from the civil  
14 jurisdiction of the United States courts.<sup>4</sup>

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<sup>4</sup> Article 31 of the Vienna Convention provides in relevant part:

- (1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
  - (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
  - (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
  - (c) an action relating to any professional or

1           Plaintiffs argue that reading section 11(g) of the U.N.  
2           Convention on Privileges and Immunities to extend to Mugabe  
3           and Mudenge the full measure of immunity set forth in  
4           Article 31 of the Vienna Convention would be "inconsistent  
5           with" section 11(a) of the U.N. Convention on Privileges and  
6           Immunities because section 11(a) expressly limits the scope  
7           of immunity from legal process that temporary U.N.  
8           representatives can enjoy. In plaintiffs' view,

9           [s]ection 11(g) should not be read to "override"  
10          [sections 11(a) to (f)], but should instead be read to  
11          be a reference to "privileges, immunities, and  
12          facilities" afforded to diplomats but not specifically  
13          referenced in [sections 11(a) to (f)], such as the  
14          right to use the representative's national flag on his  
15          means of transport (Vienna Convention Art. 20).

16  
17          Reply Br. of Plaintiffs-Appellees-Cross-Appellants, at 28.

18           We join the district court in declining to adopt  
19          plaintiffs' overly narrow interpretation of section 11(g).  
20          "When interpreting a treaty, we begin with the text of the  
21          treaty and the context in which the written words are used."  
22          E. Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991)  
23          (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486  
24          U.S. 694, 699 (1988)) (internal quotation marks omitted).  
25          "[T]reaties are construed more liberally than private  
26          agreements, and to ascertain their meaning we may look

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commercial activity exercised by the diplomatic  
agent in the receiving State outside his official  
functions.

1 beyond the written words to the history of the treaty, the  
2 negotiations, and the practical construction adopted by the  
3 parties.” Id. at 535 (quoting Air France v. Saks, 470 U.S.  
4 392, 396 (1985)) (internal quotation marks omitted).  
5 Further, in construing treaty language, “[r]espect is  
6 ordinarily due the reasonable views of the Executive  
7 Branch.” El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,  
8 525 U.S. 155, 168 (1999); see Sumitomo Shoji Am., Inc. v.  
9 Avagliano, 457 U.S. 176, 184-85 (1982) (“Although not  
10 conclusive, the meaning attributed to treaty provisions by  
11 the Government agencies charged with their negotiation and  
12 enforcement is entitled to great weight.”). “But where the  
13 text [of the treaty] is clear, . . . [courts] have no power  
14 to insert an amendment.” Chan v. Korean Air Lines, Ltd.,  
15 490 U.S. 122, 134 (1989).

16 Applying these principles, we conclude, as a  
17 preliminary matter, that the text of section 11 of the U.N.  
18 Convention on Privileges and Immunities is ambiguous. It is  
19 not clear what would make a particular immunity or privilege  
20 “inconsistent with” any of the privileges and immunities  
21 specifically enumerated in section 11. Would the proposed  
22 immunity or privilege have to render the exercise of an  
23 enumerated privilege or immunity impossible? Or would it be  
24 enough (as plaintiffs assert) for it to negate certain

1 limitations or conditions that otherwise would attach to the  
2 exercise of an enumerated privilege or immunity? The answer  
3 is not evident from the face of the treaty. Therefore, we  
4 must resort to other interpretive tools.

5 Plaintiffs argue that ordinary principles of statutory  
6 construction do not permit a reading of section 11(g) that  
7 would expand the circumstances under which immunity from  
8 legal process attaches. First, they point out that reading  
9 section 11(g) as a grant of near-absolute immunity from suit  
10 would render section 11(a) superfluous -- a result not  
11 favored by principles of statutory construction. See  
12 Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113  
13 (2001). Second, they cite the rule that, where a statutory  
14 text lists a number of items seriatim (as in sections 11(a)  
15 to (f)), the specific qualifications in one provision cannot  
16 be overridden by a general catch-all clause (like  
17 section 11(g)). See id. at 114-15 (general phrases are  
18 "controlled and defined by reference to the enumerated  
19 categories"); Varsity Corp. v. Howe, 516 U.S. 489, 511  
20 (1996).

