No. 19-

In the Supreme Court of the United States

KALEV MUTOND, IN HIS INDIVIDUAL CAPACITY ONLY, ADMINISTRATEUR GÉNÉRALE, 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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN P. ELWOOD
Counsel of Record
JOHN B. BELLINGER III
ROBERT N. WEINER
RAÚL R. HERRERA
R. STANTON JONES
STEPHEN K. WIRTH
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

QUESTIONS PRESENTED

Respondent Darryl Lewis, an American citizen and security contractor, was arrested and detained in the Democratic Republic of the Congo (DRC) on grounds that he was illegally working as a foreign mercenary. Upon his release, he sued two high-ranking DRC officials—the Minister of Justice and the Administrator General of the DRC's National Intelligence Agency—raising claims under the Torture Victim Protection Act (TVPA). The district court dismissed respondent's complaint on the basis of conduct-based foreign-official immunity because the conduct alleged in the complaint was undertaken solely in petitioners' capacities as foreign officials and expressly ratified by the DRC government.

The D.C. Circuit reversed, announcing two sweeping holdings in conflict with the law of other circuits and the longstanding position of the Executive Branch. First, the court held that conduct-based immunity does not apply where a plaintiff seeks money damages from foreign officials only in their personal, rather than official, capacities. Second, the court held, in the alternative, that the TVPA impliedly abrogates any conduct-based immunity. The court further explained that its two holdings were independent bases for the court's jurisdiction over petitioners.

The questions presented are:

1. Whether a plaintiff can preclude conduct-based immunity for foreign government officials merely by suing them in their personal capacities.

2. Whether the TVPA abrogates all common-law conduct-based immunity for foreign officials, as the D.C. Circuit held below, or leaves immunity intact, as the Second and Ninth Circuits have held.

PARTIES TO THE PROCEEDINGS

1. Petitioners, who were appellees in the court of appeals and defendants in the district court, are Alexis Thambwe Mwamba and Kalev Mutond, citizens and residents of the Democratic Republic of the Congo (DRC).

At the time this lawsuit was filed and during the events alleged in the complaint, Mr. Thambwe served as the Minister of Justice of the DRC, and Mr. Mutond served as the Administrator General of the DRC's National Intelligence Agency. Following DRC elections in December 2018, Mr. Thambwe resigned as Minister of Justice to serve as the President of the DRC Senate, and Mr. Mutond resigned as Administrator General to return to private life.

2. Respondent, who was appellant in the court of appeals and plaintiff in the district court, is Darryl Lewis, an American citizen and resident of Georgia.

TABLE OF CONTENTS

Table of Contents—Continued Page

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 918 F.3d 142. The opinion of the district court (App. 16a-26a) is reported at 258 F. Supp. 3d 168.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2019. App. 1a. On May 29, 2019, The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 note, is reprinted in the appendix (App. 47a-49a).

STATEMENT OF THE CASE

This is the most consequential case concerning the immunity of foreign officials since *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), where this Court held that foreign-official immunity derives not from the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891, but from the common law. See 560 U.S. at 324-26. Under the common law, foreign officials are entitled to conduct-based immunity from suit for actions they undertake in their official capacities, a jurisdictional limitation that for centuries has fostered comity between nations. The decision below presents two central and recurring questions about foreign official immunity. The first is whether a plaintiff can defeat official immunity and sue to challenge the lawfulness of a foreign government's official acts by asserting that the plaintiff seeks to recover from the government official's personal funds rather than state funds. The second is whether the Tor-

ture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992), implicitly abrogates longstanding common-law immunity for official foreign government conduct.

The facts here present a paradigmatic case for conduct-based immunity. Respondent Darryl Lewis, an American citizen and former member of the U.S. military operating as a security contractor in the Democratic Republic of the Congo (DRC), was arrested and detained in the DRC and accused of illegally working as a foreign mercenary. Upon his release, he sued two DRC officials under the TVPA for alleged torture he suffered while in custody. Those officials are petitioners Alexis Thambwe Mwamba, then Minister of Justice (and currently President of the DRC Senate), and Kalev Mutond, then Administrator General of the National Intelligence Agency. All factual allegations in the complaint concern conduct, such as opening an investigation and holding a press conference, undertaken in petitioners' official capacities. *E.g.*, App. 34a-35a. The DRC, moreover, expressly ratified petitioners' conduct in two diplomatic notes to the U.S. State Department. App. 40a-46a. On those bases, the district court held that petitioners are immune and dismissed for lack of subject-matter jurisdiction. App. 16a-26a.

The court of appeals reversed, announcing two independent holdings, both of them novel and sweeping, and both worthy of this Court's review. App. 1a-15a. First, applying the Restatement (Second) of Foreign Relations Law of the United States, the court held that foreign officials cannot claim conduct-based immunity when a plaintiff seeks money damages from foreign officials only in their personal capacities and not from the foreign state's treasury. App. 5a-8a. Second, the court held that the TVPA impliedly abrogates conduct-based immunity in its entirety. App. 2a, 10a, 13a-14a.

In so holding, the court of appeals split from every other court to consider conduct-based immunity. Confronted with similar claims and similar facts to those here, no other court has held that suits against foreign officials can proceed so long as plaintiffs do not seek monetary damages directly from the state. And no other court has held that the TVPA implicitly and categorically abolishes conduct-based immunity for foreign governmental officials—regardless of whether the foreign state requested, ordered, or ratified the conduct. Indeed, the Ninth Circuit recently and emphatically "h[e]ld that the TVPA does not abrogate foreign official immunity." *Doğan* v. *Barak*, No. 16-56704, 2019 WL 3520606, at *7 (9th Cir. Aug. 2, 2019).

The panel's two holdings are not only wrong but disastrous. Left uncorrected, the decision below will permit plaintiffs to evade foreign-official immunity in practically every case, triggering a torrent of lawsuits against high-ranking foreign officials, who are now prime targets for lawsuits in Washington, D.C. (where many travel for official visits). It will no longer matter that those officials acted on behalf of their governments, that they did so within their own national territory, or even that the foreign government formally ratified those sovereign acts. Under the D.C. Circuit's reasoning, "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extrajudicial killing," making federal courts a magnet for challenges to all manner of foreign military and policy determinations, and requiring courts to "resolv[e] any number of sensitive foreign policy questions." *Barak*, 2019 WL 3520606, at *6. Permitting such lawsuits would conflict with well-established norms of international law, and could expose senior U.S. officials to a reciprocal loss of immunity in foreign courts. The situation is untenable and requires this Court's immediate intervention.

A. Allegations In The Complaint

Respondent is an American citizen and a veteran. App. 29a. In 2016, he was working in the DRC as an "unarmed security advisor" to Moise Katumbi, who was then campaigning to become DRC president. App. 31a. In late April 2016, police arrested respondent at a political rally in Lubumbashi and transferred him to Kinshasa, where the DRC's National Intelligence Agency detained him. App. 32a-33a. At a press conference ten days later, Minister Thambwe accused respondent of being a mercenary and ordered an investigation into a suspected plot by Mr. Katumbi to destabilize and overthrow the DRC government. App. 34a-35a. The U.S. Embassy in Kinshasa publicly disputed those accusations and opened diplomatic channels with DRC officials to negotiate respondent's release. App. 36a. While negotiations proceeded, DRC officials permitted U.S. consular officials to meet with respondent. *Ibid.* The DRC government released him in early June. *Ibid.*

In July 2016, respondent filed this lawsuit against Minister Thambwe and Administrator General Mutond, alleging TVPA violations and seeking at least $4,500,000 in compensatory and punitive damages. App. 38-39a. The complaint alleges that, during respondent's six weeks in custody, petitioners "used their respective positions of authority" (App. 38a), "to have [him] detained, tortured, interrogated, and threatened with indefinite imprisonment on false charges, all to attempt to obtain false confessions to support a false accusation that American mercenaries were infiltrating the DRC to overthrow the government" (App. 29a-30a). Respondent alleges "[o]n information and belief" (App. 29a) that petitioners "knew or should have known of" his alleged treatment and "failed to" prevent it (App. 37a), that his detention occurred at petitioners' "direction" or with their "knowledge and consent" (App. 31a), and that Administrator

General Mutond "participated personally in activities constituting detention, interrogation, and torture" (App. 29a). But the complaint does not cite a single fact to support these generic, conclusory assertions. It alleges no facts showing petitioners' knowledge of any alleged torture, indicating their actual participation in it, or reflecting their specific actions or decisions—with one benign exception for each petitioner: All that respondent specifically attributes to Minister Thambwe is a statement to the press about opening an investigation. App. 34a. And the only act specifically attributed to Administrator General Mutond is a single remark he allegedly made to respondent: "Don't let me find out you're a mercenary." *Ibid.*

B. Diplomatic Correspondence

In August 2016, the DRC's Ambassador to the United States sent the U.S. State Department the first of two diplomatic notes regarding this lawsuit. App. 40a-43a. The note requested that the State Department confirm certain facts about respondent's detention, including that "D.R.C. law enforcement officials communicated with the U.S. Embassy in Kinshasa, provided access by U.S. officials to Mr. Lewis, and permitted U.S. officials to be present during interrogations of Mr. Lewis." App. 41a. The note emphasized that "[a]t no time during Mr. Lewis' detention did the U.S. Embassy raise concerns with the Government of the D.R.C. that Mr. Lewis was being treated inappropriately." *Ibid.* It described the complaint's allegations regarding respondent's detention as "detrimental and spurious" and noted the "constructive and appropriate manner in which [respondent's] detention was addressed by both governments." App. 41-42a.

In a second diplomatic note in December 2016 (App. 44a-46a), the DRC's Ambassador reiterated that respondent had never been mistreated. App. 45a. On the contrary, the note observed that U.S. Ambassador

James Swan had "publicly thanked" the DRC government for allowing consular visits, and respondent's DRC counsel acknowledged that DRC's justice system had "'functioned properly' and 'treated [respondent] with dignity' throughout 'the whole process of the investigation.'" *Ibid.* The Ambassador asked the United States "to submit to the court a suggestion of immunity on behalf of Messrs. Thambwe and Mutond because all of the alleged conduct at issue in the lawsuit was performed exclusively in their respective official capacities." App. 44a.

C. Proceedings Below

1. Petitioners moved to dismiss respondent's complaint, asserting conduct-based foreign-official immunity because petitioners were foreign officials who undertook all the conduct at issue in their official capacities on behalf of the DRC. C.A. App. A21-A25. Petitioners also disputed personal jurisdiction because petitioners had no connection to the United States, and all the conduct alleged occurred within the DRC. C.A. App. A25-A27.

2. The district court (Lamberth, J.) dismissed the case on immunity grounds. App. 16a-26a. "[B]ecause the defendants are immune under the common law foreign official immunity doctrine," the court "lack[ed] subject matter jurisdiction" over the complaint. App. 16a. Under *Samantar*, 560 U.S. 305, the court explained, courts must analyze foreign-official immunity under the common law. App. 19a. Applying the Restatement (Second) of Foreign Relations Law of the United States § 66 (1965) (Restatement),[1] the court concluded that petitioners are immune from suit because "(1) [they] are agents of the DRC; (2) any actions [they] took in relation to the plaintiff's detention were carried out in their official ca-

[1] The district court mistakenly cited the Restatement as having been published in 1986. App. 20a. It was published in 1965.

pacities; and (3) exercising jurisdiction would have the effect of enforcing a rule of law against the DRC." App. 21a.

The court rejected respondent's argument that petitioners are not immune because they acted outside their authority. The court held that "the DRC Ambassador's ratification of the defendants' actions [is] sufficient to establish that they were acting in their official capacities." App. 23a. The court also rejected respondent's argument that petitioners could not be immune for acts illegal under DRC law. The court reasoned that holding foreign officials liable on that basis "would have the effect of enforcing a rule of law against the DRC" and would "place [a] * * * 'strain upon our courts and our diplomatic relations'" because "the Court would be forced to question the constitutionality of an action that a foreign nation has ratified." App. 25a (citation omitted). The court did not address whether it had personal jurisdiction over petitioners for acts committed abroad. *Ibid.*

3. The D.C. Circuit reversed. App. 1a-15a. In three separate opinions, the panel set forth two sweeping "alternative holding[s]." App. 2a.

a. Judge Wilkins, joined by Judge Srinivasan, analyzed immunity under the common law. App. 1a-9a. The opinion assumed that § 66 of the Restatement (Second) of Foreign Relations Law of the United States "captures the contours of common-law official immunity." App. 6a. Judge Wilkins focused exclusively on the third element of § 66(f)—whether "exercising jurisdiction would be to enforce a rule of law against the state." App. 5a. Judge Wilkins block-quoted an illustration in the Restatement's commentary, stating that immunity was warranted for a suit against an official "seeking to compel him to apply [foreign state] funds." App. 7a. From that, Judge Wilkins drew the negative inference that a U.S. suit could

enforce a rule of law against a foreign state *only* by imposing "direct fiscal impacts on [that] state." App. 8a.

Because petitioners had been sued only "in their individual capacities" and "ha[d] not proffered anything to show that [respondent] 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," Judge Wilkins concluded that the suit would not enforce a rule of law against the state. App. 7a. Forcing senior DRC officials to defend their handling of a high-profile domestic security matter in U.S. courts was "too attenuated to be equated with the direct fiscal impacts" ostensibly required to impose a rule of law on the DRC. App. 8a. Judge Wilkins concluded for the court that, where a "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." *Ibid.*

b. Judge Randolph, joined in relevant part by Judge Srinivasan, concurred in the judgment to "provide the alternative holding" (App. 2a) that the TVPA impliedly abrogates common-law conduct-based immunity. App. 11a-15a. Judge Randolph declined to join Judge Wilkins's opinion for the court because he was skeptical that *any* common-law immunity exists for foreign officials, musing—despite this Court's contrary holding in *Samantar*, 560 U.S. at 325-326—that "[i]t may well be that there is not now and never was any common law of immunity for foreign officials sued in the United States." App. 13a. But, even assuming common-law immunity exists, he concluded that such immunity "must give way" here because the TVPA "imposes liability for actions that would render the foreign official eligible for immunity under the Restatement." App. 14a. In other words, because the TVPA "subjects foreign officials to liability for acts undertaken in an official capacity," it "displaces any

common-law, conduct-based immunity that might otherwise apply." App. 10a.

