

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JACQUES DIEUDONNE ITONG MIANGO,
et al.,

Plaintiffs,

v.

DEMOCRATIC REPUBLIC OF THE CONGO
*Embassy of the Democratic Republic of the
Congo, et al.,*

Defendants.

Case No. 15-cv-1265 (ABJ)

**STATEMENT OF INTEREST SUBMITTED BY
THE UNITED STATES OF AMERICA**

The United States respectfully submits this Statement of Interest in response to this Court's request for its views,¹ *see* Dkt. 141, concerning the immunity of Jean Marie Kassamba, Jacques Mukaleng Makal, Raymond Tshibanda, Sam Mpengo Mbey, and Seraphin Ngwej, five individuals who, at the time of the acts at issue in this suit, were in Washington, D.C., alleged to have been part of an official delegation from the Democratic Republic of the Congo (DRC) (hereinafter, the "individual DRC defendants"). This Statement of Interest explains that the State Department has determined that the individual DRC defendants do not enjoy immunity from this suit under the Diplomatic Relations Act. In addition, the United States identifies for the Court the principles governing conduct-based immunity to explain the need for fact-finding by the Court to determine whether the individual DRC defendants are immune from suit under those principles.

¹ This filing is submitted under 28 U.S.C. § 517, which 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."

BACKGROUND

Plaintiffs allege that on August 6, 2014, they staged a peaceful protest in front of the Capella Hotel, where Joseph Kabila, the President of the Democratic Republic of the Congo, was staying during his visit to Washington, D.C., for the “U.S.-Africa Leaders’ Summit.” Second Am. Compl. ¶ 24. Plaintiffs’ protest was aimed at alleged “human rights abuses and violations” in the Democratic Republic of the Congo. *Id.* ¶ 26. Plaintiffs allege that the individual DRC defendants began “belittling, threatening, intimidating, and disrupting” Plaintiffs’ protest. *Id.* ¶ 28. Plaintiffs further allege that their protest remained peaceful and continued as President Kabila approached and entered the Capella Hotel. *Id.* ¶¶ 29, 31. Shortly after President Kabila entered the hotel, Plaintiffs allege that a group of “apparent security enforcers” “rushed out” of the hotel to join the individual DRC defendants and “physically attack[ed]” Plaintiff Jacques Dieudonne Itonga Miango and a “student protester.” *Id.* ¶ 32. Plaintiff Miango was allegedly “knocked down to the ground, beaten, kicked, choked, and stomped on by . . . Kabila’s security enforcers . . . including Defendant Kassamba and Defendant Sam Mpengo Mbey.” *Id.* After the attack, Plaintiffs allege that “some of” the individual DRC defendants (unidentified by name) raided Plaintiff Miango’s car and confiscated his possessions, including “protest materials, a computer, [an] iPod, a camera, and other items.” *Id.* ¶ 34.

Plaintiffs brought suit against a variety of defendants under the Alien Tort Statute, 28 U.S.C. § 1350, the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330 *et seq.*, the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.*, and the statutory and common law of the District of Columbia. *Id.* ¶¶ 1, 39–156, 173–82. Plaintiffs allege that they suffered from, among other things, crimes against humanity, *id.* ¶¶ 39, 42–48, cruel and degrading treatment, *id.* ¶¶ 51, 54–57, infringement upon rights to free expression, assembly, thought, and association, *id.* ¶¶ 83, 86–89, battery, *id.* ¶¶ 117–22, assault, *id.* ¶¶ 126–31, and intentional infliction of emotional distress, *id.* ¶¶

145–49.²

Summonses were issued to Defendants, but because none answered or otherwise responded, the Court granted Plaintiffs’ motion for default judgment. *See* Order, Dkt. 130; Mem. Op., Dkt. 131. On May 7, 2018, President Kabila and the other individual DRC defendants moved to vacate the default judgment and to dismiss the case, arguing that they are immune from this suit. *See* Defs.’ Mot., Dkt. 133.