21 These arguments are not without force. But while  
22 general principles of statutory construction "may be brought  
23 to bear on difficult or ambiguous passages" of a treaty,  
24 Schlunk, 486 U.S. at 700, the understandings of the treaty

1 signatories and the views of the executive branch are at  
2 least as important in resolving ambiguity. See Saks, 470  
3 U.S. at 396; see also Hakala v. Deutsche Bank AG, 343 F.3d  
4 111, 116 (2d Cir. 2003) ("General principles of statutory  
5 construction are notoriously unreliable."). Here, those  
6 understandings and views overwhelmingly support an  
7 interpretation of section 11(g) that would accord the full  
8 protection of Article 31 of the Vienna Convention to  
9 temporary U.N. representatives.

10 First, the United States government officials who  
11 ratified the U.N. Convention on Privileges and Immunities  
12 plainly believed that it would afford full diplomatic  
13 immunity to temporary U.N. representatives. Two excerpts  
14 from a report of the Senate Committee on Foreign Relations,  
15 which was charged with considering whether the United States  
16 should ratify the U.N. Convention on Privileges and  
17 Immunities, are particularly relevant.<sup>5</sup> See generally Comm.  
18 on Foreign Relations, Convention on the Privileges and

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<sup>5</sup> Plaintiffs contend that statements made during the pre-ratification hearings in the Senate cannot be used to divine the meaning of the Convention because they "were made twenty-four years after the Convention was drafted and adopted by the U.N. General Assembly." Rep. Br. of Plaintiffs-Appellants-Cross-Appellants, at 30 (emphasis in original). Contrary to plaintiffs' contention, however, the Supreme Court has expressly approved the use of such materials in interpreting international treaties, and has even suggested that they are more useful than treaties' negotiation history. See United States v. Stuart, 489 U.S. 353, 367-68, 367 n.7 (1989).

1 Immunities of the United Nations, S. Exec. Rep. No. 91-17,  
2 at 3, 11-12 (1970) [hereinafter Senate Report]. The first  
3 is a statement by State Department Legal Advisor John R.  
4 Stevenson during hearings before the committee on March 9,  
5 1970. He said:

6 At the present time resident representatives are  
7 already granted full diplomatic privileges and  
8 immunities under the headquarters agreement.<sup>6</sup>  
9 Nonresident representatives, on the other hand, are  
10 only covered by the International Organizations  
11 Immunities Act and that grants them immunities relating  
12 to acts performed by them in their official capacity.  
13

14 Under the [U.N. Convention on Privileges and  
15 Immunities], the nonresident representatives would also  
16 receive full diplomatic privileges and immunities.  
17

18 . . . .

19  
20 . . . [M]any of the nonresident representatives  
21 are distinguished parliamentarians who come to New York  
22 for very short periods of time and we believe they  
23 should be treated with the same respect as the  
24 permanent representatives.  
25

26 Id. app. at 11-12 (Stat. of Hon. John R. Stevenson, Legal

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<sup>6</sup> At the time of these hearings, the "headquarters agreement" between the United States and the U.N. governed immunity from suit for resident U.N. representatives. See Agreement respecting the headquarters of the United Nations, June 26, 1947, U.S.-U.N., 61 Stat. 3416, T.I.A.S. No. 1676 (entered into force Nov. 21, 1947). Article V, § 15 of the headquarters agreement provided that resident representatives "shall . . . be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as [the United States] accords to diplomatic envoys accredited to it." Id. at 3428.

By contrast, temporary U.N. representatives were only "immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as . . . representatives." 22 U.S.C. § 288d(b) (2001).

