



United States Department of State

Washington, D.C. 20520

April 26, 2019

Joseph H. Hunt
Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington D.C. 20530

Re: *Miango et al. v. Democratic Republic of the Congo et al.* (D.D.C. 15-cv-1265)

Dear Mr. Hunt:

The above-referenced suit names as defendants, among others, five individuals who are alleged to have been part of a delegation from the Democratic Republic of the Congo (DRC) traveling with then-President Joseph Kabila to the U.S.-Africa Leaders' Summit in August 2014. The five individuals are Jean Marie Kassamba, Jacques Mukaleng Makal, Raymond Tshibanda, Sam Mpengo Mbey, and Seraphin Ngwej (hereinafter, the "individual DRC defendants"). Federal District Court Judge Amy Berman Jackson requested the views of the U.S. government on the immunity of the individual DRC defendants by letter dated October 25, 2018; any response is currently due by May 1, 2019. The Government of the DRC has also asked the Department of State to submit to the court a suggestion of immunity on behalf of the individual DRC defendants.

It is the view of the Department of State that the Diplomatic Relations Act (DRA) does not provide diplomatic immunity to the individual DRC defendants. The United States generally interprets 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. The 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 current or former members of the DRC's diplomatic mission in the United States. The individual DRC defendants thus do not benefit from diplomatic immunity under the DRA.

In addition, the Department has considered whether the individual DRC defendants would be entitled to conduct-based immunity for official acts. Due to the lack of clear factual information available to the Department regarding the individual DRC defendants' involvement in the incident underlying the complaint, however, the Department is not in a position to reach a conclusion on whether they would benefit from conduct-based immunity. However, the Department believes it would be appropriate to advise the Court of the governing conduct-based immunity principles applicable to the circumstances of this case.

The State Department follows an internal procedure to evaluate requests for conduct-based immunity for foreign officials, taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and

informed by customary international law, and considering the overall impact of the matter on the foreign policy of the United States. As a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate. *See, e.g.*, Letter from Legal Adviser Brian J. Egan to Principal Deputy Assistant Attorney General Benjamin C. Mizer at 2 (June 10, 2016), filed in *Dogan et al. v. Barak*, No. 2:15-cv-8130 (C.D. Cal.) [*hereinafter*, “*Dogan Letter*”]; Letter from Legal Adviser Harold Hongju Koh to Acting Assistant Attorney General Stuart F. Delery at 1 (Sept. 7, 2012), filed in *Doe v. Zedillo*, No. 3:11-cv-01433-AWT (D. Conn.) [*hereinafter*, “*Zedillo Letter*”] (“In a case involving conduct-based immunity, as here, the Department of State generally presumes that actions taken by a foreign official exercising the powers of his office were taken in his official capacity.”).¹

Here, Plaintiffs allege that security officials accompanying President Joseph Kabila physically attacked the Plaintiffs and subsequently ransacked their car and removed their possessions. *See, e.g.*, Second Amended Complaint ¶¶ 32-34. However, beyond the Plaintiffs’ allegations that two of the individual DRC defendants were present during the attack, there appears to be no specific information in the complaint about the actions or involvement of the individual DRC defendants. In addition, information available to the Department indicates that none of the individual DRC defendants were security officials for the DRC: according to information available to the Department, Raymond Tshibanda was the Foreign Minister; Seraphin Ngwej was the Ambassador-at-Large for the Great Lakes Region and Presidential Advisor; Jacques Mukaleng Makal was the Director of Presidential Press; Sam Mpengo Mbey was the Chief Executive Officer of the publication “Grands Lacs,” a publication devoted to the activities of the Head of State; and Jean Marie Kassamba was the Chief Executive Officer and Journalist at “Tele50.” Finally, law enforcement reports available to the Department indicate that different individuals were responsible for the attack on the Plaintiffs.

As a general matter, if the Court finds that the 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. In particular, the allegations as described by the Plaintiffs here, including the fact that the alleged attack was entirely unprovoked and occurred after President Kabila was inside the hotel, suggest that any physical contact with the Plaintiffs was not reasonably connected to carrying out the functions of ensuring the President’s security. It is also unclear how the alleged theft of the Plaintiffs’ personal items, as pled, could relate to actions taken while exercising the powers of their office. Finally, given that none of the individual DRC defendants were security officials for the DRC, it is unclear how the allegations here regarding protection of the President would fall within their official functions.

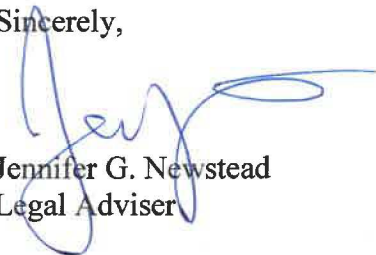
¹ As the U.S. government has noted in other cases, however, the Executive Branch’s recognition of immunity for a foreign official in the civil context does not imply that the foreign official would be immune in a criminal prosecution. *See, e.g.*, Brief for the United States as *Amicus Curiae*, at 6 n.8, filed in *Ben Haim v. Edri et al.*, No. A-002247-15T4 (Superior Court of New Jersey, Appellate Division, January 2014).

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. *See, e.g., Zedillo Letter at 2* (asserting immunity where plaintiffs sought to hold former President liable simply because he was serving as President when lower-level officials allegedly committed tortious acts).

The State Department lacks sufficient factual information to make an immunity determination in this case and believes the Court should undertake a limited factual finding about the nature of the attack and the involvement of the individual DRC defendants. After the district court makes its findings of fact, if the Court does not find facts that match the guidance provided by the Department, it may 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.

Accordingly, the Department of State requests that the Department of Justice inform the Court of these views at the earliest opportunity.

Sincerely,



Jennifer G. Newstead
Legal Adviser