On October 25, 2018, the Court

extend[ed] an invitation to the Department of State to communicate its views on the questions to be resolved, including but not limited to the following issues:

1. The Department of State’s position as to the immunity of the defendants as diplomatic agents under the Diplomatic Relations Act, and
2. The Department of State’s position as to the immunity of DRC President Joseph Kabila as an official “head-of-state.”

Letter from the Chambers of the Honorable Amy Berman Jackson (Oct. 25, 2018), Dkt. 141. On December 3, 2018, the United States informed the Court that President Kabila, as the official head of state of the Democratic Republic of the Congo, is immune from this suit. *See* Suggestion of Immunity Submitted by the United States of America, Dkt. 142. On January 19, 2019, “in light of the State Department’s determination that President Kabila enjoys head-of-state immunity,” the Court granted Defendants’ motion to vacate the default judgment as to President Kabila and dismissed Plaintiffs’ claims against President Kabila for lack of jurisdiction. Order at 4, Dkt. 144.

In the Suggestion of Immunity, the United States also informed the Court that the State Department was “considering its position on the first issue” and “respectfully propose[d] to provide

² The action was also filed against the United States Secret Service, the District of Columbia Metropolitan Police Department, Capella Hotels Group, LLC, and Castleton Hotel Partners, LLC. *See* Second Am. Compl. at 3–4. The Court dismissed these defendants on March 22, 2017. *See* *Miango v. Democratic Republic of the Congo*, 243 F. Supp. 3d 113 (D.D.C. 2017).

its views, if any, concerning the immunity of the other defendants” at a later date. *See* Suggestion of Immunity Submitted by the United States of America at 1 n.2, Dkt. 142.

ARGUMENT

The Department of State has determined that the Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants. *See* Letter from Jennifer G. Newstead to Joseph H. Hunt at 1 (copy attached as Exhibit A). The State Department also has considered whether the individual DRC defendants are immune from suit based on claims concerning acts taken in an official capacity (i.e., conduct-based immunity), under the principles accepted by the Executive Branch.³ *See id.*; *see also* Letter from the Chambers of the Honorable Amy Berman Jackson (Oct. 25, 2018), Dkt. 141 (“extending an invitation to the Department of State to communicate its views on the questions to be resolved, including but not limited to” two specific issues). The State Department does not have sufficient factual information at this time concerning the involvement of the individual DRC defendants in this attack to determine whether the individual DRC defendants would enjoy conduct-based immunity. *See* Exh. A at 1–3. Because the State Department lacks sufficient factual information in this case to make an immunity determination at this time, the State Department respectfully requests that the Court undertake limited fact-finding about the nature of the attack and, in particular, the involvement of the individual DRC defendants. *Id.* at 3. After the Court makes its factual findings, if the Court does not find facts that align with the guidance provided below by the State Department, it would be appropriate for the Court to invite the State Department’s views concerning the application of the immunity principles recognized by the Executive Branch to the facts found by the Court. *See id.*

³ As explained below, the Supreme Court has held that the Executive Branch retains its historical authority to determine the principles governing foreign official immunity.

I. The Individual DRC Defendants Are Not Immune From This Suit Under The Diplomatic Relations Act.

The individual DRC defendants argue that they enjoy diplomatic immunity because they were members of a “diplomatic mission” to the United States under the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (22 U.S.C. § 254a *et seq.*) (DRA). *See* Defs.’ Mot. at 4–6, Dkt. 133-1. But, for the reasons set forth below, the State Department has concluded that the Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants.

The DRA gives effect to the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, 500 U.N.T.S. 95 (VCDR), which entered into force for the United States in 1972. The DRA provides that “[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the [VCDR] . . . or under any other laws extending diplomatic privileges and immunities, shall be dismissed.” 22 U.S.C. § 254d. “[T]he purpose of such immunit[y] is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.” VCDR, preamble, clause 4. Although the VCDR does not expressly define the term “mission,”⁴ the DRA defines the term “mission” as including “missions within the meaning of the [VCDR] and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention.” 22 U.S.C. § 254a(3). Applying this definition, the United States has long interpreted the DRA to apply to diplomats assigned to missions in the United States, and has never interpreted it to apply to visiting foreign officials who are no longer in the United States. *See, e.g., United States v. Sissoko*, 995 F. Supp. 1469, 1470 (S.D. Fla.