1 Advisor, Dep't of State). The second excerpt is a statement  
2 of the Senate Committee itself:

3 With regard to representatives of members,  
4 currently only resident representatives of permanent  
5 missions to the U.N. have full diplomatic immunities.  
6 Nonresident representatives enjoy only functional  
7 immunities; that is, immunities with respect to their  
8 official acts. Under the [U.N. Convention on  
9 Privileges and Immunities], these nonresident  
10 representatives will also be entitled to full  
11 diplomatic immunities.

12  
13 Id. at 3.

14 As evidenced by these excerpts, the Senate Committee on  
15 Foreign Relations and the State Department both believed  
16 that the U.N. Convention on Privileges and Immunities would  
17 confer more than just "functional" immunity, i.e., the type  
18 of immunity described in section 11(a), on temporary U.N.  
19 representatives; they understood that such representatives  
20 would be afforded "full diplomatic immunities." Id. That  
21 section 11(g) was intended to supplement the protection  
22 provided by section 11(a) is further supported by a table  
23 submitted by State Department Legal Advisor Stevenson during  
24 the March 9, 1970 hearings, the purpose of which is to  
25 illustrate the effect of the U.N. Convention on Privileges  
26 and Immunities in certain typical civil and criminal  
27 situations involving "nonofficial activities." Id. app. at  
28 29 (table). The table indicates that, in contrast to prior  
29 law, "Nonresident (temporary) representative[s]" would be

1 "immune from suit or prosecution under sec. 11(g)." Id.  
2 (emphasis added).

3 This inclusive interpretation of section 11(g) was also  
4 adopted by former U.N. Secretary-General Kurt Waldheim in a  
5 1976 opinion concerning immunity from legal process:

6 Section 11 of [the] Convention specifies the more  
7 important immunities attaching to "the representatives  
8 of Members[,"] including "immunity from legal process  
9 of every kind[,"] and, in subsection (g) thereof,  
10 explicitly extends to representatives, in addition,  
11 "such other privileges, immunities and facilities not  
12 inconsistent with the foregoing as diplomatic envoys  
13 enjoy" . . . . In other words, taken as a whole,  
14 Section 11 of the Convention in fact confers . . .  
15 diplomatic privileges and immunities on the  
16 representatives of Members.

17  
18 1976 U.N. Jurid. Y.B. 224, 227 (emphasis added). Taken  
19 together, Secretary-General Waldheim's opinion, the Senate  
20 Report excerpts discussed above, and the broad  
21 interpretation of section 11(g) advanced by the Government  
22 in this litigation (which is accorded "great weight," see  
23 Sumitomo Shoji Am., 457 U.S. at 185), persuade us that  
24 section 11(g) extends to temporary U.N. representatives like  
25 Mugabe and Mudenge the full range of immunity from legal  
26 process afforded by Article 31 of the Vienna Convention.

27 One potential obstacle remains, however, to affording  
28 Mugabe the full protection of Article 31 of the Vienna  
29 Convention: section 11 of the U.N. Convention on Privileges  
30 and Immunities stipulates that the immunities described

1           therein, including the diplomatic immunities set forth in  
2           section 11(g), apply only while the U.N. representative is  
3           “exercising [his] functions and during [his] journey to and  
4           from the place of meeting.” U.N. Convention on Privileges  
5           and Immunities, supra, 21 U.S.T. 1418, art. IV, § 11  
6           (prefatory language). Whereas Mudenge was served with  
7           process outside of the Zimbabwe Mission building and,  
8           therefore, squarely within the parameters set forth in  
9           section 11, Mugabe was served with process while attending a  
10          ZANU-PF fund-raising rally, a private activity unrelated to  
11          his duties as a U.N. representative. Plaintiffs argue that  
12          because Mugabe was not acting in his capacity as a U.N.  
13          representative when he was served with copies of the  
14          complaint, he cannot claim immunity under section 11.

