

**In the Supreme Court of the United States**

---

KALEV MUTOND, in his individual capacity only,  
Administrateur Generale, Agence Nationale de Renseignements,  
Democratic Republic of the Congo,

*and*

ALEXIS THAMBWE MWAMBA, in his individual capacity only,  
Ministre de la Justice, Garde des Sceaux et Droits Humains,  
Democratic Republic of the Congo,

*Petitioners,*

*v.*

DARRYL LEWIS,

*Respondent.*

---

**APPLICATION FOR AN EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI**

---

To the Honorable John G. Roberts Jr., Chief Justice of the United States and  
Circuit Justice for the United States Court of Appeals for the District of Columbia  
Circuit:

1. Pursuant to Supreme Court Rule 13.5, petitioners Kalev Mutond and  
Alexis Thambwe Mwamba respectfully request a 60-day extension of time, until  
Friday, August 9, 2019, within which to file a petition for a writ of certiorari.<sup>1</sup> The

---

<sup>1</sup> The case captions in the district court and the court of appeals identify one of the  
defendants in this action as “Alexis Tambwe Mwamba.” This application uses his  
preferred spelling, “Thambwe.”

court of appeals issued its opinion on March 12, 2019. A copy of the opinion is attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due June 10, 2019. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. Petitioners here (defendants below) were, at all relevant times, high-ranking officials of the Democratic Republic of the Congo (DRC). Petitioner Alexis Thambwe Mwamba was the DRC's Minister of Justice, and he is now a Senator. Petitioner Kalev Mutond was the Director of the DRC's National Intelligence Agency. Respondent (plaintiff below) brought claims against petitioners in the U.S. District Court for the District of Columbia, seeking compensatory and punitive damages under the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (1992). The district court dismissed the suit based on lack of subject-matter jurisdiction, holding that petitioners were entitled to foreign-official immunity under the common law. *Lewis v. Mutond*, 258 F. Supp. 3d 168, 172 (D.D.C. 2017).

4. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit vacated the district court's decision dismissing the case for lack of subject-matter jurisdiction and remanded it for further proceedings. *Lewis v. Mutond*, 918 F.3d 142 (D.C. Cir. 2019). In three separate opinions, the panel set forth two alternative holdings, each of which was joined by two members of the court.

5. Judge Wilkins's opinion analyzed the immunity issue under the common law. The opinion assumed, but did not decide, that Section 66 of Restatement

(Second) of Foreign Relations Law of the United States (1965) “captures the contours of common-law official immunity.” *Id.* at 146. Under Restatement § 66(f), a foreign official is entitled to immunity where: (1) the actor was a “public minister, official, or agent of the [foreign] state” at the time of the alleged acts; (2) the acts were “performed in [the foreign official’s] official capacity”; and (3) “the effect of exercising jurisdiction would be to enforce a rule of law against the state.” Restatement § 66(f).

6. In applying the Restatement test, Judge Wilkins focused solely on the third element, reasoning that petitioners “ha[d] not proffered anything to show that Plaintiff seeks to draw on the DRC’s treasury or force the state to take specific action, as would be the case if the judgment were enforceable against the state.” *Lewis*, 918 F.3d at 147. The opinion noted that petitioners were “being sued in their individual capacities” and that Respondent “[was] not seeking compensation out of state funds.” *Id.* In Judge Wilkins’s view, these facts were dispositive of the immunity analysis. *See id.* (“In cases like this one, in which the plaintiff pursues an individual-capacity claim seeking relief against an official in a personal capacity, exercising jurisdiction does not enforce a rule against the foreign state.”).

7. The implications of this reasoning are sweeping. Judge Wilkins’s approach, which applies to all foreign officials sued in the D.C. Circuit, would enable a plaintiff to overcome immunity simply by suing a foreign official in his or her individual capacity and seeking damages from personal, rather than state, funds—even when it is undisputed that the alleged acts are official in nature.

8. In an opinion concurring in the judgment, Judge Randolph questioned two of the assumptions underlying Judge Wilkins’s analysis: first, that “the immunity of the defendant foreign officials under the [TVPA] turns on ‘the common law’” and, second, that Restatement § 66(f) “embodies the governing common law.” *Id.* at 148 (Randolph, J., concurring in the judgment). Instead, Judge Randolph looked to the relationship between the TVPA and common-law foreign-official immunity, concluding that “the common law must give way” because the TVPA “imposes liability for actions that would render the foreign official eligible for immunity under the Restatement.” *Id.* at 150.

9. Judge Randolph’s opinion too is breathtaking in its scope. It completely abrogates common-law foreign-official immunity in all TVPA cases brought in the D.C. Circuit. That view would permit lawsuits against high-ranking foreign officials—such as the Minister of Justice and the Director of the National Intelligence Agency here—to proceed based entirely on allegations that the foreign officials, acting in their official capacities, violated the TVPA.

10. Judge Srinivasan issued a concurring opinion “fully join[ing] Judge Wilkins’s opinion.” *Id.* at 148 (Srinivasan, J., concurring). He also “agree[d] with the portion of Judge Randolph’s concurrence in the judgment explaining that the [TVPA] subjects foreign officials to liability for acts undertaken in an official capacity and thus displaces any common-law, conduct-based immunity that might otherwise apply in the context of claims under that Act.” *Id.* Thus, *both* of these conflicting rationales—that the common law governs the immunity of foreign officials in TVPA

cases, and that it does not—received the support of two judges on the panel, and both are binding law in the D.C. Circuit.

11. The issues in this case are significant. Left undisturbed, the D.C. Circuit’s ruling would eviscerate immunity for foreign officials—either all foreign officials sued in an individual capacity, under the reasoning of Judges Wilkins and Srinivasan, or all foreign officials sued under the TVPA, under the reasoning of Judges Randolph and Srinivasan. These opinions effectively render dead letter this Court’s opinion in *Samantar v. Yousuf*, 560 U.S. 305 (2010)—which established that foreign-official immunity is to be analyzed under the common law—and substantially undermine the role of the State Department in making immunity determinations. Moreover, by gutting immunity for foreign officials in U.S. courts, the opinions may have the perverse effect of creating comparable exposure for U.S. officials in foreign courts, as foreign governments may hesitate to grant U.S. officials greater protection than the United States grants theirs.

12. Petitioners respectfully request an extension of time to file a petition for certiorari. A 60-day extension would allow counsel sufficient time to fully research and analyze the issues presented, to coordinate with and prepare the petition for filing. In addition, undersigned counsel has a number of other pending matters that will interfere with counsel’s ability to file the petition on June 10, 2019.

13. Respondent does not consent to this request.

Wherefore, petitioners respectfully request that an order be entered extending the time to file a petition for a writ of certiorari to August 9, 2019.

May 24, 2019

Respectfully submitted,

/s/ Robert N. Weiner

Robert N. Weiner

*Counsel of Record*

ARNOLD & PORTER KAYE SCHOLER LLP

601 Massachusetts Ave. NW

Washington, DC 20001

(202) 942-5000

Robert.Weiner@arnoldporter.com

*Counsel for Petitioners*