Judge Srinivasan wrote separately to explain that he "fully join[ed]" both "Judge Wilkins's opinion" and "Judge Randolph's concurrence in the judgment," so petitioners "in this case do not qualify for immunity for *either* of two reasons" that independently foreclosed immunity: First, "they fall outside the scope of the common-law conduct-based immunity," and second, "they fall within the scope of liability contemplated by the TVPA." App. 10a (emphasis added).

The court declined to address petitioners' argument regarding personal jurisdiction. The court instead remanded to the district court, noting that "[c]ertainly, 'a plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery.'" App. 9a (citation omitted).

REASONS THE PETITION SHOULD BE GRANTED

The decision below nullifies conduct-based foreign-official immunity and opens U.S. courts to a flood of suits against foreign officials—even where the alleged conduct was undertaken on behalf of, and ratified by, the foreign state. The D.C. Circuit's holdings will not only encourage even more suits against high-ranking foreign officials, but will prolong suits that previously would have been promptly dismissed. These lawsuits will undermine U.S. foreign-policy interests and put U.S. officials at serious risk of reciprocal treatment in foreign courts. That the decision below creates two circuit splits on frequently recurring issues heightens the urgent need for this Court's review.

I. The Decision Below Creates Two Circuit Splits And Conflicts With The Settled Views Of The Executive Branch

No other court has adopted so constricted a view of foreign-official immunity as the D.C. Circuit. No other court has held that defendants cannot claim immunity unless a plaintiff seeks money directly from the state treasury. And no other court has held that the TVPA impliedly abrogates conduct-based immunity. Instead, the other lower courts and the Executive Branch are unanimous that foreign officials can claim immunity from personal-capacity suits brought under the TVPA.

A. The Circuits Are Divided Over The Scope Of Conduct-Based Immunity

Since *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), dozens of courts have applied common-law principles to uphold the immunity afforded to foreign officials for conduct taken on behalf of their sovereigns. Faced with claims and facts similar to those here, not one court has accepted the argument that immunity does not apply in personal-capacity suits—until now.

To petitioners' knowledge, *every* post-*Samantar* case seeking damages from foreign officials has been a personal-capacity suit, yet no court has ever considered that fact relevant to—much less dispositive of—an official's immunity. That remains true for the many cases that have expressly relied on the Restatement when delineating conduct-based immunity under the common law. *E.g.*, *Doğan* v. *Barak*, No. 16-56704, 2019 WL 3520606, at *4-5 (9th Cir. Aug. 2, 2019); *Matar* v. *Dichter*, 563 F.3d 9, 14 (2d Cir. 2009); *Heaney* v. *Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971); *Ivey for Carolina Golf Dev. Co.* v. *Lynch*, No. 17-cv-439, 2018 WL 3764264, at *3 (M.D.N.C. Aug. 8, 2018); *Mireskandari* v. *Mayne*, No. 12-cv-3861, 2016 WL 1165896, at *16 (C.D. Cal. Mar. 23, 2016); *In re Terrorist Attacks on Sept. 11, 2001*, 122

F. Supp. 3d 181, 187 (S.D.N.Y. 2015); *Smith* v. *Ghana Commercial Bank, Ltd.*, No. 10-cv-4655, 2012 WL 2930462, at *9-10 (D. Minn. June 18, 2012), R&R adopted, 2012 WL 2923543 (July 18, 2012), aff'd, No. 12-2795 (8th Cir. Dec. 7, 2012); see also *Moriah* v. *Bank of China Ltd.*, 107 F. Supp. 3d 272, 277 n.33 (S.D.N.Y. 2015).

The Ninth Circuit's recent decision in *Doğan* v. *Barak* puts the split in stark relief. Plaintiffs in that case sued former Israeli Defense Minister Ehud Barak in his personal capacity for his role in "plann[ing]," "direct[ing]," and "authoriz[ing]" an Israeli military action that resulted in their son's death. 2019 WL 3520606, at *2. The plaintiffs emphasized repeatedly that they had sued Barak in his personal capacity and that the suit was not binding on Israel. See Appellants' Br. at 6, 22-23, 44-45, *Doğan* v. *Barak*, No. 16-56704 (9th Cir. May 19, 2017). The Ninth Circuit rejected that argument. Relying on the Restatement, the court held that Barak was immune because "exercising jurisdiction" over him for conduct undertaken in his official capacity and on behalf of Israel "would be to enforce a rule of law against the sovereign state of Israel." 2019 WL 3520606, at *5.

Similarly, courts in the Second Circuit have never construed common-law immunity so narrowly, even when citing the Restatement. Beginning with *Heaney* v. *Government of Spain* in 1971—before enactment of the FSIA—Judge Friendly, writing for the court, granted common-law immunity under the Restatement in a personal-capacity suit against a Spanish consular officer. 445 F.2d at 504-505. Decades later, in *Dichter*, the court again cited the Restatement to grant immunity in a personal-capacity suit against the head of Israel's domestic security agency. 563 F.3d at 14.

These cases, though relying on the same source of common law as the decision below, are irreconcilable with the D.C. Circuit's holding that conduct-based im-

munity does not apply where a plaintiff seeks money damages from foreign officials only in their personal capacities. Only this Court's intervention can resolve the confusion.

B. The Circuits Are Divided Over Whether The TVPA Abrogates Conduct-Based Immunity

The decision below creates yet another critical split on whether the TVPA abrogates common-law immunity for foreign officials. The Second and Ninth Circuits have squarely held that the TVPA does not abrogate common-law conduct-based immunity. Those holdings directly conflict with the D.C. Circuit's holding that the TVPA "displaces any common-law, conduct-based immunity." App. 10a.

In *Matar* v. *Dichter*, the Second Circuit rejected plaintiffs' argument that "any immunity [the defendant] might enjoy is overridden by his alleged violations of the TVPA." 563 F.3d at 15. And courts in that circuit have repeatedly applied *Dichter* to reject claims that the TVPA abrogates immunity. *E.g.*, *Burma Task Force* v. *Sein*, No. 15-cv-7772, 2016 WL 1261139, at *3 (S.D.N.Y. Mar. 30, 2016); *"American Justice Ctr." (AJC), Inc.* v. *Modi*, No. 14-cv-7780, slip op. at 3 (S.D.N.Y. Jan. 14, 2015); *Devi* v. *Rajapaksa*, No. 11-cv-6634, 2012 WL 3866495, *3-4 (S.D.N.Y. Sept. 4, 2012), aff'd, No. 12-4081, 2013 WL 3855583 (2d Cir. 2013); *Tawfik* v. *al-Sabah*, No. 11-cv-6455, 2012 WL 3542209, at *3-4 (S.D.N.Y. Aug. 16, 2012). Likewise, in *Doğan* v. *Barak*, the Ninth Circuit recently "h[e]ld that the TVPA does not abrogate foreign official immunity." 2019 WL 3520606, at *7.

The circuits are divided. Only this Court can resolve the disagreement.

C. The Decision Below Conflicts With The Long-standing Views Of The Executive Branch

The decision below also conflicts with the views of the Executive Branch. In a series of statements of interest, suggestions of immunity, and *amicus* briefs filed over more than a decade, the Executive Branch has set forth common-law "principles * * * susceptible to general application by the judiciary." U.S. Br. at 21 n.*, *Matar* v. *Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007) (U.S. *Dichter* Br.). Those principles foreclose the exercise of jurisdiction here.

To begin with, the Executive Branch has suggested immunity in numerous personal-capacity suits. *E.g.*, Suggestion of Immunity at 7-1, *Doğan* v. *Barak*, No. 15-cv-8130 (C.D. Cal. June 10, 2016) (*Barak* SOI); Suggestion of Immunity at 6-8, *Ben-Haim* v. *Edri*, No. L-003502-15 (N.J. Super. Ct. Dec. 3, 2015); Statement of Interest at 9-11, *Rosenberg* v. *Lashkar-e-Taiba*, No. 10-cv-5381 (E.D.N.Y. Dec. 17, 2012); Statement of Interest at 4, 23-27, *Matar* v. *Dichter*, No. 05-cv-10270 (S.D.N.Y. Nov. 17, 2006) (*Dichter* SOI); U.S. Br. at 23-34, *Ye* v. *Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004). The government has never intimated that a plaintiff's choice to sue a foreign official in his personal capacity (for official conduct) is relevant to the immunity analysis, much less dispositive.

Likewise, the Executive Branch has consistently argued that the TVPA does *not* abrogate common-law conduct-based immunity. The Executive Branch could not be clearer: "The TVPA Does Not Override the Immunity of Foreign Officials." U.S. *Dichter* Br. at 25. "[T]here is no reason to believe that Congress meant [the TVPA] to effect such a sweeping change to existing immunity practices. The statutory text does not express such an intention, and the legislative history specifically disavows it." *Ibid.* The Executive Branch has maintained this view in

brief after brief. *E.g.*, *Dichter* SOI at 33-35; U.S. *Dichter* Br. at 25-28; U.S. Reply Br. at 1-2, *Manoharan* v. *Rajapaksa*, No. 11-cv-235 (D.D.C. Feb. 13, 2012); U.S. Br. at 8-12, *Manoharan* v. *Rajapaksa*, No. 12-5087 (D.C. Cir. Nov. 8, 2012); *Barak* SOI at 10-12; U.S. Br. at 15-21, *Doğan* v. *Barak*, No. 16-56704 (9th Cir. July 26, 2017) ("The TVPA does not address, let alone abrogate, the common-law immunity of foreign officials.").

II. The Decision Below Conflicts With *Samantar*

Samantar itself involved a TVPA claim against a foreign official in his personal capacity, seeking "damages from his own pockets." 560 U.S. at 325. This Court nevertheless held that immunity to such a suit is "properly governed by the common law." *Ibid.* That statement would be meaningless (and even misleading) if foreign officials were categorically barred from asserting immunity in personal-capacity suits, or if the TVPA abrogated common-law immunity entirely.

More fundamentally, the decision below upends *Samantar*'s two-step framework for determining whether a foreign official is immune. Under *Samantar*'s first step, if the Executive Branch issues a "suggestion of immunity" the district court must "surrender[] its jurisdiction." 560 U.S. at 311.[2] Where the Executive Branch has not taken a position, *Samantar*'s second step requires the district court to "decide for itself whether all the requisites for such immunity exist[]." *Ibid.*

The D.C. Circuit's first holding wipes out step two. So long as plaintiffs sue foreign officials in their personal capacities—which is how these suits are *always* plead-

[2] Most courts treat suggestions of immunity as dispositive; other courts give them "substantial weight" in reaching an independent assessment of the appropriateness of immunity. See *Barak*, 2019 WL 3520606, at *4-5; *Rosenberg* v. *Pasha*, 577 F. App'x 22, 23 (2d Cir. 2014).

ed—courts will have no substantive role in determining whether a foreign official is immune. The upshot is that the decade of cases since *Samantar*, in which courts have carefully developed a robust common law of foreign-official immunity, would be rendered a dead letter. See *supra* Section I.A-B. And the Executive Branch would be solely responsible for future development of the common law.

That outcome not only conflicts with *Samantar*'s framework; it conflicts with the interests of the United States. If courts cannot make immunity determinations for themselves, the Executive Branch may be forced to file routine suggestions of immunity—even where it may have strategic or policy reasons for not intervening. That not only wastes Executive Branch resources, but could also upset diplomatic relations. Accord U.S. *Dichter* Br. at 21 n.* ("[Immunity] principles are susceptible to general application by the judiciary without the need for recurring intervention by the Executive, particularly in the form of suggestions of immunity filed on a case-by-case basis.").

As for TVPA claims, neither of *Samantar*'s steps survives the decision below. If, as the D.C. Circuit held, the TVPA abrogates common-law conduct-based immunity root and branch, *a fortiori* it abrogates the Executive Branch's ability to suggest common-law immunity. If Congress has abrogated immunity, then there is no immunity for the State Department to suggest.

In short, if the decision below stands, the D.C. Circuit will have effectively overruled *Samantar*'s two-step framework for determining immunity under the common law. It is the province of this Court to say whether *Samantar* remains good law.

III. The Decision Below Is Wrong

The D.C. Circuit's decision is mistaken at every turn. Nothing in the Restatement or any other authority excludes personal-capacity suits from conduct-based immunity. And nothing in the TVPA abrogates conduct-based immunity under the common law.

A. Petitioners Are Immune From Suit Under The Common Law

The D.C. Circuit's holding denying petitioners immunity because they "are being sued in their individual capacities and [respondent] is not seeking compensation out of state funds" (App. 7a) conflicts with the common law of foreign-official immunity as articulated by the Executive Branch and as applied by U.S. courts for more than 200 years. It is the nature of the challenged conduct, not the nature of the lawsuit, that determines whether immunity applies. Petitioners are immune from suit for their exercise of quintessentially sovereign powers, undertaken on behalf of, and ratified by, the DRC. See *Barak*, 2019 WL 3520606, at *4-5. Whether plaintiffs sue them in their personal capacities does not alter this analysis.

The court of appeals relied on a cramped reading of a single, irrelevant illustration from the comments to Restatement § 66. App. 7a-8a. The illustration states that a foreign official is immune from a suit seeking to compel payment of state funds in the official's possession. App. 7a. While that outcome is obviously correct, it does not follow, as a matter of logic or law, that *only* suits with "direct fiscal impacts on the foreign state" (App. 8a) trigger immunity. Nothing in the Restatement supports such a limitation. The third prong of § 66(f)—which addresses whether "exercising jurisdiction would * * * enforce a rule of law against the state"—says nothing about "state funds" or "direct fiscal impacts." App. 7a-8a. Nor does it require that "the *judgment* [be] en-

forceable against the state." App. 7a (emphasis added). The purpose of immunity is to protect foreign sovereigns and their officials not merely from judgments but from jurisdiction, including all the "attendant burdens of litigation." *Giraldo* v. *Drummond Co.*, 808 F. Supp. 2d 247, 250-251 (D.D.C. 2011) (quoting *Foremost–McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)).