15                 Taking our cue from former U.N. Secretary-General  
16          Waldheim, we decline to read the prefatory language of  
17          section 11 so narrowly. Secretary-General Waldheim,  
18          recognizing that U.N. representatives traveling to U.N.  
19          conferences typically engage in activities ancillary to  
20          their actual representative functions, interpreted the words  
21          “while exercising their functions” to mean “during the  
22          entire period of presence in the State . . . for reasons of  
23          the conference in question.” 1976 U.N. Jurid. Y.B. 224, 228  
24          (quoting 1967 Y.B. Int’l L. Comm. at 176 ¶ 87). Waldheim

1 explained that "to interpret [the prefatory words] so as to  
2 limit them to times when the person concerned is actually  
3 doing something as part of his functions as a representative  
4 . . . leads to absurd and meaningless results making such an  
5 interpretation wholly untenable." Id.

6 We can imagine hypothetical situations in which  
7 section 11's prefatory language might foreclose a temporary  
8 U.N. representative's entitlement to the immunities set  
9 forth in section 11; for example, if a representative were  
10 served with process months after the completion of a U.N.  
11 conference while traveling in the United States for purely  
12 personal reasons. But this is not such a case; Mugabe was  
13 served while the U.N. Millennium Summit was still in  
14 progress. Under the circumstances, he was entitled, through  
15 section 11(g), to the full protection of Article 31 of the  
16 Vienna Convention.

17 Having determined that Mugabe and Mudenge are subject  
18 to the terms of Article 31, we now consider whether any of  
19 the exceptions found in that Article apply. Article 31(1)  
20 provides:

21 A diplomatic agent shall enjoy immunity from the  
22 criminal jurisdiction of the receiving State. He shall  
23 also enjoy immunity from its civil and administrative  
24 jurisdiction, except in the case of:

- 25  
26 (a) a real action relating to private immovable  
27 property situated in the territory of the  
28 receiving State, unless he holds it on behalf of

1 the sending State for the purposes of the mission;  
2

3 (b) an action relating to succession in which the  
4 diplomatic agent is involved as executor,  
5 administrator, heir or legatee as a private person  
6 and not on behalf of the sending State;  
7

8 (c) an action relating to any professional or  
9 commercial activity exercised by the diplomatic  
10 agent in the receiving State outside his official  
11 functions.  
12

13 Vienna Convention, supra, 23 U.S.T. 3227, art. 31(1). While  
14 plaintiffs concede the inapplicability of these exceptions  
15 to Mudenge, they assert that subsection (c) deprives Mugabe  
16 of immunity from legal process because the ZANU-PF rally  
17 that he attended "had nothing at all to do with [his]  
18 'official functions' as a representative of Zimbabwe to the  
19 U.N." Br. of Plaintiffs-Appellees-Cross-Appellants, at 56.  
20 The key words in subsection (c), however, are "activity  
21 . . . in the receiving State." Plaintiffs' lawsuit falls  
22 outside the scope of subsection (c) because plaintiffs'  
23 claims do not "relat[e] to" Mugabe's activities at the  
24 rally; they relate to his activities in Zimbabwe.

25 Plaintiffs nevertheless attempt to identify a nexus  
26 between their lawsuit and the ZANU-PF rally by arguing that

27 the rally seemed specifically designed to combat the  
28 extensive international outrage directed toward Mugabe  
29 personally and against ZANU-PF as an organization --  
30 outrage triggered specifically by the murderous tactics  
31 that ZANU-PF inflicted on its political opponents, such  
32 as the Plaintiffs in this case.  
33

