RECENT DEVELOPMENTS

Lewis v. Mutond: The Role of Separation of Powers Doctrine in International Human Rights Law

I. OVERVIEW

An American citizen alleged that two officials from the Democratic Republic of the Congo (DRC) imprisoned him and subjected him to various forms of mental and physical torture over a six-week span without ever charging him with a crime.[1] In the spring of 2016, Darryl Lewis, a former United States airman, was working as security advisor to Moise Katumbi, a former Katanga Province governor and DRC presidential candidate.[2] On April 24, Lewis was traveling to a campaign event with colleagues when their vehicles were apprehended by the DRC's National Intelligence Agency, Agence Nationale de Renseignements (ANR).[3] ANR agents arrested the men, interrogated them, and accused Lewis of being an American mercenary.[4] The next morning, they were forcibly taken over 1400 miles from Lubumbashi, in the southernmost region of the country, to the western border city of Kinshasa.[5] For the following six weeks, Lewis claims he was interrogated for sixteen hours daily and denied food, sleep and access to basic hygiene.[6]

Lewis brought his claim to federal court against two named DRC government officials.[7] Lewis alleged that defendant Kalev Motund, General Administrator of the ANR, was involved in his detention, at one point threatening him: "Don't let me find out you're a mercenary."[8] In a

1. Lewis v. Motund, 918 F.3d 142, 144 (D.C. Cir. 2019).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

press conference on May 4, 2016, defendant Alexis Thambwe Mwambra, DRC's Minister of Justice, publicly named Lewis as a mercenary sent to assassinate the sitting president, claiming he had "documented proof."[9] While the United States Embassy in Kinshasa condemned the remarks the following day, Lewis was not released until June 8, 2016, having never been formally charged with a crime.[10]

The plaintiff brought his action seeking compensatory and punitive damages to the United States District Court for the District of Columbia.[11] His complaint asserted that the defendants are liable under the Torture Victims Protection Act of 1991 (TVPA), which creates an express cause of action against individuals who torture under actual or apparent authority or color of law of a foreign government.[12] The defendants moved to dismiss for lack of subject matter jurisdiction, arguing that they were acting in their official government capacity and therefore immune to the suit.[13] The District Court granted the motion to dismiss, which Lewis appealed.[14] The United States Court of Appeals for the District of Columbia *held* that the defendants did not satisfy the necessary elements for conduct-based immunity under the common law. *Lewis v. Motund*, 918 F.3d 142, 147 (D.C. Cir. 2019).

II. BACKGROUND

The TVPA was enacted in 1992 after six years of debate and committee hearings, in response to a worldwide push to end torture led by the United Nations (U.N.).[15] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted, with strong support from the United States, by the U.N. General Assembly on December 10, 1984.[16] The Convention was signed by the United States on April 18, 1988, and ratified by the U.S. Senate on October 27, 1990.[17] The Convention called for ratifying nations to adopt measures ensuring that torturers be held accountable for their actions.[18]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 144-45.
13. *Id.* at 145.
14. *Id.*
15. *See* H.R. REP. 102-367 (Nov. 25, 1991).
16. *See generally* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 39 U.N.T.S. 46.
17. S. TREATY DOC. NO. 100-20 (1990).
18. *See* H.R. REP. 102-367, art. 2.

In addition to the call for enforcements against torture from the U.N, the United States Congress found that, while noble in theory, customary international law banning torture was not enough to eradicate the practice.[19] Congress agreed that torture should have real consequences, and in drafting the TVPA, created an express cause of action for torturers to be civilly sued in U.S. courts.[20] This Act expanded upon a preexisting U.S. law, the Alien Tort Claims Act, which created a cause of action for civil remedies for non-U.S. citizens to seek justice in U.S. courts if no other system was available to them.[21] The TVPA extended the civil remedies to U.S. citizens tortured abroad.[22]

The TVPA remained subject to the restrictions found in the Foreign Sovereign Immunities Act of 1976 (FSIA).[23] Namely, the TVPA would not create a cause of action against a foreign state itself or an "agency or instrumentality" of a foreign state, only individuals.[24] Additionally, the TVPA would not override the doctrines of sovereign or diplomatic immunity.[25]

As the constitutionality of the TVPA has not been questioned, the U.S. Supreme Court has rarely interpreted it.[26] The two most noteworthy cases on the law are *Jesner v. Arab Bank, PLC*, which declined to extend the definition of "individuals" to foreign corporations in the context of the TVPA, and *Samantar v. Yousef*.[27] In *Samantar*, the Court held that an individual foreign official is not a "foreign state" or an "agency or instrumentality" of a foreign state for jurisdictional purposes.[28] In that case, Somali respondents residing in the United States sued the petitioner, a former Somali government official, under the TVPA and Alien Tort