When courts consult the Restatement as a source of common law, they must read it in harmony with other common-law sources, including court decisions and Executive Branch statements—none of which have distinguished between personal- and official-capacity suits. *E.g.*, *Barak*, 2019 WL 3520606, at *4-5; *Barak* SOI at 7-10. That is especially so because the Restatement was published in 1965—before the FSIA or *Samantar*—and therefore does not necessarily reflect more recent developments of the common law. In light of those other common-law sources, the third prong of § 66(f) is best understood to distinguish foreign officials who are technically acting within the scope of their duties but whose conduct does not implicate the sovereign decisions and policies of the foreign state. For example, a consular employee's duties may include driving an official vehicle, but holding him personally liable for a traffic accident would not impair the state's ability to execute its sovereign function of diplomatic relations. Accord *Rishikof* v. *Mortada*, 70 F. Supp. 3d 8, 15-16 (D.D.C. 2014); Restatement § 66, cmt. b, illus. 3.

Conversely, exercising jurisdiction over a foreign official *would* have the effect of enforcing a rule of law against a foreign state where, as here, the official has engaged in quintessentially sovereign conduct on behalf of, and ratified by, the state. Where a foreign state has claimed its officials' actions "as [its] own," a decision "on the legality of the [officials'] actions * * * amount[s] to a

decision on the legality of [the state's] actions." *Doe 1* v. *Buratai*, 318 F. Supp. 3d 218, 233 (D.D.C. 2018) (Friedrich, J.), aff'd, No. 18-7170, 2019 WL 668339 (D.C. Cir. 2019). In addition, as this Court has recognized, holding individual officials personally liable for conduct in furtherance of sovereign functions adversely affects the "government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992); see *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1866 (2017). Such suits go far beyond imposing a "direct fiscal impact[]" on the state's "treasury." App. 8a. They violate the state's sovereignty.

Judge Friedrich's recent decision in *Buratai* is instructive. In that case—issued before the decision below—she explained that a personal-capacity suit against Nigerian officials for alleged TVPA violations "would have the effect of enforcing a rule of law against Nigeria" because "[t]he Nigerian government claimed the defendants' actions as the country's own" by ratifying their conduct in a letter to the State Department. 318 F. Supp. 3d at 233. Judge Friedrich concluded that, because Nigeria had ratified its officials' conduct, "a decision * * * on the legality of the defendants' actions would amount to a decision on the legality of Nigeria's actions." *Ibid.* Judge Friedrich rejected plaintiffs' argument that they had sued the Nigerian officials in their personal capacities only, reasoning that holding them personally liable for state conduct "would affect how Nigeria's government, military, and police function, regardless whether the damages come from the defendants' own wallets or Nigeria's coffers." *Ibid.*

So too here. The central allegations of the complaint concern prosecutorial and police powers that are "peculiarly sovereign in nature," *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993), including deciding "whether to detain, charge, try, or release [respondent]" (App. 29a),

"giving orders to and supervising" government personnel (*ibid.*), and "order[ing] the general prosecutor of the DRC to open a judicial case" (App. 34a). By ratifying its officials' conduct, the DRC has adopted that conduct "as [its] own." *Buratai*, 318 F. Supp. 3d at 233. Exercising jurisdiction here—regardless whether liability ultimately is imposed—would intrude on the exercise of the DRC's police powers, requiring petitioners to defend in U.S. court prosecutorial determinations made on the DRC's behalf. Penalizing DRC officials for breaching a U.S. legal duty, because they enforced DRC laws and implemented DRC policies, manifestly imposes a rule of law against the DRC.

Numerous cases have recognized that, where a foreign state ratifies its official's conduct, a suit against the official is effectively against the state. *E.g.*, *Barak*, 2016 WL 6024416, at *9; *Buratai*, 318 F. Supp. 3d at 232-233; see also *Belhas* v. *Ya'alon*, 515 F.3d 1279, 1283-1284 (D.C. Cir. 2008); *Dichter*, 500 F. Supp. 2d at 292. Likewise, the Executive Branch has consistently maintained that the immunity analysis "turns on whether the acts in question were performed on the state's behalf, such that they are attributable to the state itself." U.S. *Dichter* Br. at 21. Part of that analysis is whether a suit challenges "core aspects of the foreign state's sovereignty." *Id.* at 24; see *id.* at 4 (relying on Israel's assertion that "to allow these proceedings to go forward 'is to allow suit against Israel itself'").

Because petitioners' conduct was in furtherance of core sovereign functions undertaken on behalf of the DRC and ratified by the DRC, exercising jurisdiction over those sovereign actions would have the effect of enforcing a rule of law against the DRC.

B. The TVPA Does Not Impliedly Abrogate Conduct-Based Immunity

The court of appeals' second holding—that the TVPA abrogates common-law conduct-based immunity in essentially every case—ignores the longstanding presumption against implied abrogation, conflicts with Congress's intent, and disregards the Executive Branch's application of common-law immunity in other cases.

This Court has recognized the "longstanding * * * principle that 'statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (alterations incorporated) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Ibid.* (citation omitted). Common-law doctrines "ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983) (quoting *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812)). This Court has specifically instructed that courts should "proceed on the assumption that common-law principles of immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Filarsky* v. *Delia*, 566 U.S. 377, 389 (2012) (alterations incorporated) (quoting *Pulliam* v. *Allen*, 466 U.S. 522, 529 (1984)); see also *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 146 (1812).

Conduct-based immunity is about as "long-established and familiar" as common-law principles come. *Texas*, 507 U.S. at 534. By 1797, it was already

"well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States." *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797). A century later, in *Underhill* v. *Hernandez*, this Court recognized "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority * * * as civil officers." 168 U.S. 250, 252 (1897). And in *Samantar*, the Court reaffirmed that common-law principles govern the immunity of foreign officials. 560 U.S. at 325-326.

Nothing in the TVPA abrogates the centuries of immunity that preceded it. The TVPA's text does not "speak[] directly" to conduct-based immunity, *Texas*, 507 U.S. at 534; rather, it simply creates a cause of action against any "individual who, under actual or apparent authority, or color of law, of any foreign nation" commits torture or extrajudicial killing. § 2(a). To be sure, liability under the TVPA overlaps with one element of conduct-based immunity: official conduct. But the creation of a cause of action does not, in itself, abrogate background principles of immunity—even where the cause of action applies on its face to persons who are immune.

The most relevant analogue is 42 U.S.C. § 1983, which creates a right of action against "[e]very person who, under color of [law]," deprives another of his or her legal rights. That statute applies "on its face" to official conduct and "admits of no immunities" or exceptions. *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). Nevertheless, because the distinction between the creation of a right of action and immunity from suit is "an entrenched feature" of U.S. law, *Rehberg* v. *Paulk*, 566 U.S. 356, 361 (2012), this Court has interpreted § 1983 "in harmony with general principles of tort immunities and defenses

rather than in derogation of them," *Imbler*, 424 U.S. at 418.

The same analysis governs here. The TVPA, like § 1983, establishes a right of action and defines the class of persons liable. And, like § 1983, the TVPA "does not expressly abrogate any common law immunities." *Barak*, 2019 WL 3520606, at *5. The TVPA should therefore be read "in harmony with general [common-law] principles" of conduct-based immunity. *Imbler*, 424 U.S. at 418. Just as the Court read § 1983 to preserve common-law qualified, legislative, and judicial immunity, see *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967), it should read the TVPA narrowly to preserve common-law foreign-official immunity. See *Barak*, 2019 WL 3520606, at *5-6; accord *Buratai*, 318 F. Supp. 3d at 237 ("The Act evinces no decision to transform federal courts into a forum for adjudicating such disputes. To avoid this 'slippery slope,' it makes sense that the Act leaves in place conduct-based immunity * * * ."). Likewise, the TVPA should be read in harmony with settled principles of international law, see *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), including the decisions of foreign courts, which uniformly recognize conduct-based immunity. *Dichter* SOI at 20-22 (citing cases and treaties).

The court of appeals' contrary decision, moreover, proves too much. If the TVPA's text were sufficient to abrogate conduct-based immunity, it would likewise abrogate head-of-state and diplomatic immunity, for both heads of state and diplomats may be "individual[s] who, under actual or apparent authority, or color of law, of any foreign nation" commit torture or extrajudicial killing. § 2(a). That outcome would be so disruptive of diplomatic relations that even Judge Randolph was unwilling to take his reasoning to its logical conclusion. App. 14-15a.

Reading the TVPA in harmony with conduct-based immunity preserves the original scope of the TVPA that Congress intended. As the United States has explained:

> The legislative history indicates that Congress believed that such immunity would be difficult to establish in cases where true torture or extrajudicial killing occurred—since states would rarely "admit some knowledge or authorization of relevant acts." But the converse implication is that where, as here, there is no doubt that the official's conduct is attributable to the state, Congress understood that the official could validly assert an immunity defense.

U.S. *Dichter* Br. at 27 (citations omitted) (quoting S. Rep. No. 102-249, at 8 (1991)); see also *id.* at 26-27 (describing legislative history).

To be sure, reading the TVPA in harmony with common-law immunity will result in some foreign officials being immune to TVPA claims. But it provides ample room for the TVPA's application. See *Barak*, 2019 WL 3520606, at *6. The Act would still apply where a foreign official abuses his apparent authority for personal gain. *E.g.*, *Kadic* v. *Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995). And it will still apply with respect to acts performed "under color of law" but that are not properly attributable to a foreign state, or where there is no recognized government. *E.g.*, *Yousuf* v. *Samantar*, 699 F.3d 763, 777 (4th Cir. 2012). A foreign sovereign, moreover, may waive its official's immunity or disclaim his conduct. *E.g.*, *Hilao* v. *Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *In re Doe*, 860 F.2d 40, 45-46 (2d Cir. 1988). Or the Executive Branch may issue a suggestion of *non*immunity. *E.g.*, *Ahmed* v. *Magan*, No. 10-cv-342, 2011 WL 13160129, at *1 (S.D. Ohio Nov. 7, 2011). But in cases like this one—where the DRC has expressly ratified petitioners' conduct and principles established by the Executive Branch in dozens of prior suggestions of

immunity would clearly foreclose jurisdiction—foreign officials are immune under the common law.

IV. The Decision Below Will Have Sweeping Repercussions

Unless corrected, the decision below will open the door to even more litigation against foreign officials in U.S. courts, threaten the comity between the United States and foreign sovereigns, distort and displace the role of the State Department in determining common-law immunity, and put senior U.S. officials at risk of liability in foreign courts if foreign governments and courts refuse to recognize their immunity. These consequences call out for this Court's immediate intervention.

A. The Decision Below Opens The Door To Even More Suits Against Foreign Officials

The decision below provides plaintiffs with a roadmap to plead around immunity in nearly every case—even where, as here, the alleged conduct was undertaken on behalf of, and expressly ratified by, the foreign state.

First, plaintiffs can simply sue foreign officials in their personal capacities. So long as plaintiffs do not seek funds directly from "the [foreign state's] treasury" or threaten any "direct fiscal impacts on the foreign state," foreign officials cannot claim conduct-based immunity. App. 7a-8a. Importantly, this approach bypasses immunity in *all* cases—not just actions under the TVPA. Second, under the court's alternative holding, the TVPA abrogates all conduct-based immunity, so foreign officials sued under the Act are categorically foreclosed from invoking immunity.

Those two holdings reduce the common-law immunity this Court recognized in *Samantar* to an empty shell. The relevant cases that petitioners have identified uniformly were pleaded against foreign officials in their

personal capacities only; *not one* was an official-capacity suit.[3] And the D.C. Circuit's opinion virtually ensures that any future suits against foreign officials will be brought as personal-capacity suits. If that were not enough, under the court's second holding, there is no conduct-based immunity in *any* of the many TVPA claims filed in U.S. courts each year. "Because the whole point of immunity is to enjoy 'an immunity from *suit* rather than a mere defense to *liability*,'" the D.C. Circuit's "reading of the TVPA would effectively extinguish the common law doctrine of foreign official immunity." *Barak*, 2019 WL 3520606, at *6 (citation omitted).

A decision that so comprehensively eliminates conduct-based immunity would be alarming coming from any court in the United States; that it comes from the D.C. Circuit creates a potential emergency. As the Nation's capital, the District of Columbia is not just home to the federal government, but also host to 177 embassies. It is a regular destination for countless foreign officials. Now, foreign officials who visit Washington risk being tagged with a lawsuit for conduct undertaken on behalf of, and ratified by, the sending state. See *Burnham* v. *Superior Ct. of Cal.*, 495 U.S. 604 (1990); *Doe* v. *Qi*, 349 F. Supp. 2d 1258, 1274-1276 (N.D. Cal. 2004). Even before this decision, plaintiffs had brought dozens of TVPA suits in the District against foreign officials from numerous foreign states—including China, Cuba, Libya, Iran, Israel, Nigeria, North Korea, Sri Lanka, and Syria.[4] See

---

[3] Indeed, an *official*-capacity suit would likely amount to a suit against the sovereign itself governed by the FSIA. See, *e.g.*, *Odhiambo* v. *Republic of Kenya*, 930 F. Supp. 2d 17, 34 (D.D.C. 2013).

[4] *E.g.*, *Bao* v. *Li*, 201 F. Supp. 2d 14 (D.D.C. 2000) (China); *Jerez* v. *Republic of Cuba*, 777 F. Supp. 2d 6 (D.D.C. 2011) (Cuba); *Fisher* v. *Great Socialist People's Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46 (D.D.C. 2008) (Libya); *Holland* v. *Islamic Republic*

J.B. Bellinger, *Lawsuits Force Foreign Governments To Navigate U.S. Court System*, Wash. Diplomat (May 3, 2016), http://bit.ly/2OX3M03. Now that the D.C. Circuit has declared open season on foreign officials, that list will surely grow.