34 Br. of Plaintiffs-Appellees-Cross-Appellants, at 56. We

1 decline to adopt this exceedingly broad conception of  
2 "relating to." Although the term "relating to" (or "related  
3 to"), when used in statutes, is typically defined more  
4 broadly than the term "arising out of," it still connotes a  
5 "connection" with, "reference to," or "associat[ion] with"  
6 its object. See Coregis Ins. Co. v. Am. Health Found.,  
7 Inc., 241 F.3d 123, 128-29 (2d Cir. 2001) (quoting Webster's  
8 Third New International Dictionary 117 (1986) and Jackson v.  
9 Lajaunie, 270 So.2d 859, 864 (La. 1972)) (internal quotation  
10 marks omitted). As we noted in Coregis, Webster's  
11 Dictionary defines "related" as "connected by reason of an  
12 established or discoverable relation." Id. at 128 (internal  
13 quotation marks omitted). Plaintiffs' complaint makes no  
14 "reference to," nor does it have an "established or  
15 discoverable relation" to, Mugabe's participation in the  
16 Friends of ZANU-PF rally; it is based entirely on events  
17 that occurred well before the rally and many thousands of  
18 miles away.

19 Since none of the other exceptions under Article 31(1)  
20 is relevant here, Mugabe and Mudenge are both entitled to  
21 diplomatic immunity from suit under the terms of the Vienna  
22 Convention and the U.N. Convention on Privileges and  
23 Immunities. Therefore, the claims filed against them  
24 individually were properly dismissed.

1           B.    *Head-of-State Immunity*

2           The district court held that Mugabe and Mudenge were  
3 also entitled to immunity from suit as heads of state  
4 because the Government had filed a suggestion of head-of-  
5 state immunity on their behalf, which, in the court's view,  
6 was dispositive.  See Tachiona I, 169 F. Supp. 2d at 297.  
7 Plaintiffs argue that this was error because the FSIA, not  
8 the executive's suggestion of immunity, governs head-of-  
9 state immunity determinations, and neither Mugabe nor  
10 Mudenge is entitled to the protections afforded under the  
11 Act.

12           We have some doubt as to whether the FSIA was meant to  
13 supplant the "common law" of head-of-state immunity, which  
14 generally entailed deference to the executive branch's  
15 suggestions of immunity.  See Ex Parte Peru, 318 U.S. 578,  
16 589 (1943); see also Wei Ye v. Jiang Zemin, No. 03-3989, --  
17 F.3d --, 2004 WL 1984430, at \*3 (7th Cir. Sept. 8, 2004)  
18 (holding that FSIA does not apply to heads of state).  For  
19 one thing, the FSIA applies only to foreign states, which  
20 are defined as including "political subdivision[s]," and  
21 "agenc[ies] or instrumentalit[ies]" thereof.  See 28 U.S.C.  
22 § 1603(a).  "[A]genc[ies] [and] instrumentalit[ies]" in turn  
23 are defined in terms not usually used to describe natural  
24 persons.  See 28 U.S.C. § 1603(b) (defining "agency or

1 instrumentality" as an "entity" that, inter alia, is "an  
2 organ of a foreign state or political subdivision thereof,  
3 or a majority of whose shares or other ownership interest is  
4 owned by a foreign state or political subdivision thereof,"  
5 28 U.S.C. § 1603(b)(2)). But see, e.g., Chuidian v. Phil.  
6 Nat'l Bank, 912 F.2d 1095, 1100-03 (9th Cir. 1990) (holding  
7 that the FSIA grants immunity to lower foreign government  
8 officials for acts committed in their official capacity).  
9 Moreover, the only references to heads of state or other  
10 foreign officials in the FSIA's legislative history suggest  
11 that their immunity is not governed by the Act. See H.R.  
12 Rep. No. 94-1487, at 21 (1976), reprinted in 1976  
13 U.S.C.C.A.N. 6604, 6620 (describing bill that would later  
14 become the FSIA as "deal[ing] only with the immunity of  
15 foreign states and not its diplomatic or consular  
16 representatives") [hereinafter House Report]; Immunities of  
17 Foreign States: Hearing on H.R. 3493 Before the Subcomm. on  
18 Claims and Governmental Relations of the House Comm. on the  
19 Judiciary, 93rd Cong. 16 (1973) (statement of Bruno Ristau,  
20 Chief, Foreign Litigation Unit, Civil Division, Department  
21 of Justice) ("[W]e are not talking . . . in terms of  
22 permitting suit against the Chancellor of the Federal  
23 Republic [of Germany] . . . . That is an altogether  
24 different question.").

