Alien Tort Claims Act Proceeding Against Robert Mugabe

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According to news reports, Robert Mugabe, the head of state of Zimbabwe, was served with process while he was in New York City for the United Nations Millennium Summit, in a suit brought by Zimbabwean nationals seeking civil damages under the U.S. Alien Tort Claims Act (ATCA). The suit alleges that Mugabe orchestrated violence by his political party against its opponents, including beating and burning the plaintiffs or, in one case, the husband of a plaintiff, in order to stay in power at the time of Zimbabwe's parliamentary elections in June.

The ATCA gives federal courts in the United States jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."(1) The violence alleged in the suit, if proved and if committed by state officials acting as such, or if committed under color of law, would almost certainly be a tort (i.e. a civil wrong) in violation of the law of nations. International law prohibits torture and cruel, inhuman or degrading treatment at the hands of public officials, even when the victims are citizens of the state in which the treatment occurs.(2) The definition of torture in the international Convention Against Torture includes not only the infliction of severe pain or suffering for purposes of eliciting information, but also for purposes of intimidating or coercing an individual or a third person for some other reason.(3) Torture, however, would not necessarily have to be proved, since cruel, inhuman or degrading treatment would also suffice for potential liability.

Nevertheless, Mugabe could assert in defense to the suit that, as the current head of state of Zimbabwe, he is entitled to head-of-state immunity from suit in a U.S. court. In 1994 a federal court held that Jean-Bertrand Aristide, then the recognized head of state of Haiti, was immune from suit in a U.S. court in a case involving an alleged political assassination.(4) In 1995 an ATCA suit against Radovan Karadi, the president of the self-proclaimed republic of Srpska in Bosnia-Herzegovina, was allowed to proceed, but the United States had never recognized the legitimacy of a state of Srpska and the case thus would be distinguishable from the current one.(5) In 1999 the British House of Lords denied head-of-state immunity to Augusto Pinochet of Chile, but he was no longer the head of state at the time of the British proceedings, so his case could be distinguished as well.(6)

Some cases in federal courts also allow individual high-ranking foreign government officials to claim sovereign immunity from suit.(7) Sovereign immunity is based on a federal statute, the Foreign Sovereign Immunity Act (FSIA),(8) which applies primarily to governments themselves and their instrumentalities, rather than to heads of state. It is not clear that all federal courts would consider someone like Mugabe eligible for sovereign immunity (as distinguished from head-of-state immunity). If the court in the Mugabe case did so, it would probably provide Mugabe with another successful defense. Even though the FSIA contains a limited exception to immunity for cases involving torture, it applies only to sovereigns that are on the U.S. State Department's terrorist list (Zimbabwe is not) and it applies only in favor of persons who were U.S. nationals at the time of the alleged torture.(9)

Mugabe could also argue that the alleged violence was not "official," since it was conducted by a political party or persons in the service of a political party, rather than by the government as such. If it was not official, there would be doubt whether it constituted a violation of international law. An answer could be that if Mugabe, the head of state, orchestrated the violence for purposes of remaining in power, that would supply the "official" element.

Mugabe might argue, further, that international law is not incorporated into federal law in the United States in the absence of a specific Congressional act adopting a particular rule of international law as a rule of federal law, so a federal court relying on the constitutional grant of jurisdiction over federal questions could not constitutionally exercise jurisdiction over an international law claim without such a Congressional statute. The ATCA, however, is a Congressional act. Most federal courts that have applied the ATCA have treated it as incorporating rules of international law as federal rules of decision on which plaintiffs may base their claims for monetary damages. In

addition, there is a line of federal cases to the effect that some rules of customary international law have the status of federal common law in the United States. The rules most likely to have that status would be specific rules protecting basic human rights, such as the rule against torture of the rule against cruel, inhuman or degrading treatment.(10)

Another argument might be based on the federal act of state doctrine, which precludes courts in this country from inquiring into the validity of the public acts of a recognized foreign sovereign committed within its own territory. There is a question, mentioned above, whether the acts of a political party, even one in power, are the acts of the sovereign. Even if they are, one Supreme Court precedent on the act of state doctrine suggests that U.S. courts may review acts of foreign sovereigns when there is a great degree of codification or consensus concerning a particular area of international law.(11) There is a high degree of consensus regarding the international law prohibition of torture and other cruel, inhuman or degrading treatment of individuals by government officials (leaving aside procedural defenses such as head-of-state immunity which could apply in a domestic court, though not in an international criminal court).

Questions could be raised about the propriety of serving process on Mugabe while he was in New York for a U.N. meeting. The Convention on the Privileges and Immunities of the U.N., a multilateral treaty to which the United States is a party, gives "representatives" to the U.N. immunity from arrest (Mugabe was not arrested) and from legal process of any kind "in respect of words spoken or written and all acts done by them in their capacity as representatives."(12) Mugabe probably would be considered a representative of Zimbabwe to the U.N. during his brief visit to New York, but the legal process served on him did not relate to anything done by him in that capacity. Under the Convention, he would also be entitled to "such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy."(13) This could give him immunity from suit (just as head-of-state immunity would), but would not necessarily invalidate the service of process on him.

There is also a Headquarters Agreement between the United States and the United Nations. It gives diplomatic immunity to "resident representatives" of members to the U.N. But Mugabe would not be a "resident" representative.(14)

The strongest defense, judging from the facts available so far, would appear to be head-of-state immunity.