But the effects of the decision below will not stop at the District of Columbia's borders. They will extend also to foreign officials who never set foot in the District because courts in the D.C. Circuit potentially have jurisdiction over virtually all actions brought in the United States against foreign officials. The statutes under which foreign defendants are typically sued in U.S. courts—including the TVPA—do not require plaintiffs to comply with any one state's longarm statute.[5] And, in this context, whether the exercise of personal jurisdiction comports with due process depends "on whether [the] defendant has sufficient contacts with the United States as a whole," not merely with the forum state. *Mwani* v. *bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005). Put simply, if the decision below stands, forum-shopping plaintiffs will transform the District of Columbia's federal courts into the global center for litigation against high-ranking foreign officials.

---

of Iran, 496 F. Supp. 2d 1 (D.D.C. 2005) (Iran); *Belhas*, 515 F.3d 1279 (Israel); *Doe 1* v. *Buratai*, 318 F. Supp. 3d 218 (D.D.C. 2018) (Nigeria); *Han Kim* v. *Democratic People's Republic of Korea*, 950 F. Supp. 2d 29, 30 (D.D.C. 2013) (North Korea); *Manoharan* v. *Rajapaksa*, 845 F. Supp. 2d 260 (D.D.C. 2012) (Sri Lanka); *Foley* v. *Syrian Arab Republic*, 249 F. Supp. 3d 186 (D.D.C. 2017) (Syria).

[5] See, *e.g.*, *Mwani* v. *bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005) (concluding that Federal Rule of Civil Procedure 4(k)(2) effectively served as a nationwide longarm statute that "eliminate[d] the need to employ the forum state's long-arm statute" in an action brought under the Alien Tort Statute); *Nikbin* v. *Islamic Republic of Iran*, 471 F. Supp. 2d 53, 71 (D.D.C. 2007) (similar analysis for TVPA claim); 18 U.S.C. § 2334(a) (nationwide service of process under the Antiterrorism Act); 18 U.S.C. § 1965 (same for RICO).

B. The Decision Below Threatens The United States' Foreign-Policy Interests

Left uncorrected, the D.C. Circuit's decision—and the avalanche of cases that will follow—threaten the comity between the United States and other sovereigns that foreign-official immunity has long safeguarded. See *Underhill*, 168 U.S. at 252. These suits will "place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations," *Belhas*, 515 F.3d at 1287, including key U.S. allies, strategic partners, and negotiating counterparts, whose officials have already been targeted in U.S. courts, *e.g.*, *Qi*, 349 F. Supp. 2d 1258 (China); *Barak*, 2019 WL 3520606 (Israel); *Rosenberg* v. *Pasha*, 577 F. App'x 22 (2d Cir. 2014) (Pakistan); *In re Terrorist Attacks*, 122 F. Supp. 3d 181 (Saudi Arabia). The United States has consistently emphasized that such suits threaten important foreign-policy interests:

> Allowing foreign officials to be sued in U.S. courts for their official conduct would depart from customary international law, aggravate our relations with the foreign states involved, and potentially expose our own officials to similar suits abroad. The principle of foreign official immunity serves as a vital protection against such interference by private litigants with the Executive's conduct of foreign affairs.

U.S. *Dichter* Br. at 2; see U.S. Br. at 22, *Giraldo* v. *Drummond Co.*, No. 11-7118 (D.C. Cir. Aug. 3, 2012) (U.S. *Giraldo* Br.) ("Suits against former foreign officials also can adversely affect the nation's foreign relations interests.").

The Executive Branch has long advocated judicial restraint to enable it to pursue diplomatic resolutions of complex foreign-policy issues, urging courts to "be cautious when asked to sit in judgment on the acts of foreign

officials taken within their own countries pursuant to their government's policy." Letter from W.H. Taft to R.D. McCallum 7 (Sept. 25, 2002) (filed in *Doe* v. *Qi*, No. 02-cv-672 (N.D. Cal. Aug. 4, 2004), ECF No. 94 at 25). In particular, when suits name sitting officials and "none of the operative acts are alleged to have taken place in the United States," such cases are likely to "detract from, or interfere with, the Executive Branch's conduct of foreign policy." *Id.* at 7-8.

This Court has likewise explained that "it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945); see *Doe* v. *Exxon Mobil Corp.*, 473 F.3d 345, 359 (D.C. Cir. 2007) (Kavanaugh, J., dissenting) ("A civil lawsuit in a U.S. court involving a foreign government, foreign officials, or foreign interests may adversely affect relations between the United States and the foreign nation."). And for good reason: The resulting "[s]trains in international relationships" caused by suits against foreign officials may "incrementally reduce US national security" and "undermine a variety of cooperative ventures, ranging from trade, to environmental protection, to the war on drugs, to arms control, to combating terrorism." Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 460 (2001). For example, the State Department has found that U.S. lawsuits disrupt important negotiations because of foreign states' reluctance to send officials to the United States "due to fear that they will be harassed." Letter from W.H. Taft to The Hon. D. Meron 2 (Aug. 3, 2004) (filed in *Qi*, No. 02-cv-672, ECF No. 94).

It is hard to overstate the potential for the decision below to interfere with foreign relations. Under the D.C.

Circuit's logic, anyone detained by a foreign government can allege that he was "threatened" with "severe physical pain or suffering," TVPA § 3(b)(2)(A), and potentially state a claim against high-ranking foreign officials and policymakers, like petitioners here. That is so even where, as here, the U.S. ambassador commended foreign officials for their handling of respondent's case. App. 45a. Likewise, "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extrajudicial killing," *Barak*, 2019 WL 3520606, at *6, thus subjecting foreign military officials to suit under the TVPA and opening U.S. courts to political challenges to the lawfulness of military actions worldwide.

Matar v. *Dichter* is just one example. The plaintiffs there brought a TVPA claim against the former head of Israel's domestic security agency for his alleged role in a military strike resulting in civilian deaths. 563 F.3d at 10. Had it applied the D.C. Circuit's reasoning, the Second Circuit would have allowed that case to proceed, forcing a former senior Israeli official to defend himself in U.S. court against claims that an Israeli military action abroad amounted to torture and extrajudicial killing under U.S. law. The United States considered such an outcome unacceptable. Noting "the potential for discovery and passing of judgment concerning the foreign state's intelligence-gathering and the political and military decision-making of its top officials" the Executive Branch objected that such cases should not be allowed to proceed in U.S. courts because they "would intrude on core aspects of the foreign state's sovereignty and give rise to serious diplomatic tensions." U.S. *Dichter* Br. at 24-25.

This potential for judicial intrusion "on core aspects of the foreign state's sovereignty," *ibid.*, also undermines the FSIA, which by design provides "the sole basis for

obtaining jurisdiction over a foreign state in our courts." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). While official immunity protects individual officers, it "is for the benefit of the foreign state," U.S. *Giraldo* Br. at 22, to prevent litigation over the state's sovereign decisions. The D.C. Circuit decision fosters such litigation by letting plaintiffs, through the simple expedient of pleading "personal capacity" or alleging a TVPA claim, sue a foreign official for implementing the state's policies, even where the foreign state directed the official to act and expressly ratified the actions. And the decision permits such suits even though the official's conduct would not be actionable under the FSIA's narrow exceptions to foreign sovereign immunity. See 28 U.S.C. § 1605.

The decision below also violates "the golden rule among nations [that] compels [courts] to give the respect to the laws, policies and interests of others that [they] would have others give to [their] own." *Mujica* v. *AirScan Inc.*, 771 F.3d 580, 608 (9th Cir. 2014) (internal quotation marks omitted). Courts around the world have "long recognized that foreign officials enjoy civil immunity for their official acts." *Dichter* SOI at 20; see *id.* at 20-23 (citing cases). By "parting with this international consensus," the D.C. Circuit's decision "threaten[s] serious harm to U.S. interests" and "invit[es] reciprocation in foreign jurisdictions." *Id.* at 22; accord *Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciprocity * * * ."); *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) ("[P]rotect[ing] foreign diplomats in this country * * * ensures that similar protections will be accorded those that we send abroad to represent the United States * * * ." (citation omitted)). Given the scope of U.S. military and diplomatic operations worldwide, high-ranking U.S. officials "are at special risk of being subjected to politically driven lawsuits

abroad" in connection with controversial U.S. policies or military operations. U.S. *Dichter* Br. at 25.

Finally, the D.C. Circuit's decision raises the specter of U.S. courts becoming forums for politically motivated lawsuits brought to influence foreign elections. Respondent here was represented in district court by a registered lobbyist for Moise Katumbi, an opposition candidate for DRC president when the complaint was filed. App. 17a n.1, 41a-42a; C.A. App. A69 & n.1. If the decision below is allowed to stand, U.S. courts may be turned into a forum for spurious and inflammatory lawsuits brought by and against foreign political factions seeking to play out a political drama, using U.S. courts as the stage. These theatrics not only waste judicial resources but enmesh the United States in domestic issues of foreign nations and threaten diplomatic relations.

V. This Case Is An Ideal Vehicle For Deciding The Questions Presented

This case presents an ideal vehicle for the Court to decide both questions presented, and there are no obstacles to this Court's review. The court of appeals passed upon both questions; both are dispositive of petitioners' immunity claims; and both are squarely presented.[6]

The fact that the court below "assum[ed]" without deciding that the Restatement "captures the contours of common-law official immunity" (App. 6a) gives this Court maximum flexibility to decide the first question presented under whatever standard it deems fit, whether drawing upon the Restatement or not. See *Samantar*, 560 U.S. at 321 n.15 ("express[ing] no view on whether Restatement § 66 correctly sets out the scope of the com-

[6] That *respondent* failed to raise TVPA abrogation below (App. 15a) is no obstacle to this Court's review. The issue was "passed upon" by the court of appeals, which is all that is required. *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

mon-law immunity"). This Court, moreover, need not resolve the full scope of common-law immunity; it would be enough simply to address whether immunity can be circumvented by pleading against an official in his personal capacity.

Finally, that the court of appeals remanded the case for consideration of personal jurisdiction is no barrier to this Court's immediate review. It is always true that immune defendants could ultimately avoid liability on some nonimmunity ground, such as lack of personal jurisdiction or by prevailing on the merits. But foreign-official immunity is not merely immunity from *judgment*; it is immunity from *jurisdiction*, including the "attendant burdens of litigation." *Giraldo*, 808 F. Supp. 2d at 250-251; see *Barak*, 2019 WL 3520606, at *6. For that reason, a decision denying immunity is immediately appealable. See, *e.g.*, *Yousuf*, 699 F.3d at 768 & n.1; *Enahoro* v. *Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005).

If that were not enough, the remand order here brings exactly the sort of "attendant burdens" immunity is meant to prevent. The decision below specifically noted that, "[c]ertainly, 'a plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery.'" App. 9a (citation omitted). Permitting intrusive discovery against foreign officials who are immune from the jurisdiction of U.S. courts frustrates the fundamental purpose of immunity. This Court should act now to safeguard those important interests.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

JOHN P. ELWOOD
Counsel of Record
JOHN B. BELLINGER III
ROBERT N. WEINER
RAÚL R. HERRERA
R. STANTON JONES
STEPHEN K. WIRTH
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

AUGUST 2019

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 2018 Decided March 12, 2019

No. 17-7118

DARRYL LEWIS,
APPELLANT

v.

KALEV MUTOND, IN HIS INDIVIDUAL CAPACITY ONLY,
ADMINISTRATEUR GENERALE,
AGENCE NATIONALE DE RENSEIGNEMENTS,
DEMOCRATIC REPUBLIC OF THE CONGO
AND ALEXIS TAMBWE MWAMBA, IN HIS INDIVIDUAL
CAPACITY ONLY, MINISTRE DE LA JUSTICE,
GARDE DES SCEAUX ET DROITS HUMAINS,
DEMOCRATIC REPUBLIC OF THE CONGO,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01547)

Merrill C. Godfrey argued the cause and filed the briefs for appellant.

Robert N. Weiner argued the cause for appellees. With him on the brief were *Raul R. Herrera*, *R. Stanton Jones*, and *Stephen K. Wirth.*

Before: SRINIVASAN and WILKINS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* WILKINS.

Concurring opinion filed by *Circuit Judge* SRINIVASAN.

Opinion concurring in the judgment filed by *Senior Circuit Judge* RANDOLPH.

WILKINS, *Circuit Judge*: This case involves a lawsuit brought under the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102–256, 106 Stat. 73 (1992), by an American citizen who sued two foreign officials from the Democratic Republic of the Congo ("DRC") for alleged torture over a six-week period. Plaintiff seeks compensatory and punitive damages.

Defendants moved to dismiss for lack of subject matter jurisdiction; lack of personal jurisdiction; and insufficient service of process. The District Court granted the motion to dismiss, holding the court lacked subject matter jurisdiction because the defendants are immune under the common law foreign official immunity doctrine.

For the reasons set forth below, we conclude that Defendants are not entitled to foreign official immunity under the common law. Because such immunity does not apply in this case, we vacate the ruling of the District Court dismissing for lack of subject matter jurisdiction and remand for further proceedings. In the opinion by Senior Judge Randolph, which is joined in relevant part by Judge Srinivasan, we provide the alternative holding that the TVPA displaces conduct-based immunity in this context.

I.

The following facts are taken from the complaint and assumed true on review of Defendants' motion to dismiss. *Scandinavian Satellite Sys., AS v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002). In April 2016, Plaintiff Darryl Lewis, an American citizen, was in the DRC working as an "unarmed security advisor" to Moise Katumbi. J.A. 4. Katumbi, the former governor of the Katanga Province, was running for president of the DRC. In his

complaint, Plaintiff asserts that, on April 24, 2016, he was traveling by car with a colleague in Lubumbashi when he was stopped by a local police officer near a political rally. Lewis, his colleague, and colleagues in a separate vehicle were detained by the National Intelligence Agency, Agence Nationale de Renseignements ("ANR"). Plaintiff describes being physically assaulted during the arrest process and being accused of being an American mercenary soldier, which he denies. Lewis and his colleagues were then transported to a local jail, where ANR members continued to assault them during a lengthy interrogation. The following morning, they were transported by air to Kinshasa, where Lewis was incarcerated and interrogated daily for six weeks. Plaintiff alleges that he was interrogated daily by ANR members for approximately sixteen hours a day and was intentionally starved and denied sleep and basic hygienic necessities.