1           In light of our conclusion that the claims against  
2           Mugabe and Mudenge were properly dismissed on the basis of  
3           diplomatic immunity, however, we have no occasion to decide  
4           whether Mugabe and Mudenge were protected from suit by head-  
5           of-state immunity -- whether under the terms of the FSIA or  
6           because of the Government's suggestion of immunity. Nor do  
7           we have any occasion to decide whether head-of-state  
8           immunity protected Mugabe and Mudenge from service of  
9           process as agents for ZANU-PF, cf. Wei Ye, 2004 WL 1984430,  
10          at \*6 (holding that executive branch's "power to recognize  
11          the immunity of a foreign head of state includes the power  
12          to preclude service of process in that same suit on the head  
13          of state even where that service is intended to reach third  
14          parties"); that question is mooted by our conclusion,  
15          explained below, that diplomatic immunity rendered the  
16          service of process a nullity.

17           C.    *Service of Process*

18           As discussed above, see Part II(A), supra,  
19          section 11(g) of the U.N. Convention on Privileges and  
20          Immunities extends to Mugabe and Mudenge the immunities that  
21          diplomats enjoy under the Vienna Convention. These include  
22          not only the immunity from legal process set forth in  
23          Article 31, but also the "inviolability" of the person:

24                   The person of a diplomatic agent shall be inviolable.  
25                   He shall not be liable to any form of arrest or

1           detention. The receiving State shall treat him with  
2           due respect and shall take all appropriate steps to  
3           prevent any attack on his person, freedom or dignity.

4           Vienna Convention, supra, 23 U.S.T. 3227, art. 29. The  
5           Government argues that the district court erred in holding  
6           that Article 29 of the Vienna Convention did not protect  
7           Mugabe and Mudenge from service of process as agents of  
8           process for ZANU-PF. See Tachiona I, 169 F. Supp. 2d at  
9           309. We agree.

10           Although the term "inviolable" is not defined in the  
11           Vienna Convention, we have described it as "advisedly  
12           categorical" and "strong." 767 Third Ave. Assocs. v.  
13           Permanent Mission of Zaire, 988 F.2d 295, 298 (2d Cir. 1993)  
14           (discussing inviolability of mission premises under Article  
15           22 of the Vienna Convention). The text of Article 29 makes  
16           plain that a person entitled to diplomatic immunity may not  
17           be arrested or detained. The scope of inviolability,  
18           however, extends further; Article 29 also protects against  
19           "attack[s]" on the "person, freedom or dignity" of the  
20           diplomatic envoy. Vienna Convention, supra, 23 U.S.T. 3227,  
21           art. 29. For example, courts have held that the  
22           inviolability principle precludes service of process on a  
23           diplomat as agent of a foreign government, see Hellenic  
24           Lines, Ltd. v. Moore, 345 F.2d 978, 979-81 (D.C. Cir. 1965),  
25           and, as applied to missions, prevents a landlord from

1 seeking to evict a diplomatic mission from its premises for  
2 non-payment of rent, see 767 Third Ave. Assocs., 988 F.2d at  
3 302.