⁴ The VCDR does define related terms. For example, the VCDR defines “members of the mission” as “the head of the mission and the members of the staff of the mission,” art. 1(b), and defines the “premises of the mission” as “the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission,” art. 1(i).

1997) (concluding that a foreign official's status as a "special adviser to a special mission to the United States" did not entitle him to diplomatic immunity because he had not been submitted to the U.S. State Department for accreditation, and the Gambia had not notified the State Department of the official's diplomatic status); *see also United States v. Babel*, 662 F.3d 610, 623 (2d Cir. 2011) ("[T]he DRA applies only to diplomats, and not to other officials[.]"); *Jungquist v. Nahyan*, 940 F. Supp. 312, 321–22 (D.D.C. 1996), *rev'd in part on other grounds*, 115 F.3d 1020 (D.C. Cir. 1997) (declining to dismiss claims against defendants under the DRA even though they argued that they "occupied positions given diplomatic and mission status" because there was "no evidence . . . that the State Department considers that to be the case"); U.S. Department of State Office of Foreign Missions, *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities*, available at <https://www.state.gov/documents/organization/149734.pdf>, at 6 (defining "members of diplomatic missions" as "the staffs of diplomatic missions (embassies)").

The State Department determines who is entitled to diplomatic immunity. *See Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 192 (D.D.C. 2007) (quoting *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949) (citing *Zdravkovich v. Consul Gen. of Yugoslavia*, No. 98-7034, 1998 WL 389086, at *1 (D.C. Cir. June 23, 1998) (per curiam); *Jungquist*, 940 F. Supp. at 321–22 ("[T]he determination of a diplomat's status is made by the State Department, not the Court."); *see also Abdulaziz v. Metro. Dade Cnty.*, 741 F.2d 1328, 1330 (11th Cir. 1984); *United States v. Kostadinov*, 734 F.2d 905 (2d Cir. 1984). The State Department's Office of Foreign Missions conducted a records check and reported that none of the individual DRC defendants had been notified to the State Department as members of the DRC's diplomatic mission in the United States. Exh. A at 1. Because the individual DRC defendants are not members of a diplomatic mission as those terms are understood under the DRA and the VCDR, they do not benefit from diplomatic immunity.

To support their argument that they are immune from suit, the individual DRC defendants point to internal State Department communications (released pursuant to a Freedom of Information Act request) in which the State Department assessed that the members of President Kabila's traveling party involved in the attack enjoyed "diplomatic immunity."⁵ Defs.' Mot. at 5, Dkt. 133-1 (citing Dkt. 129-5). But that assessment was focused on a different inquiry not governed by the DRA and VCDR: whether the individual DRC defendants were immune from suit *while in the United States as part of the DRC head of state's traveling party*. Once the head of state's visit concluded, immunity associated with that visit ceased.

In sum, the State Department has concluded that Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants.

II. Additional Factual Development Is Necessary To Determine Whether The Individual DRC Defendants Are Immune From Suit Under Principles Of Conduct-Based Immunity Accepted By The Executive Branch.

After concluding that the individual DRC defendants are not immune from suit under the Diplomatic Relations Act, the State Department considered whether the individual DRC defendants are entitled to conduct-based immunity for official acts. For the foregoing reasons, it is the State Department's position that the factual record is insufficient for the State Department to determine at this time whether the individual DRC defendants were involved in the incident underlying the Second Amended Complaint and thus whether or not they are immune from suit.