Plaintiff claims that Defendant Kalev Mutond, General Administrator of the ANR, was involved in his detention in Kinshasa, at one point warning him: "Don't let me find out you're a mercenary." J.A. 7. Plaintiff further claims that Defendant Alexis Thambwe Mwamba, DRC Minister of Justice, publicly accused him of being a mercenary sent to assassinate President Joseph Kabila during a press conference on May 4, 2016, claiming to have "documented proof." J.A. 7. The following day on May 5, 2016, the U.S. Embassy in Kinshasa allegedly issued a statement condemning the remarks concerning Lewis and mercenary activities. Lewis was released on June 8, 2016, having never been charged with a crime.

Plaintiff contends that Defendants are liable under the TVPA. The TVPA creates an express cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture." 28 U.S.C. § 1350 (note) sec. 2(a). Plaintiff's complaint alleges that "Defendants at all times

used their respective positions of authority to act under apparent authority or color of law of the DRC with respect to the actions alleged in this complaint." J.A. 11. Rather than order his release from custody and protect him from torture, Plaintiff argues, Defendants enabled the abuses described in the complaint.

Defendants moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, claiming that Plaintiff's complaint alleges acts exclusively taken in Defendants' official capacity. Because foreign officials enjoy immunity from suits based on official acts committed in their official capacities, Defendants argued, the District Court lacked jurisdiction. The District Court agreed and granted Defendants' motion to dismiss. *Lewis v. Mutond*, 258 F. Supp. 3d 168, 172 (D.D.C. 2017). Plaintiff timely appealed.

II.

This Court reviews *de novo* the District Court's dismissal for lack of subject-matter jurisdiction. *Simon v. Republic of Hungary*, 812 F.3d 127, 135 (D.C. Cir. 2016). The defendant bears the burden of proving foreign official immunity. *Cf. Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (explaining that a foreign state defendant who asserts the defense of immunity under the Foreign Sovereign Immunities Act "bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity").

A.

Because this case involves foreign officials – not foreign states – the issue of immunity is governed by the common law, not the Foreign Sovereign Immunities Act ("FSIA"). *See Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (noting that a case "in which respondents have sued petitioner in his personal capacity . . . is properly governed

by the common law"). The doctrine of common law foreign immunity distinguishes between two types of immunity: status-based and conduct-based immunity. Status-based immunity is reserved for diplomats and heads of state and attaches "regardless of the substance of the claim." Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag 2d 61, 64 (2010); *see also Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012). Conduct-based immunity is afforded to "any [] [p]ublic minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law § 66(f) (1965) (hereinafter Restatement); *see also Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009); *Samantar*, 699 F.3d at 774.

As explained by the Supreme Court in *Samantar*, a two-step procedure is used to determine whether a foreign official is entitled to conduct-based foreign sovereign immunity. *Samantar*, 560 U.S. at 311-12. At the first step, a foreign official requests a "suggestion of immunity" from the State Department and, if granted, the District Court is divested of its jurisdiction. *Id.* at 311. If the State Department does not grant a suggestion of immunity, the District Court is authorized to decide whether *all* the requisites for foreign-official immunity exist. *Id.* at 311-12.

B.

We turn to the two-step procedure outlined in *Samantar* to evaluate Defendants' claim to conduct-based immunity. At step one, *see Samantar*, 560 U.S. at 311-12, we conclude that Defendants are not entitled to immunity. On August 9, 2016, the DRC Ambassador to the United States sent a letter to the United States Department of State denying Plaintiff's allegations and requesting that the State Department submit a suggestion of immunity to

the court. This request was reiterated in a December 13, 2016 follow-up letter. However, the State Department did not accede to the plea of the DRC, and never issued a request that the District Court surrender its jurisdiction.

At step two, we consider whether Defendants satisfy the requisites for conduct-based immunity. The Supreme Court has "expressed no view on whether Restatement [2d of Foreign Relations] § 66 correctly sets out the scope of the common-law immunity applicable to current or former foreign officials." *Samantar*, 560 U.S. at 321 n.15. Here, however, both parties assume § 66 accurately sets out the scope of common-law immunity for current or former officials, *see* Appellees' Br. 14 & n.4, and we therefore proceed on that understanding without deciding the issue. Assuming, as the parties do, that Restatement § 66 captures the contours of common-law official immunity, Defendants are not entitled to immunity.

Under Restatement § 66, the court considers three factors. First, whether the actor is a public minister, official, or agent of the foreign state. Restatement § 66(f). Second, whether the acts were performed in her official capacity. *Id.* And third, whether exercising jurisdiction would serve to enforce a rule of law against the foreign state. *Id.* To establish conduct-based immunity, a defendant must establish all three factors. Restatement § 66 cmt. b ("Public ministers, officials, or agents of a state . . . do not have immunity from personal liability *even for acts carried out in their official capacity*, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state." (emphasis added)).

As a result, to enjoy conduct-based immunity as defined by the Restatement, Defendants must satisfy the third factor by proving that exercising jurisdiction in this case is tantamount to enforcing a rule of law against the DRC itself. *See* Restatement § 66(f). Defendants attempt to prove this, in part, by arguing that "Plaintiff's suit

seeks to hold high-ranking DRC government officials liable for official conduct carried out entirely within the DRC." Appellees' Br. 30. This position elides the second and third elements for establishing conduct-based immunity. The second immunity element focuses on the nature of Defendant's acts and whether they were taken within an "official capacity." By contrast, the third element considers whether the remedies sought by Plaintiff serve to enforce a rule of law against the DRC. That element, as understood through the lens of the small number of decisions speaking to the existence and scope of common-law immunity, would allow for immunity when a judgment against the official would bind (or be enforceable against) the foreign state. *See* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 Fordham L. Rev. 2669, 2676-78 (2011) (examining cases).

This approach is reinforced by the illustrations in the Restatement commentary. For example, the Restatement explains:

> X, an official of the defense ministry of state A, enters into a contract in state B with Y for the purchase of supplies for the armed forces of A. A disagreement arises under the contract and Y brings suit in B against X as an individual, seeking to compel him to apply certain funds of A in his possession to satisfy obligations of A under the contract. X is entitled to the immunity of A.

Restatement § 66, cmt. B(2).

Defendants have 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. Defendants in this case are being sued in their individual capacities and Plaintiff is not seeking compensation out of state funds. J.A. 2; *see also* Appellant's Br. 27 ("[T]he monetary

liability sought here against individuals . . . would have no effect on the state treasury."). Defendants argue that the effect on the DRC's treasury is "irrelevant" because "[e]xercising jurisdiction here would compel the DRC's sitting Minister of Justice and General Director of the National Intelligence Agency to defend their handling of a high-profile domestic security matter in U.S. courts." Appellees' Br. 32. Taking such foreign officials away from their official duties in the DRC, Defendants argue, is a "sufficient sanction to constitute enforcing a rule of law on the DRC." Appellees' Br. 32 (alterations and quotations omitted). But these collateral effects are too attenuated to be equated with the direct fiscal impacts on the foreign state that are contemplated by the Restatement. *Cf. Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[E]ven though a State is not named a party to the action, . . . [if] the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity." (citation omitted)). 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. Defendants are thus not entitled to the conduct-based foreign official immunity. In view of our conclusion that Defendants have not satisfied the necessary third element of conduct-based immunity, we need not address Plaintiff's arguments relating to the first two elements.

III.

For these reasons, we vacate the District Court's grant of Defendant's motion to dismiss for lack of subject matter jurisdiction and remand for further proceedings. Defendants argue that, even if the District Court has subject matter jurisdiction, this Court should affirm on the basis that the court lacks personal jurisdiction over them. Defendants claim they do not have "any connection to the

United States, and all of the conduct at issue is alleged to have occurred entirely within the DRC." Appellees' Br. 33 (citing *Mwani v. bin Laden*, 417 F.3d 1, 8 (D.C. Cir. 2005)); *see also* Fed. R. Civ. P. 4(k)(2). Plaintiff's memorandum in opposition to Defendants' motion to dismiss disagreed but requested jurisdictional discovery if the court were inclined to agree with Defendants. *See Second Amendment Found. v. U.S. Conference of Mayors*, 274 F.3d 521, 525 (D.C. Cir. 2001) ("Certainly, 'a plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery.'" (quoting *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996)) (alterations omitted)). The District Court neither addressed Defendants' personal jurisdiction argument nor ruled on Plaintiff's request for jurisdictional discovery. *Lewis v. Mutond*, 258 F. Supp. 3d 168, 174-75 (D.D.C. 2017). We decline to decide the matter in the first instance. Accordingly, on remand, the District Court should consider the question of personal jurisdiction and whether Plaintiff is entitled to jurisdictional discovery.

So ordered.

SRINIVASAN, *Circuit Judge*, concurring:

I fully join Judge Wilkins's opinion, which explains that if, as the parties assume, Restatement (Second) of Foreign Relations Law § 66(f) sets out the scope of common-law, conduct-based immunity for foreign officials, the defendants in this case do not qualify for that immunity. I also agree with the portion of Judge Randolph's concurrence in the judgment explaining that the Torture Victim Protection Act (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. *See* Concurring Op. 3–4. In my view, therefore, the defendants in this case do not qualify for immunity for either of two reasons: (a) as Judge Wilkins explains, they fall outside the scope of the common-law, conduct-based immunity contemplated by Restatement § 66(f); or (b) as Judge Randolph explains, they fall within the scope of liability contemplated by the TVPA per the allegations in the complaint.

RANDOLPH, *Senior Circuit Judge*, concurring in the judgment:

The court assumes that the immunity of the defendant foreign officials under the Torture Victims Protection Act turns on "the common law" and that the Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965)[1] embodies the governing common law.

I think both assumptions are dubious. Neither has been tested in an adversary proceeding.

Consider first the proposition that, as the court assumes, Restatement (Second) § 66(f)[2] recites the common law. The common law is "the dominant consensus of common-law jurisdictions." *Field v. Mans*, 516 U.S. 59, 70 n.9

---

[1] The Restatement (Second) was superseded by the Restatement (Third) of Foreign Relations Law of the United States (1987). *See* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 Fordham L. Rev. 2669, 2678 n.45 (2011). There may be a plausible but oddly unexplained reason for invoking the older Restatement version and ignoring the newer. I see no need to get into this.

[2] "The immunity of a foreign state under the rule stated in § 65 extends to

(a) the state itself;
(b) its head of state and any person designated by him as a member of his official party;
(c) its government or any governmental agency;
(d) its head of government and any person designated by him as a member of his official party;
(e) its foreign minister and any person designated by him as a member of his official party;
(f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state;
(g) a corporation created under its laws and exercising functions comparable to those of an agency of the state."

Restatement (Second) § 66.

(1995).[3] This Restatement is titled "Foreign Relations Law of the United States," but it does not pretend to be a statement of "common law." Instead it sets forth "rules of international law as distinguished from the rules of domestic law," "[e]xcept as otherwise indicated." Restatement (Second) § 2(2).[4] The immunity provision of Restatement (Second) § 66(f) contains no such exception, express or implied.

Restatement § 66(f) appears to be a distillation of scant case law in this country, international treaties to which the United States may or may not be a party, the writings of law professors here and abroad, negotiated settlements of international disputes, and other non-judicial sources such as actions of our Department of State and perhaps comments in meetings of the American Law Institute. Restatement (Second) § 1, comment *c*, explains that the "paucity of adjudicated decisions in the international field has led to greater reliance on non-judicial sources than in domestic law." *See also* Restatement (Second) § 2, cmt. *f*.

If Restatement (Second) § 66(f) is not common law, and does not purport to be, how then does one discover

---

[3] Another definition of the common law, in a highly regarded posting in the Federal Register, is this: "The common law is a body of judge-made substantive rules, principles, and prescribed standards of conduct." Federal Trade Commission, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8365 (July 2, 1964); *see also* A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J.L. & Pub. Pol'y 1035, 1044 (2006) ("The common law judge analyzes past judicial decisions, considers the reasons behind the decisions, comes up with a principle to explain the cases, and then applies that principle to a new case.").

[4] "Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

the real common law? The answer is not obvious. It may well be that there is not now and never was any common law of immunity for foreign officials sued in the United States. "The lower courts will find only minimal guidance from [pre-1976] decisions involving the common law immunity of foreign officials. Those cases were 'few and far between,' and none addressed claims of human rights abuses." *Stephens*, *supra*, at 2671 (footnote omitted) (quoting *Samantar v. Yousuf*, 560 U.S. 305, 323 (2010)).[5]

Even if there were a common law of immunity for foreign officials and even if the Restatement (Second) § 66(f) stated it, the question remains: does the Restatement's version of the common law control actions such as this arising under the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note? A foreign official may be immune from suit pursuant to the Restatement's § 66(f) only with respect "to acts performed in his official capacity." Here the Democratic Republic of the Congo notified the State Department that the defendants' alleged torture actions were "undertaken in their official capacities."

That may have satisfied a prerequisite for immunity under the Restatement, but it also amounted to a confession satisfying one of the prerequisites for liability under the Torture Act. Section 2(a) of the Torture Act does away with the Nuremberg defense, and more. Pursuant to § 2(a) an "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual." 28 U.S.C. § 1350 note § 2(a)(1). The Torture Act thus imposes liability for

---

[5] "The courts will not be able to turn to pre-FSIA common law decisions and commentary to determine the scope of the modern common law of official immunity in part because the cases were sparse, leaving a few guidelines but no substantial body of law." *Id.* at 2702. "Pre-FSIA" means before enactment of the Foreign Sovereign Immunities Act of 1976.

actions that would render the foreign official eligible for immunity under the Restatement. When there is such a clear conflict between statutory law and judge-made common law, the common law must give way. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 314–15 (1981).[6]

I leave to the last a discussion of the Supreme Court's decision in *Samantar v. Yousuf* and our court's decision in *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (per curiam).

Samantar v. Yousuf interpreted the term "foreign state" in the following provision of the Foreign Sovereign Immunities Act (FSIA): "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States . . . ." 28 U.S.C. §1604. The Supreme Court held that "foreign state" did not include foreign officials. In so holding the Court did "not resolve the dispute among the parties as to the precise scope of an official's immunity at common law." 560 U.S. at 321.[7] Although the plaintiffs sued under the Torture Act, the Court did not address the conflict between the Torture Act and Restatement § 66(f).