4 The district court gave two principal reasons for its  
5 conclusion that the inviolability principle did not protect  
6 Mugabe and Mudenge from service of process as agents for  
7 ZANU-PF. First, it observed that the FSIA permits service  
8 of process on an agency or instrumentality of a foreign  
9 state by, inter alia, "delivery of a copy of the summons and  
10 complaint" to officers and agents of the agency or  
11 instrumentality, 28 U.S.C. § 1608(b)(2), which could  
12 conceivably include "a state official or diplomat otherwise  
13 entitled to immunity." Tachiona I, 169 F. Supp. 2d at 306.  
14 The court did not suggest that § 1608(b)(2) provided any  
15 express justification for the service of process on Mugabe  
16 and Mudenge as agents for ZANU-PF (which is, after all, a  
17 private entity and not an agency or instrumentality of a  
18 foreign state), but thought the provision "contemplate[d]  
19 and legitimize[d] the point that the doctrine of  
20 inviolability does not serve as an absolute barrier to the  
21 service of process in certain limited circumstances." Id.  
22 at 306-07. Second, the district court implied from the fact  
23 that Article 31 of the Vienna Convention sets forth certain  
24 enumerated exceptions to immunity from suit that "service of

1 process per se does not offend the concept of personal  
2 inviolability." Id. at 307. For the reasons that follow,  
3 we decline to adopt the district court's reasoning.

4 As the district court observed, the FSIA permits  
5 service of process on "an officer, a managing or general  
6 agent, or . . . any other agent authorized by appointment or  
7 by law to receive service of process in the United States"  
8 on behalf of an agency or instrumentality of a foreign  
9 state. 28 U.S.C. § 1608(b)(2). While it is true that, in  
10 the abstract, this category of persons could include agents  
11 or officers who are otherwise entitled to diplomatic  
12 immunity, we decline to construe the FSIA as a license to  
13 serve process on diplomatic and consular representatives,  
14 even as agents for private, non-immune entities. As a  
15 preliminary matter, § 1608(b)(2) permits personal service on  
16 an agent or officer of an agency or instrumentality of the  
17 foreign state (e.g., the president of a foreign bank) only;  
18 absent special agreement, the FSIA does not permit personal  
19 service on agents or officers of the foreign state itself.  
20 See 28 U.S.C. § 1608(a); Gray v. Permanent Mission of  
21 People's Republic of Congo, 443 F. Supp. 816, 819-21  
22 (S.D.N.Y.), aff'd, 580 F.2d 1044 (2d Cir. 1978). While one  
23 can perhaps envision a situation in which the officer of the  
24 agency or instrumentality (like the bank president) is also

1 a state official entitled to diplomatic immunity, such a  
2 coincidence is not so likely as to warrant the presumption  
3 that Congress intended, when it sanctioned service of  
4 process on agents and officers of an agency or  
5 instrumentality of a foreign state, to also permit service  
6 of process on state officials entitled to diplomatic  
7 immunity. Indeed, the legislative history of the FSIA  
8 demonstrates unequivocally that the Act was not intended to  
9 affect the immunity of "diplomatic or consular  
10 representatives." House Report, supra, at 21, 1976  
11 U.S.C.C.A.N. at 6620. Congress expressly stated that  
12 persons entitled to diplomatic immunity would not be proper  
13 agents for service under the FSIA:

14 It is also contemplated that the courts will not direct  
15 service in the United States upon diplomatic  
16 representatives, Hellenic Lines Ltd. v. Moore, 345 F.2d  
17 978 (D.C. Cir. 1965), or upon consular representatives,  
18 Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y.  
19 1956), aff'd, 238 F.2d 400 (2d Cir. 1956).

20  
21 House Report, supra, at 25, 1976 U.S.C.C.A.N. at 6624. In  
22 light of these unambiguous statements, it was error for the  
23 district court to rely on the service-of-process provision  
24 of the FSIA as circumstantial evidence that service of  
25 process on individuals entitled to diplomatic immunity would  
26 not violate international law.