19. *See id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. 28 U.S.C. § 1603 (1976).
24. *Id.*
25. *See* H.R. REP. 102-367 (Nov. 25, 1991).
26. A Westlaw Edge search for Supreme Court cases mentioning "TVPA" returns only seven case results. *Search Results for TVPA Supreme Court Cases*, Westlaw Edge (last visited Jan. 13, 2020) (narrow search jurisdiction to United States Supreme Court and enter "TVPA" in the search bar). The same search on Lexis Advance returns only five cases as of January 13, 2019. *Search Results for TVPA Supreme Court Cases, Lexis Nexus*, Lexis Advanced (last visited Jan. 13, 2020) (search for "TVPA," starting in cases within the jurisdiction of the United States Supreme Court).
27. Jesner v. Arab Bank, 138 S. Ct. 1386, 1405 (2018); Samantar v. Yousef, 560 U.S. 305 (2010).
28. *Samantar*, 560 U.S. at 316.

Statute.[29] The Somali official, who had previously served as First Vice President, Minister of Defense, and Prime Minister, claimed sovereign immunity under the FSIA.[30] The official argued that when a statute, like the FSIA, is clearly a congressional attempt to codify the common law, the statute should be interpreted consistently with the common law.[31]

The common law for foreign official immunity, developed long before the FSIA's enaction in 1976, required courts to conduct a two-part test.[32] First, did the State Department request foreign diplomatic immunity for this person?[33] If so, the court would abandon its jurisdiction.[34] If not, the court could decide for itself whether all the requisite elements of foreign official immunity had been established by the defendant.[35]

When the coverage of a statute descended from the common law is ambiguous, the court must determine whether Congress's intent was to codify the common law, or to displace it.[36] By looking to the legislative history, the Court saw no intent by Congress to replace the common law, nor to suggest a reading of the FSIA in which "foreign state" could be interpreted to include individual officials of a foreign state.[37] The FSIA codified a restrictive theory of foreign official immunity, applying the prima facie meaning for foreign state: a political body governing a defined territory.[38] For two additional reasons, the Court found that the FSIA did not automatically govern the jurisdiction of the district court: first, because the plaintiff-respondents, by suing the former official in her personal capacity, were not seeking renumeration from the state treasury; and second, because the State Department had not recommended foreign official immunity.[39] Therefore, the Court remanded so that the district court could look to the common law and decide for itself whether the official was entitled to diplomatic or sovereign immunity.[40]

While all U.S. circuit courts have not been called upon to apply the *Samantar* test, the U.S. Court of Appeals for the Second Circuit has applied the *Samantar* test on several occasions, repeatedly applying the

29. *Id.* at 308.
30. *Id.*
31. *Id.* at 320.
32. *Id.* at 311-12.
33. *Id.*
34. *Id.*
35. *Id.* at 321.
36. *Id.* at 320.
37. *Id.* at 321.
38. *Id.* at 314.
39. *Id.*
40. *Id.* at 325-26.

following definition of "foreign state" to the FSIA: "an entity bearing the 'attributes of statehood,' which include a defined territory and population, self-governance and foreign relations, and the capacity to wage war and to enter into international agreements."[41] In *Kirschenbaum v. 650 Fifth Ave.*, the court held a foundation linked to the pre-Revolution Iranian government could not be immune to jurisdiction as an agency or instrumentality of a foreign state.[42] The Second Circuit has applied the definition of "foreign state" as narrowly as possible, finding that the government of Palau was not a foreign state within the meaning of the FSIA because, as a U.S. Trust Territory, it lacked the ability to participate fully in international treaties and diplomatic relations, despite all its markers of independent statehood.[43] The Second Circuit similarly declined a Palestinian claim of immunity under the FSIA because it did not meet the definition of "foreign state," which requires a defined territory and permanent population.[44] That is not to say that the Second Circuit has always barred claims of diplomatic immunity.[45] In *Matar v. Dichter*, that court held that the former Director of Israel's General Security Service was immune to jurisdiction under the common law.[46] However, in that case, the court deferred to urging from the executive branch to decline jurisdiction, raising a separation of powers issue rarely seen in this caselaw.[47]

Prior to the *Samantar* decision, the U.S. Court of Appeals for the D.C. Circuit held that "an individual can qualify as an agency or instrumentality of a foreign state."[48] In *El-Fadl v. Central Bank of Jordan*, the court refused jurisdictional discovery for a claim against the Deputy Governor of the Central Bank of Jordan, instead granting him foreign official immunity because he was only acting in his official capacity when the circumstances incident to the case arose.[49] Also applying the common law, in *Belhas v. Moshe Ya'Alon*, the D.C. Circuit granted immunity to a former Israeli General when plaintiffs brought suit under the TVPA and