As to our decision in *Manoharan v. Rajapaksa*, the case involved head-of-state immunity. As the court discusses in this case, Maj. Op. 5, there are two types of immunity for foreign officials – status-based, as in *Manoharan*, and conduct-based, as in the case before us. Head-of-state immunity and other status-based immunities are the predominant focus of U.S. case law, sparse as it is,

---

[6] "It has often been said that statutes in derogation of the common law are to be strictly construed. That is a relic of the courts' historical hostility to the emergence of statutory law." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012).

[7] The Court "express[ed] no view on whether Restatement § 66 correctly sets out the scope of the common-law immunity applicable to current or former foreign officials." *Id.* at 321 n. 15.

related to foreign officials. *See Yousuf v. Samantar*, 699 F.3d 763, 772 (4th Cir. 2012); Restatement (Second) § 66, reporter's note 1. It is well established that when the executive provided a "suggestion of immunity," a head of state would be granted immunity by the courts. *See*, *e.g.*, *Ye v. Zemin*, 383 F.3d 620, 625–27 (7th Cir. 2004). These status-based immunities also derive from international treaties such as the Vienna Convention on Diplomatic Relations and United Nations Convention on Special Missions. Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961, 23 U.S.T. 3227 (diplomatic immunity); S. Rep. No. 102-249, at 8 (1991) (citing United Nations Convention on Special Missions, art. 21(1), *adopted* Dec. 8, 1969, 1400 U.N.T.S. 231 (entered into force June 21, 1985)) (head of state immunity). The legislative history of the Torture Act indicated that these immunities would survive. H.R. Rep. No. 102-367, at 5 (1991), 1992 U.S.C.C.A.N. 84, 88 ("[N]othing in the TVPA overrides the doctrines of diplomatic and head of state immunity.").

The conflict between the Torture Act's basis for liability and the Restatement's basis for immunity from liability was neither briefed nor argued, although it should have been. The immunity of foreign officials may be a jurisdictional question. *See Belhas v. Ya'alon*, 515 F.3d 1279, 1281, 1283 (D.C. Cir. 2008). I agree with the court that if the Restatement did apply, the defendants were not immune.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DARRYL LEWIS, Plaintiff, v. KALEV MUTOND, *in his individual capacity only*, and ALEXIS THAMBWE MWAMBA, *in his individual capacity only*, Defendants.	)	Civil Case No. 1:16-cv-1547 (RCL)

MEMORANDUM OPINION

I. INTRODUCTION

This case concerns allegations brought by Darryl Lewis ("plaintiff") for violations of the Torture Victim Protection Act of 1991 ("TVPA") in connection with his unlawful detention and torture by Kalev Mutond, the General Administrator of the National Intelligence Agency ("ANR") of the Democratic Republic of the Congo ("DRC"), and Alexis Thambwe Mwamba, the DRC Minister of Justice ("defendants"). Plaintiff brings this action to recover compensatory and punitive damages under the TVPA, and sues each defendant in his individual capacity. Defendants have moved to dismiss for (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; and (3) insufficient service of process. Because the defendants are immune under the common law foreign official immunity doctrine, this Court lacks subject matter jurisdiction over the complaint and concludes that this action should be dismissed.

II. BACKGROUND

The factual allegations in this case center on the unlawful detention and torture of plaintiff for a period of six weeks in the DRC. Plaintiff, an American citizen and former U.S. military service member, was working as an unarmed security advisor to Moise Katumbi in the DRC.[1] Plaintiff alleges that on April 24, 2016, he and three of his colleagues were detained by the Congolese riot police while leaving a political rally "solely because of their association with Mr. Katumbi." Compl. ¶ 19, ECF No. 1.

Plaintiff asserts that several ANR members subsequently arrived and transported him and his colleagues to a jail in Lubumbashi, where "ANR members interrogated [plaintiff] for three hours while physically assaulting and abusing him" for the purpose of obtaining a false confession that he was an American mercenary. Compl. ¶ 22. Plaintiff claims that the next morning he and his colleagues were transported to ANR's headquarters in Kinshasha, where plaintiff "was detained for six weeks by defendant Kalev and his subordinates." Compl. ¶ 38. Plaintiff alleges that while detained he was "interrogated daily by ANR members for approximately 16 hours a day," he "was fed no more than one meal every 24 hours," and he "was denied the necessities for basic hygiene." Compl. ¶¶ 27, 29-30.

Next, plaintiff claims that at a press conference on May 4, 2016, defendant Thambwe accused plaintiff of being an American mercenary sent to assassinate President Kabila.[2] Compl. ¶ 32. Defendant Thambwe then explained that 600 U.S. citizens, including plaintiff, "had entered the DRC since October 2015 for the purpose of

---

[1] Moise Katumbi is a former governor of the Katanga Province in the DRC and a current candidate for president of the DRC.

[2] Joseph Kabila is the current President of the Democratic Republic of the Congo and has held this position since January 2001.

assisting Mr. Katumbi in a plot to destabilize the DRC." Compl. ¶ 35. On May 5, 2016, the U.S. Embassy in Kinshasa allegedly issued a response denying defendant Thambwe's assertion that plaintiff was detained due to his involvement in a plot to overthrow President Kabila. On June 8, 2016, plaintiff was released without ever being charged by defendant Thambwe or any other DRC official.

III. LEGAL STANDARDS

A. Motion to Dismiss Pursuant to Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and must be authorized to hear a case by both Article III of the U.S. Constitution and an act of Congress. Here, plaintiff asserts both federal question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under 28 U.S.C. § 1332(a)(2). To survive a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff must establish by a preponderance of the evidence that the court has jurisdiction over the case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "Because subject matter jurisdiction focuses on the Court's power to hear a claim, however, the Court must give the plaintiffs factual assertions closer scrutiny when reviewing a motion to dismiss for lack of subject matter jurisdiction than reviewing a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6)." *Bernard v. United States DOD*, 362 F. Supp. 2d 272, 277 (D.D.C. 2003) (Lamberth, J.).

Where the motion is based "on a claim of foreign sovereign immunity, which provides protection from suit and not merely a defense to liability . . . the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case." *Jungquist v. Al Nahyan*, 115 F.3d 1020, 1027-28 (D.C. Cir. 1997).

While it is relatively rare given the infrequent nature of foreign official immunity cases, the D.C. Circuit has made reference to other filings outside the allegations of the complaint in a Rule 12(b)(1) motion to ensure that it had the authority to hear a case. *See Belhas v. Ya'Alon*, 515 F.3d 1279, 1281 (D.C. Cir. 2008) (stating "our background statement, while drawn largely from the allegations of the complaint, will occasionally make reference to other filings with the district court during the course of litigation").

B. Common Law Foreign Official Immunity

In 1976 Congress enacted the Foreign Sovereign Immunities Act (FSIA) as "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, foreign states are immune from suit in United States courts unless one or more of the enumerated exceptions outlined in the FSIA applies. *See* 28 U.S.C. §§ 1330, 1604. While some circuits previously granted foreign officials immunity under the FSIA, the Supreme Court recently held that a suit brought against a foreign official acting in his official capacity is properly governed by the common law and not the FSIA. *See Samantar v. Yousuf*, 560 U.S. 305 (2010). "In contrast, suits against officers in their personal capacities must pertain to private action[s]—that is, to actions that exceed the scope of authority vested in that official so that the official cannot be said to have acted on behalf of the state." *Doe I v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005).

Under the common law foreign official immunity doctrine, "a foreign official is entitled to one of two different types of immunity: status-based or conduct-based immunity." *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 11 n.6 (D.D.C. Sept. 29, 2014). Status based immunity is available to diplomats and heads of state and shields them from legal proceedings "by virtue of his or her current official position,

regardless of the substance of the claim."[3] Chimene I. Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag 2d 61, 63 (2010) (cited by *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012)). Here, the issue is whether defendants are entitled to conduct based immunity. Conduct based immunity is available to "any [] [p]ublic minister, official, or agent of the [foreign] state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law of the United States § 66 (1986).

When a foreign official asserts immunity, the court applies "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Samantar*, 560 U.S. at 311. Under this procedure, the foreign official can "request a 'suggestion of immunity' from the State Department. If the request [is] granted, the district court surrender[s] its jurisdiction." *Id.* However, if the request is not granted "a district court ha[s] authority to decide for itself whether all the requisites for such immunity exist[]." *Id.* "The requisites for conduct-based immunity are: (1) the actor must be a public minister, official, or agent of the foreign state; (2) the act must have been performed as part of the actor's official duty; and (3) exercising jurisdiction would have the effect of enforcing a rule of law against the foreign state." Restatement (Second) of Foreign Relations Law of the United States § 66 (1986).

---

[3] "Diplomatic immunity shields diplomats (or 'public ministers') who have been accredited by the receiving state from criminal and most civil proceedings during their appointment, unless such immunity is waived by the sending state. Such immunity also extends to certain accredited members of U.N. Missions and certain members of 'special diplomatic missions.' Head of state immunity shields incumbent heads of state from the judicial processes of foreign courts, and has also been interpreted as extending to incumbent foreign ministers." Kietner, *supra*, at 63-64.

IV. ANALYSIS

While the plaintiff's complaint properly alleges federal question jurisdiction under 28 U.S.C. § 1331 as well as diversity jurisdiction under 28 U.S.C. § 1332(a)(2), the defendants' jurisdictional attacks rely on the doctrine of common law foreign official immunity. Defendants are not subject to immunity under the first step of the common law foreign official immunity doctrine articulated in *Samantar* because the State Department has not issued a request that the District Court surrender its jurisdiction. However, the Court finds that it lacks subject matter jurisdiction under the second step of *Samantar* given that (1) the defendants are agents of the DRC; (2) any actions defendants took in relation to the plaintiffs detention were carried out in their official capacities; and (3) exercising jurisdiction would have the effect of enforcing a rule of law against the DRC.

While the doctrine of common law foreign official immunity is not fully developed, the history of foreign official immunity in the D.C. Circuit is instructive to the analysis of the present case. Prior to the Supreme Court's decision in *Samantar*, the D.C. Circuit "had found that foreign official immunity was governed by the FSIA." *Giraldo v. Drummond Co.*, 808 F. Supp. 2d at 250. More specifically, in *Belhas*, the D.C. Circuit held that the "FSIA contains no unenumerated exception [to foreign official immunity] for violations of *jus cogens* norms."[4] 515 F.3d at 1287. In *Belhas*, a retired Israeli General was sued under the TVPA for alleged "war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman or

[4] *Jus cogens* norms are "norm[s] accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted [.]" *Belhas*, 515 F.3d at 1286 n. 7. Whereas ultra vires actions are defined as "[an act by a legal official beyond the scope of the official's duties." *Ultra Vires, Bouvier Law Dictionary Desk Edition* (2012).

degrading treatment or punishment." *Id.* at 1282. However, the Israeli Ambassador to the United States wrote a letter stating that the General was acting "in the course of [his] official duties, and in furtherance of the official policies of the State of Israel." *Id.* at 1284. The D.C. Circuit held that the General qualified for immunity under the FSIA given that "his actions were within the authority given to him by the State of Israel." *Id.*

The Supreme Court subsequently held that foreign official immunity is properly governed by the common law and not the FSIA, effectively rejecting the D.C. Circuit's finding in *Belhas*. *Samantar*, 560 U.S. at 322 n.17. However, the Supreme Court noted that Courts of Appeals' analysis of foreign official immunity under the FSIA "may be correct as a matter of common-law principles." *Id.* Thus, *Belhas* remains instructive.

Here, plaintiff sues defendants in their individual capacities due to their alleged *ultra vires* actions. While the D.C. Circuit has not directly addressed the issue of whether *ultra vires* actions fall outside the scope of common law foreign official immunity, another member of this Court, Judge Bates, followed the D.C. Circuit's rationale in *Belhas* to determine that "allegations of *jus cogens* violations do not defeat [foreign official] immunity." *Giraldo*, 808 F. Supp. 2d 247, 251 (D.D.C. 2011). In *Giraldo*, the court applied the D.C. Circuit's reasoning that "without 'something more nearly express' from Congress, it would not adopt a rule that would require federal courts to 'assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong.'" *Id.* at 250. "Not only would such a rule place a strain upon our courts and our diplomatic relations, but it would also eviscerate any protection that foreign official immunity affords." *Id.*

In the present case, the first required element of common law foreign immunity is satisfied without dispute given that it is uncontested that both Mutond and Thambwe are agents of the DRC. This Court then must determine whether the alleged actions were performed as part of the actor's official duty. Here, plaintiff asserts that the defendants were not acting in their official capacities and should not be granted immunity given that "[b]oth committed acts outside the lawful authority they are entitled to exercise under DRC law." Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss. 9., ECF. No. 16. While plaintiff cites several cases to establish that immunity is automatically forfeited when a defendant acts beyond the scope of their authority, this Circuit has held that "[i]n cases involving foreign sovereign immunity, it is also appropriate to look to statements of the foreign state that either authorize or ratify the acts at issue to determine whether the defendant committed the alleged acts in an official capacity." *Belhas*, 515 F.3d at 1283.

Ratification of an official's actions can be sufficient to establish immunity under the common law foreign official immunity doctrine. *See id.* Here, the DRC's Ambassador to the United States sent the U.S. Department of State two letters in relation to the case at bar just as the Israeli Ambassador to the U.S. transmitted a letter in relation to the General's case in *Belhas*. In these letters, the DRC Ambassador requested that the United States Government submit a suggestion of immunity to the court on behalf of the defendants given that "any actions Messrs. Thambwe's and Mutond's took or statements they made in connection with Mr. Lewis's detention was in their official capacities." Reply Mem. in Supp. of Defs.' Mot. to Dismiss Ex. B. 3., ECF No. 17. Because the D.C. Circuit considered the Israeli Ambassador's ratification of the General's actions sufficient to establish that he was acting within the scope of his authority in *Belhas*, this

Court finds the DRC Ambassador's ratification of the defendants' actions sufficient to establish that they were acting in their official capacities in the present case. Accordingly, this Court finds that plaintiff's complaint does not present sufficient evidence against the defendants to sue them in their personal capacities.