27 We also disagree with the district court's  
28 interpretation of the interplay between Articles 29 and 31

1 of the Vienna Convention. The district court reasoned that  
2 because Article 31 permits suit against -- and, therefore,  
3 service of process upon -- diplomats in certain limited  
4 circumstances, service of process does not violate the  
5 inviolability principle. See Tachiona I, 169 F. Supp. 2d at  
6 307. But this reasoning turns controlling precedent on its  
7 head. In 767 Third Avenue Associates, we explained that the  
8 inviolability principle "makes no provision for exceptions  
9 other than those set forth in Article 31." 988 F.2d at 298  
10 (emphasis added). Accordingly, the fact that service of  
11 process is allowed in order to initiate the actions  
12 permitted by the express exceptions to inviolability does  
13 not mean that service of process on a diplomat is otherwise  
14 permissible under Article 29. If anything, that fact  
15 indicates that service of process on a diplomat in any  
16 action not specified in Article 31 would be improper; 767  
17 Third Avenue Associates mandates that unless the Article 31  
18 exceptions apply, the term "inviolable" must be accorded its  
19 fullest meaning, untempered by Article 31. Id. at 298-99.

20 In line with 767 Third Avenue Associates, the State  
21 Department forcefully argues that Article 29 of the Vienna  
22 Convention should be interpreted to preclude service of  
23 process on persons entitled to diplomatic immunity, even  
24 where such persons are served on behalf of a non-immune,

1 private entity. See J.A. at 336-39 (letters from the State  
2 Department to the Department of Justice). Not only is the  
3 Government's interpretation entitled to "great weight,"  
4 Sumitomo Shoji Am., 457 U.S. at 185, but it is also  
5 supported by authority and sound reasoning.

6 "Personal inviolability is of all the privileges and  
7 immunities of missions and diplomats the oldest established  
8 and the most universally recognised." Satow's Guide to  
9 Diplomatic Practice 120 (Lord Gore-Booth ed., 5th ed. 1979).  
10 It is "essential to ensure inviolability of the person of  
11 the ambassador in order to allow him to perform his  
12 functions without hindrance from the government of the  
13 receiving state, its officials and even private persons."  
14 Sen, A Diplomat's Handbook of International Law and Practice  
15 107 (3d ed. 1988); see also 767 Third Ave. Assocs., 988 F.2d  
16 at 298-99 (giving broad interpretation to the term  
17 "inviolab[le]").

18 It was with the foregoing considerations in mind that  
19 the District of Columbia Circuit ruled, in the Hellenic  
20 Lines case, that service of process on a diplomat as agent  
21 for a foreign government violated international law. See  
22 345 F.2d at 980-81. The court noted four ways in which  
23 service of process might impair the performance of  
24 diplomatic functions or otherwise impinge upon a diplomat's

1 dignity. First, diplomats would feel "obliged to restrict  
2 [their] movements to avoid finding [themselves] in the  
3 presence of a process server." Id. at 980 n.5 (quoting  
4 submission of State Department). Second, they would be  
5 diverted from their duties "by the need to devote time and  
6 attention to ascertaining the legal consequences" of the  
7 service of process. Id. Third, the manner in which process  
8 is served could be "publicly embarrassing." Id. at 981 n.5.  
9 Finally, permitting service of process on foreign diplomats  
10 could be construed as a hostile act and, thus, could invite  
11 retaliatory practices in otherwise friendly countries. Id.

12 Plaintiffs seek to distinguish Hellenic Lines on the  
13 basis that, in that case, the plaintiff sought to serve  
14 process on a diplomat as an agent of a foreign government,  
15 not as an agent of a private, non-immune entity like ZANU-  
16 PF. Nothing in the D.C. Circuit's reasoning turned on the  
17 identity of the defendant, however. Rather, the court  
18 focused on the practical consequences of allowing service of  
19 process upon diplomatic agents, see id. at 980 n.5,  
20 consequences that are equally likely to follow whether the  
21 diplomat (or the U.N. representative enjoying diplomatic  
22 immunity) is served as an agent for a private entity or as  
23 an agent for a foreign government.

24 Like the court in Hellenic Lines, we have no reason to