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, governs the immunity of foreign states from civil suit in courts in the United States. Before Congress enacted

⁵ The State Department's use of the term "diplomatic immunity" should not be interpreted as a determination by the State Department that the individual DRC defendants enjoy immunity under the VCDR and the DRA. As stated above, the State Department's Office of Foreign Missions conducted a records check and reported that none of the individual DRC defendants had been notified to the State Department as members of the DRC's diplomatic mission in the United States. Exh. A at 1. They thus do not benefit from diplomatic immunity.

the FSIA, foreign state immunity was determined by a “two-step procedure.” *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). If the State Department suggested the immunity of a foreign state, the court dismissed the suit. *Id.* If the State Department did not provide its views, “a district court had authority to decide for itself whether all the requisites for such immunity existed” applying “the established policy of the [State Department].” *Id.* at 312 (quotation marks omitted; alteration in original). In *Samantar*, the Supreme Court held that the FSIA codified principles of foreign state immunity and so supplanted the Executive Branch’s determination of the governing principles. *Id.* at 325. But the Court found “nothing in the [FSIA’s] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.” *Id.*; *see id.* at 323 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”). Accordingly, the two-step procedure continues to apply in suits against foreign officials, and the principles accepted by Executive Branch govern. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”).⁶

As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity. The State Department does not have sufficient factual information at this time concerning the individual DRC defendants’ involvement in the attack. *See* Exh. A at 1–3. The resolution of this

⁶ In a recent case in which a defendant claimed foreign official immunity and in which the State Department did not participate, the D.C. Circuit evaluated the foreign official’s immunity by applying principles identified by the Restatement (Second) of Foreign Relations Law. *See Lewis v. Mutond*, 918 F.3d 142, 145 (D.C. Cir. 2019). The Court relied on the Restatement because both parties “assume[d]” that the Restatement “captures the contours of common-law official immunity.” *Id.* at 146. But the Court “proceed[ed] on that understanding without deciding the issue.” *Id.* As explained above, in suits in which the State Department does not participate, courts are to apply the immunity principles accepted by the Executive Branch. And if those principles are not discernable, the proper course is for the court to invite the United States’ views, as the Court did in this case.

factual questions is necessary to determine whether the individual DRC defendants enjoy immunity from suit under the conduct-based immunity principles accepted by the Executive Branch.

Foreign official immunity, like foreign state immunity, is a threshold question. In the context of foreign state immunity, the Supreme Court has explained that when the question of immunity “turn[s] upon further factual development, the trial judge may take evidence and resolve relevant factual disputes.” *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017). The Court further explained that immunity determinations must be made as early in the litigation as possible. *See id.* at 1317 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493–94 (1983)). Therefore, if there are factual questions that need to be resolved to make the foreign state immunity determination, the Court must undertake the needed factual inquiry as early in the litigation as possible. The same principle applies to factual questions controlling a foreign official’s immunity from suit under the principles accepted by the Executive Branch.

Accordingly, the United States respectfully requests that the Court undertake limited fact-finding about the nature of the attack and, in particular, the involvement of the individual DRC defendants. As a general matter, if the Court finds that Plaintiffs’ allegations could be substantiated against the individual DRC defendants named in the Second Amended Complaint, and concludes that this attack was an entirely unprovoked attack on peaceful protesters exercising their First Amendment rights, it would not constitute an official act for which conduct-based immunity would be available. Exh. A at 2–3. On the other hand, if the Court finds that the individual DRC defendants are named in this action due to their official positions, and that they were not responsible for an entirely unprovoked attack against peaceful protesters exercising their First Amendment rights, the State Department would recognize their immunity from this suit. *Id.* at 3. After the Court makes its findings of fact, if the Court does not find facts that align with the guidance provided above by the State Department, it would be appropriate for the Court to invite the State

Department's views concerning the application of the immunity principles recognized by the Executive Branch to the facts found by the Court. *See id.*

CONCLUSION

For the foregoing reasons, the Department of State has concluded that the individual DRC defendants are not entitled to immunity under the Diplomatic Relations Act. The State Department has further concluded that additional fact-finding is necessary to ascertain the nature of the attack and the involvement of the individual DRC defendants before a determination regarding conduct-based immunity can be made. If the Court's factual findings do not align with the guidance provided by the State Department herein, it would be appropriate at that point for the Court to invite the State Department's views concerning the application of the immunity principles recognized by the Executive Branch to the facts found by the Court.

May 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2019, I electronically filed the foregoing Statement of Interest Submitted by the United States of America using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: May 1, 2019

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