Relying on opinions from other circuits, plaintiff further asserts that the defendants "could not have been torturing in their 'official capacity' because torture was *ultra vires* under DRC law." Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss. 13. However, Judge Bates in *Giraldo* found the D.C. Circuit's reasoning in *Belhas* to be instructive and this Court concurs. In *Belhas* the General was sued under the TVPA for *jus cogens* violations but was granted immunity under the FSIA given that he was acting in his official capacity. Here, defendants are being sued under the TVPA for the unconstitutional torture and detention of plaintiff but were acting in their official capacities. Under the D.C. Circuit's reasoning in *Belhas* regarding foreign official immunity, the defendants were acting in their official capacities when they carried out the allegedly unlawful acts. Accordingly, this Court finds the second requisite of conduct based immunity—whether the alleged actions were performed as part of the actor's official duty—under *Samantar* to be satisfied.

The final required element for common law foreign immunity is that exercising jurisdiction over defendants will have the effect of enforcing the rule of law against the DRC. Here, defendants were acting in their official capacities on behalf of the DRC when they carried out the alleged *ultra vires* acts just as the General in *Belhas* was found to be acting in his official capacity "in furtherance of the interests of the sovereign" when he carried out the alleged *jus cogens* acts. 515 F.3d at 1282. Plaintiff attempts to differentiate "conduct that violates international principles of *jus cogens* and conduct that is outside

the constitutional authority of a defendant." Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss. 14. However, this Court finds that the rationale laid out in *Belhas* regarding *jus cogens* violations applies with even greater force to the alleged DRC constitutional violations in the present case. *Jus cogens* norms are universally illegal whereas violations of a nation's constitution are country specific and would require our judicial system to assess whether a foreign official complied with his own nation's laws. Here, the Court would be forced to question the constitutionality of an action that a foreign nation has ratified which would arguably place an even greater "strain upon our courts and our diplomatic relations." *Giraldo*, 808 F. Supp. 2d at 250. Consequently, exercising jurisdiction over defendants would have the effect of enforcing a rule of law against the DRC, which satisfies the final requirement of common law foreign official immunity under *Samantar*.

This Court lacks subject matter jurisdiction given that (1) the defendants are agents of the DRC; (2) any actions defendants took in relation to the plaintiff's detention were carried out in their official capacities; and (3) exercising jurisdiction would have the effect of enforcing a rule of law against the DRC. Therefore, this Court will grant defendants' motion to dismiss for lack of subject matter jurisdiction.

V. CONCLUSION

For the reasons stated above, this Court will grant defendant Kalev Mutond and defendant Alexis Thambwe Mwamba's motion to dismiss for lack of subject matter jurisdiction. Accordingly, this Court will not address defendants' motion to dismiss for lack of personal jurisdiction or insufficient service of process at this time.

A separate order accompanies this memorandum opinion.

[Signature]
Royce C. Lamberth
United States District Judge

DATE: July 6, 2017

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DARRYL LEWIS, Plaintiff, v. KALEV MUTOND, *in his individual capacity only*, and ALEXIS THAMBWE MWAMBA, *in his individual capacity only*, Defendants.	)	Civil Case No. 1:16-cv-1547 (RCL)

ORDER

For the reasons in the accompanying Memorandum Opinion, issued this same date, defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) is hereby **GRANTED**. The case is dismissed with prejudice.

It is further **ORDERED** that the defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) and 12(b)(5) are hereby **DENIED as moot.**

So ORDERED.

[Signature]
Royce C. Lamberth
United States District Judge

DATE: July 6, 2017

APPENDIX D

DARRYL LEWIS,
2207 Lake Park Drive SE,
Apartment M
Smyrna, Georgia 30080,

Plaintiff,

v.

KALEV MUTOND,
Administrateur Generale
Agence Nationale de
Renseignements
Boulevard Col. Tshatshi
Gombe, Kinshasa
Democratic Republic of the Congo,
in his individual capacity only,

and

ALEXIS TAMBWE MWAMBA,
Ministre de la Justice, Garde des
Sceaux et Droits Humains
Coin de l'Avenue des Cliniques et
Boulevard de la Nation
Gombe, Kinshasa
Democratic Republic of the Congo,
in his individual capacity only,

Defendants.

Civil No.
1:16-cv-1547

JURY TRIAL DEMANDED

COMPLAINT

1. The Plaintiff Darryl Lewis brings this action to recover compensatory and punitive damages under the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note, 106 Stat. 73, for severe pain and suffering caused to him by torture by Defendants in May and

June 2016 in the Democratic Republic of the Congo ("DRC").

2. Plaintiff demands a jury trial on all issues so triable.

PARTIES

3. Plaintiff Darryl Lewis is an American citizen currently residing and domiciled in Smyrna, Georgia. He works as a security advisor. He has previously served in the United States military.

4. Defendant Kalev Mutond ("Kalev") is the General Administrator of the Congolese secret police, the Agence Nationale de Renseignements ("ANR"). At all times relevant to the events in this complaint he exercised full authority and control over the ANR and its members and they acted under his direction and control. He was at all times responsible for giving orders to and supervising all ANR personnel. He also participated personally in activities constituting detention, interrogation, and torture of Mr. Lewis. Defendant Kalev is sued here in his individual capacity.

5. Defendant Alexis Tambwe[1] Mwamba ("Tambwe") is the Minister of Justice in the DRC (his full formal title is "Ministre de la Justice, Garde des Sceaux et Droits Humains"). At all times relevant to the events in this complaint he exercised authority over the Ministry of Justice, with full authority over decisions to try detainees. On information and belief he was involved in or responsible for decisions whether to detain, charge, try, or release Mr. Lewis. On information and belief, he and his subordinates acted in concert with Defendant Kalev and his subordinates at the ANR to have Mr. Lewis detained, tortured, interrogated, and threatened with indefinite imprisonment on false charges, all to attempt to obtain false

[1] This name is sometimes spelled "Thambwe."

confessions to support a false accusation that American mercenaries were infiltrating the DRC to overthrow the government. Defendant Tambwe is sued here in his individual capacity.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), because this action arises under the laws of the United States, namely, the TVPA. This Court also has jurisdiction under 28 U.S.C. § 1332(a)(2), because Plaintiff is domiciled in Georgia, Defendants are citizens of a foreign state (the DRC), and the amount in controversy exceeds $75,000 in that Plaintiff seeks to recover no less than $4,500,000 for the harms caused to him by the Defendants.

7. Jurisdiction over Defendants will be proper under Fed. R. Civ. P. 4(k)(2) following the completion of service of process.

8. Venue in this Court is proper under 28 U.S.C. § 1391(c)(3), because the Defendants are not residents of the United States and may be sued in any judicial district.

GENERAL ALLEGATIONS

History of Torture by Members of the ANR

9. The DRC is a constitutional republic.

10. Torture is a crime and is unconstitutional in the DRC.

11. However, the United States Department of State has determined that ANR personnel have long been involved in human rights violations, including torture. *See, e.g.*, U.S. Department of State, "Democratic Republic of the Congo 2015 Human Rights Report," *available at* www.state.gov/documents/organization/252881.pdf (last visited July 26, 2016).

12. International aid organizations, such as the Red Cross, are allowed to access and evaluate the conditions of legitimate, lawful government detention facilities in the

DRC. However, these organizations have not been able to access illegal detention facilities run by the ANR.

13. Under DRC law, detainees must appear before a magistrate within 48 hours, be read their rights, and be permitted to contact their families and attorneys. However, the ANR holds suspects in *incommunicado* detention in illegal facilities. Such detention, including the detention at issue here, occurs at the direction of or with the knowledge and consent of Defendants, who could prevent such detention.

14. Security personnel in the ANR arrest and detain perceived opponents and critics, often under the pretext of national security, without charging individuals or permitting access to an attorney.

15. Domestic human rights non-governmental organizations (NGOs) have been subjected to harassment, detention, and other abuses when reporting on abuses by the ANR.

16. Amnesty International has received many reports of torture and maltreatment of individuals under detention by the ANR. Institute for War & Peace Reporting, ACR Issue 220 at 6. ANR's activities are characterized by "flagrant and routine abuse[s] of human rights" that "can range from simple beatings to being ordered to lie down and stare into the sun for hours on end." *Id.*

17. There are numerous documented instances of torture by members of the ANR over just the last few years. On information and belief, Defendants directed, participated in, or knew of and supported this pattern of torture.

Detention and Torture of Mr. Lewis

18. On April 24, 2016, Mr. Lewis was working in the DRC in Lubumbashi as an unarmed security advisor to Moise Katumbi, an opposition leader and former governor of the Katanga Province, who is currently a candidate for president of the DRC.

19. At around 2:00 pm, near a political rally attended by Mr. Katumbi, the car in which Mr. Lewis and a colleague were riding and a second car with two other colleagues were stopped and surrounded by Congolese riot police. All four colleagues were unarmed and were breaking no laws. All were detained solely because of their association with Mr. Katumbi. Mr. Lewis was the only American among them.

20. Several members of the ANR arrived shortly thereafter. These persons pulled Mr. Lewis and his three colleagues out of their cars and confiscated their possessions, physically assaulted Mr. Lewis and his colleagues, handcuffed Mr. Lewis to one of his colleagues, handcuffed another of his colleagues, and forced them all back into the cars. In this process these members of the ANR slammed a car door on Mr. Lewis's left elbow. One of the ANR members repeatedly yelled at Mr. Lewis, falsely accusing him of being an American mercenary soldier.

21. The ANR members used the two cars to drive Mr. Lewis and his colleagues to a jail in Lubumbashi, where they were separated from each other and incarcerated in filthy, unsanitary conditions.

22. The ANR members interrogated Mr. Lewis for three hours while physically assaulting and abusing him and inflicting extreme mental and physical pain and suffering. This included knocking Mr. Lewis around, pulling his handcuffed hands up behind his back to put extremely painful pressure on his shoulder joints while pushing him in the back of the head, and other forms of battery. The object of the interrogation was to obtain a false confession that Mr. Lewis was an American mercenary soldier.

23. Mr. Lewis speaks English as his native language and does not speak French. His captors were all native French speakers and spoke to him in French except for a few who spoke in broken English or translated to broken English.

24. During the night the ANR members brutally beat one of Mr. Lewis's Congolese colleagues while interrogating this colleague, so that in the morning this colleague could barely walk. Mr. Lewis could hear the beating and interrogation from his nearby cell. The point of the interrogation was to extract a false confession from Mr. Lewis's colleague that Mr. Lewis was an American mercenary soldier, and to cause mental suffering in Mr. Lewis. During the beating, one of the ANR members came to the window of Mr. Lewis's cell and said "You're next." Mr. Lewis experienced extreme mental suffering as a result of this threat during a period when he fully anticipated that the threats he had received would be carried out.

25. In the morning, Mr. Lewis and his colleagues were transferred to a Jeep and driven away from the jail without being informed where they were being taken or why. One of his Congolese colleagues familiar with the ANR stated that he thought that they were being transported to a remote location to be secretly executed and began weeping.

26. Instead Mr. Lewis and his colleagues were taken to an airport and transported by air to Kinshasha, where they were incarcerated and interrogated again by the ANR members at ANR headquarters.

27. During a detention that lasted six weeks, Mr. Lewis was interrogated daily by ANR members for approximately 16 hours a day.

28. Interrogations were timed to disrupt sleep and cause severe sleep deprivation for Mr. Lewis.

29. Mr. Lewis was fed no more than one meal every 24 hours and was fed at irregular and unpredictable intervals. The meals were too small to meet basic human needs. By these means the ANR members were slowly starving Mr. Lewis while interrogating him.

30. Despite his daily requests for basic toiletries such as soap, Mr. Lewis was denied the necessities for basic hygiene.

31. Roughly ten days after Mr. Lewis was first detained, during his incarceration in Kinshasha, Defendant Kalev threatened him, "Don't let me find out you're a mercenary," saying in effect that Mr. Lewis would suffer greatly once a false confession was extracted, and that he would be sent to prison indefinitely.

32. At a press conference on May 4, 2016, Defendant Tambwe accused Mr. Lewis of being a mercenary sent to assassinate President Kabila. Margaret Brennan, CBS News, "CBS Exclusive: Family of American security contractor jailed in Congo pleads for his freedom" (May 19, 2016) (*available at* http://www.cbsnews.com/news/cbs-exclusive-family-of-american-security-contractor-jailed-in-congo-pleads-for-his-freedom/) (last visited July 27, 2016).

33. Defendant Tambwe stated at the May 4, 2016 press conference that he ordered the general prosecutor of the DRC to open a judicial case against Mr. Katumbi over "documented proof" that American and South African mercenaries, including Mr. Lewis, were working for Katumbi in the Katanga province. Elsa Buchanan, *International Business Times*, "DRC: US 'deeply concerned' as Moise Katumbi asks for UN intervention over 'imminent arrest'" (May 6, 2016) (*available at* http://www.ibtimes.co.uk/drc-us-deeply-concerned-moise-katumbi-asks-un-intervention-over-imminent-arrest-1558585) (last visited July 27, 2016).

34. Defendant Tambwe "showed as evidence pictures of an American, Darryl Lewis, who was arrested last month in Lubumbashi, carrying a machine gun. Mr. Lewis served in the United States military several years ago and the picture was apparently an old one, taken from a social media account." Jeffrey Gettleman, "Congo Lurches Toward a New Crisis as Leader Tries to

Crush a Rival," *The New York Times* (May 12, 2016, A1), *available at* http://www.nytimes.com/2016/05/12/world/africa/congo-moise-katumbi-joseph-kabila.html (last visited July 26, 2016).

35. Defendant Tambwe asserted that 600 United States citizens, mostly men, and some ex-soldiers had entered the DRC since October 2015, including Mr. Lewis, and falsely insinuated that these persons including Mr. Lewis were part of a supposed plot by Mr. Katumbi to destabilize the DRC. Ryan Rifai, Al Jazeera, "DR Congo cracks down on 'foreign mercenaries'" (May 4, 2016) (*available at* http://www.aljazeera.com/news/2016/05/dr-congo-cracks-foreign-mercenaries-160504150108710.html) (last visited July 27, 2016).

36. Defendant Tambwe specifically trumpeted the detention of Mr. Lewis, and stated that other United States veterans had been staying at residences owned by Mr. Katumbi "for reasons that the inquiry will clarify." Yahoo! News "DR Congo announces probe into opposition use of US mercenaries" (May 4, 2016) (*available at* https://www.yahoo.com/news/dr-congo-announces-probe-opposition-us-mercenaries-145556908.html) (last visited July 27, 2016).

37. Based on information and belief, the means Defendant Tambwe was using to "clarify" a false narrative regarding former U.S. military personnel infiltrating the DRC to overthrow the government included acting in concert with Defendant Kalev and the ANR in detaining and torturing Mr. Lewis to attempt to obtain a false confession.

38. Mr. Lewis was detained for six weeks by Defendant Kalev and his subordinates for the purposes of advancing Defendant Tambwe's "inquiry" to "clarify" falsehoods.

39. On information and belief, Mr. Lewis and other Americans have been singled out by Defendants for

persecution, false accusations, mistreatment, torture, illegal detention, and/or expulsion because they are Americans and, in the case of veterans such as Mr. Lewis, because they are veterans.

40. On May 5, 2016, the United States Embassy in Kinshasa issued a statement noting the detention of Mr. Lewis and stating that "the allegations of mercenary activities" made by Defendant Tambwe "are false." Embassy of the United States, Kinshasa, Democratic Republic of the Congo, "U.S. Embassy Concerned About False Accusations of Mercenary Activities" (May 5, 2015), *available at* http://kinshasa.usembassy.gov/pr-05052016.html (last visited July 26, 2016).

41. Despite Mr. Lewis's daily requests to contact his employer and his family and to obtain counsel, he was not allowed any contact with the outside world for two weeks, at which point United States Embassy officials were allowed a supervised visit with him.

42. After the first two weeks of Mr. Lewis's incarceration, ANR members began a series of mind games intended to disorient and confuse Mr. Lewis and instill false hope. This included falsely telling him they were transporting him to see a judicial officer for a hearing, transporting him out of his cell, and then returning him to his cell with no hearing.

43. ANR members also put an ANR member in Mr. Lewis's cell with him to attempt to disorient him and extract a false confession to being an American mercenary.

44. ANR members used information they obtained about the death of Mr. Lewis's brother and the sickness of his mother while he was in captivity to cause him mental distress and attempt to coerce false testimony from him.

45. After extensive diplomatic efforts and negotiation, Mr. Lewis was released on June 8, 2016.

46. Defendant Tambwe continues to threaten Mr. Katumbi and those associated with him by using a false narrative that Mr. Katumbi hired American mercenaries, and has continued to rely on the detention of Mr. Lewis as supposed evidence of this narrative. Defendant Tambwe has recently threatened Mr. Katumbi, who is currently abroad, with imprisonment if he returns to the DRC. *See* Abdur Rahman Alfa Shaban, "DRC jail awaits Katumbi if he returns—Justice Minister," *available at* http://www.africanews.com/2016/07/25/drc-jail-awaits-katumbi-if-he-returns-justice-minister/ (last visited July 26, 2016).

47. During the six weeks of Mr. Lewis's detention and interrogation, he was not charged with any crime.

48. The conditions of Mr. Lewis's detention were illegal and unconstitutional under the DRC constitution.

49. At all times during the detention of Mr. Lewis, either Defendant could have ordered that Mr. Lewis be released from custody and protected against or otherwise have avoided torture.

50. Defendants each knew or should have known of and could have prevented the torture of Mr. Lewis and failed to do so.

51. Defendants are jointly and severally liable for the damages claimed herein.

52. Although the Defendants acted under apparent authority or color of Congolese law at all times relevant to the acts alleged in this complaint, the Defendants' acts in the torture of Mr. Lewis were *ultra vires* and not authorized by law, because torture is a crime and is unconstitutional in the DRC.

53. Mr. Lewis continues to suffer mental anguish and physical pain caused by torture by the defendants, including continuing mental distress and damage to his left elbow and both wrists.

FIRST CAUSE OF ACTION

TORTURE VICTIM PROTECTION ACT

54. Plaintiff realleges and incorporates the allegations stated in the preceding paragraphs.

55. Defendants at all times used their respective positions of authority to act under apparent authority or color of law of the DRC with respect to the actions alleged in this complaint.

56. Defendants' actions and/or failure to act included or allowed torture of Mr. Lewis, including but not limited to the infliction of severe physical and mental pain and suffering on Mr. Lewis for the purpose of extracting false confessions.

57. Mr. Lewis's pain and suffering are compensable in damages in an amount not less than $1,500,000, and he should be awarded punitive damages in an amount not less than $3,000,000.

58. Plaintiff has no adequate and available remedies in the Democratic Republic of the Congo. ANR members have engaged in torture for many years with impunity and are not subject to any effective judicial oversight that would provide an adequate remedy to Mr. Lewis. Defendants operate above the law and are in positions of authority that would render any attempt to seek judicial remedies against them in the DRC entirely futile. Moreover, Mr. Lewis would be putting himself in grave physical danger if he were to return to the DRC to seek relief there.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully seeks:

1. Compensatory damages in an amount not less than $1,500,000;

2. Punitive damages in an amount not less than $3,000,000;

3. An award to the Plaintiff of his costs and reasonable attorneys' fees; and

4. Such other and additional relief as the Court deems just and equitable.

DATED this 29th day of July 2016.

Donald R. Pongrace
(D.C. Bar No. 445944)

/s/ Merrill C. Godfrey
Merrill C. Godfrey
(D.C. Bar No. 464758)
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000
mgodfrey@akingump.com

Attorneys for Plaintiff Darryl Lewis

APPENDIX E

[Seal of the Democratic Republic of Congo]

Embassy of the Democratic Republic of the Congo
To the United States of America
Washington, D.C.

N. V. N 132.62/A1/ *0020* /2016

The Embassy of the Democratic Republic of the Congo to the United States of America presents its compliments to the United States Department of State and has the honor to address a recent complaint filed in the United States District Court for the District of Columbia by Mr. Darryl Lewis, a U.S. citizen against whom legal charges are pending in the Democratic Republic of the Congo (D.R.C.). The Government of the D.R.C. is deeply concerned about Mr. Lewis' allegations in this complaint that he was subjected to inappropriate treatment while detained in the D.R.C. between April 24 and June 8 of this year. Given that U.S. Government officials had regular access to Mr. Lewis and were present during his questioning by D.R.C. law enforcement officials, the Embassy of the D.R.C. requests your immediate assistance in affirming certain facts pertaining to this matter that attest to its proper handling by the Government of the D.R.C.

As you know, Mr. Lewis was detained by D.R.C. law enforcement officials on April 24 when it was found that he was employed as a personal security agent without having been granted the required work permit. It was later discovered that he had applied for a visa to enter the D.R.C. for the purpose of teaching farming skills, another violation of law since no evidence exists to suggest that he undertook such activities while in the D.R.C. Note that our law does not allow the former military, former police officers or former members of the intelligence services to make use of private guarding services.

Soon after Mr. Lewis' detention, D.R.C. law enforcement officials communicated with the U.S. Embassy in Kinshasa, provided access by U.S. officials to Mr. Lewis, and permitted U.S. officials to be present during interrogations of Mr. Lewis that were required to determine whether charges should be filed against him. At no time during Mr. Lewis' detention did the U.S. Embassy raise concerns with the Government of the D.R.C. that Mr. Lewis was being treated inappropriately. In addition, upon receiving an appeal from the State Department on behalf of Mr. Lewis' family that he be released and allowed to return to the United States pending further legal proceedings, D.R.C. law enforcement authorities did so as a humanitarian and goodwill gesture on June 8.

The Government of the D.R.C. has now learned that, almost two months after reaching back the U.S. Soil, Mr. Lewis has filed a complaint alleging that D.R.C. officials illegally detained and tortured him, charges that are completely at odds with the circumstances of his detention and release. It is also at odds with the record of communications between both governments on this matter, during no concerns were raised by US. Officials about Mr. Lewis' treatment or condition. Consequently, The Embassy of the D.R.C. requests on behalf of the Government of the D.R.C. that the State Department promptly and publicly acknowledge that it did indeed have access to Mr. Lewis during his detention and that during that period concerns regarding the alleged mistreatment of Mr. Lewis were not raised.

We must also note recent media reports stating that in filing his legal complaint, Mr. Lewis is represented by the U.S. law firm of Akin Gump Strauss Hauer & Feld, and in particular by Mr. Donald Pongrace. The Embassy of the D.R.C. understands that this firm has also registered under the U.S. Foreign Agents Registration Act (FARA) as an agent of Mr. Moise Katumbi on matters

pertaining to the D.R.C., per a letter contract signed by Mr. Pongrace. In addition, this law firm has acknowledged in publicly-available FARA submissions that it receives support from Jones Group International, a private security company where Mr. Lewis worked as a security advisor and through which he was employed by Mr. Katumbi.

Given these circumstances – including comments by Mr. Lewis' attorney that recently appeared in U.S. publications – The Embassy of the D.R.C. expects that both the State Department and the U.S. Department of Justice will ensure that these companies and their employees comply with appropriate U.S. laws and regulations, including the reporting of all activities that, per U.S. FARA regulations, "in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting or changing the domestic or foreign policies of the United States or with reference to political or public interests, policies, or relations of a government of a foreign country or a foreign political party."

We trust that, given the detrimental and spurious allegations made against the government of the D.R.C. by Mr. Lewis and his attorneys, the State Department will take immediate steps to address our concerns, including to publicly acknowledge the constructive and appropriate manner in which Mr. Lewis' detention was addressed by both governments.

The Embassy of the Democratic Republic of the Congo to the United States of America avails itself of this opportunity to renew to the United States Department of State the assurances of its highest consideration. [Signature]

[Seal of the Democratic
Republic of the Congo]

Washington, D.C. August 09, 2016

- The United States Department of State
- H.E. Linda Thomas Greenfield, Assistant Secretary for African Affairs

APPENDIX F

[Seal of the Democratic Republic of Congo]

Embassy of the Democratic Republic of the Congo
To the United States of America
Washington, D.C.

N. V. N 132.62/A1/ *0052* /2016

The Embassy of the Democratic Republic of Congo to the United States of America presents its compliments to the United States Department of State and wishes to draw the State Department's attention to a lawsuit brought in a U.S. court against two senior D.R.C. government officials: Alexis Thambwe Mwamba, Minister of Justice, and Kalev Mutond, Director General of the National Intelligence Agency. The case is captioned *Lewis v. Mutond*, No. 1:16-cv-1547 (D.D.C. filed July 29, 2016). The Government of the Democratic Republic of Congo (D.R.C.) respectfully requests that the United States Government submit to the court a suggestion of immunity on behalf of Messrs. Thambwe and Mutond because all of the alleged conduct at issue in the lawsuit was performed exclusively in their respective official capacities.

As the United States Government is aware, the plaintiff in this lawsuit, Darryl Lewis, was detained by D.R.C. law enforcement officials on April 24, 2016, upon the discovery that Mr. Lewis was unlawfully employed in the D.R.C. as a personal security agent. Mr. Lewis, a former member of the U.S. military, had entered the D.R.C. with an improper visa on the pretense of teaching farming skills. He in fact served as a personal security agent to Moise Katumbi, in violation of D.R.C. law prohibiting former foreign and national military members, former police officers, and former security service members from serving in such a role.

Promptly after Mr. Lewis was detained, D.R.C. law enforcement officials communicated with the U.S. Embassy in Kinshasa, provided U.S. officials with access to Mr. Lewis, and permitted U.S. officials to be present during interrogations of Mr. Lewis, interrogations which were necessary to determine whether charges should be filed against him. At no time during Mr. Lewis's detention did the U.S. Embassy raise concerns about his treatment.

On June 8, 2016, Mr. Lewis was released and permitted to return to the United States. In a statement to the press that day, U.S. Ambassador James Swan publicly thanked the D.R.C. government "for having respected their obligation to allow our Embassy to pay consular visits to him during his detention." Mr. Lewis's counsel likewise said that the D.R.C. justice system "functioned properly" and "treated [Mr. Lewis] with dignity" throughout "the whole process of the investigation." A certified English translation of these statements is enclosed.

In contradiction of these statements, Mr. Lewis's U.S. lawsuit alleges that he was illegally detained and tortured at the behest of Messrs. Thambwe and Mutond in violation of the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note). The lawsuit raises detrimental and spurious allegations that are flatly controverted by U.S. officials' own observations of Mr. Lewis's treatment, contemporaneous statements of Mr. Lewis's counsel, and the record of communications between the D.R.C. and U.S. governments.

Furthermore, any actions Messrs. Thambwe's and Mutond's took or statements they made in connection with Mr. Lewis's detention was in their official capacities. The complaint contains many fabrications, but even accepting the allegations as true (which they are not), they describe official acts. For example, the complaint alleges

that Minister Thambwe's liability arises out of his "decisions whether to detain, charge, try, or release Mr. Lewis." The complaint further cites public statements made by Messrs. Thambwe and Mutond in their official capacities in which they discussed the situation involving Mr. Lewis.

This lawsuit accordingly raises significant concerns by seeking to impose personal liability on the D.R.C.'s sitting Minister of Justice and Director General of the National Intelligence Agency based on alleged conduct undertaken in their official capacities.

Taking into account the present circumstances and the United States Government's past practice regarding submission of suggestions of immunity on behalf of foreign officials in lawsuits relating to their official acts, the Government of the Democratic Republic of Congo respectfully requests that the United States Government promptly submit a suggestion of immunity in the *Lewis v. Mutond* suit.

The Embassy of the Democratic Republic of Congo to the United States of America avails itself of this opportunity to renew to the United States Department of State the assurances of its highest consideration. [Signature]

[Seal of the Democratic Republic of the Congo]

Washington, D.C. August 09, 2016

Enclosure

- The United States Department of State
- H.E. Linda Thomas Greenfield, Assistant Secretary for African Affairs

APPENDIX G

The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note) provides:

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.—For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.