41. Kirschenbaum v. 650 Fifth Ave., 830 F.3d 107, 125 (2d Cir. 2016).
42. *Id.* at 142.
43. Morgan Guar. Tr. Co. of N.Y. v. Republic of Palau, 924 F.2d 1237, 1243-44 (2d Cir. 1991).
44. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 47 (2d Cir. 1991).
45. *See, e.g.*, Matar v. Dichter, 563 F.3d 9, 16-17 (2d Cir. 2009).
46. *Id.*
47. *Id.*
48. El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir 1996).
49. *Id.*

Alien Tort Claims Act.[50] In that case, the court held that the FSIA did not extend jurisdiction over the General for actions committed by the State of Israel during hostile operations and who bears "at most a tangential relationship to the events at issue."[51] While plaintiffs argued that the TVPA abrogates the FSIA to the extent it applies to individuals, the court disagreed, demonstrating that the language and legislative history of the TVPA show that Congress intended the TVPA be subject to the restrictions in the FSIA, not override it.[52]

After the *Samantar* test was established, the D.C. Circuit applied it in conjunction with the common law and analysis of legislative history.[53] For example, in *Manoharan v. Rajapaksa*, the court held the former president of Sri Lanka was entitled to diplomatic immunity under the first prong of the *Samantar* test, because he requested a suggestion of immunity from the Department of State, which was granted.[54] The court went on to explain that because the TVPA was not intended to displace the common law, the defendant was clearly entitled to head of state immunity, even without the suggestion of the State Department.[55]

III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the District of Columbia Circuit relied on both the *Samantar* test and an application of common law to determine the Congolese officials were not automatically entitled to diplomatic immunity.[56] In its analysis, the court asserted that the FSIA is not relevant to the case because it involves foreign officials, not foreign states.[57] The court distinguished between conduct-based immunity and status-based immunity with definitions pulled from a 2010 article entitled *The Common Law of Foreign Immunity*.[58] Status-based immunity applies to foreign diplomats and heads of state and attaches "regardless of the substance of the claim."[59] Conduct-based immunity, on the other hand, as defined in the Second Restatement of Foreign Relations Law, is granted

50. Belhas v. Moshe Ya'Alon, 515 F.3d 1279, 1281 (D.C. Cir. 2008).
51. *Id.* at 1283.
52. *Id.* at 1289.
53. *See, e.g.*, Manoharan v. Rajapaksa, 711 F.3d 178, 180 (D.C. Cir. 2013).
54. *Id.*
55. *Id.*
56. Lewis v. Motund, 918 F.3d 142, 144 (D.C. Cir. 2019).
57. *Id.* at 145.
58. Chimene I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 64 (2010).
59. *Id.*

to "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."[60] Because the two defendants in this case are government officials, not heads of state or diplomats, only conduct-based immunity could potentially apply to them.[61]

The court then applied the *Samantar* test, first asking whether the U.S. State Department ever sent a suggestion of immunity to the court.[62] While the defendants did request such a suggestion, on August 9, 2016, and again on December 3, 2016, the State Department never issued one.[63] Turning to step two of the *Samantar* test, the court asked whether the defendants satisfied the requirements for conduct-based immunity.[64] In their briefs, both parties asserted that the Second Restatement of Foreign Relations Law section 66 correctly sets out the scope of the common-law immunity applicable to current or former foreign officials, so instead of searching for other applicable laws, the court considered the three factors from section 66(f).[65] The Restatement extends immunity to (1) a public minister, official, or agent of the state, (2) with respect to acts performed in his official capacity, (3) if the effect of exercising jurisdiction would be to enforce a rule of law against the state.[66] All three elements must be met for immunity to be extended.[67]

The court only addressed the third element, concluding that defendants did not prove that exercising jurisdiction would be "tantamount to enforcing a rule of law against the DRC itself."[68] Because the plaintiff did not seek to draw from the DRC's financial reserves or force the DRC government to take a specific remedial action, and because the defendants were being sued in their individual capacities, exercising jurisdiction would not, in effect, enforce a rule of law against the DRC.[69]

In conclusion, the court vacated the lower court's grant of defendant's motion to dismiss for lack of subject matter jurisdiction and remanded the case for further proceedings.[70] The court made no findings on the district

60. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (AM LAW INST. 1965).
61. *Lewis*, 918 F.3d at 145.
62. *Id.*
63. *Id.* at 145-46.
64. *Id.* at 146.
65. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66.
66. *Id.*
67. *Id.*
68. *Lewis*, 918 F.3d at 146.
69. *Id.*
70. *Id.* at 147.

court's personal jurisdiction over the defendants, but advised the lower court to consider whether the plaintiffs were entitled to jurisdictional discovery, or whether the defendants were correct in asserting the court did not have personal jurisdiction over them.[71]

Senior Circuit Judge Randolph concurred with the judgement.[72] However, he took issue with two arguments from the opinion: first, whether the question of foreign official immunity under the TVPA "turns on the common law," and second, whether the Restatement is an accurate representation of the common law.[73] The Restatement does not claim to be a digest of common law; instead it combines case law, international treaties, scholarly articles, negotiated settlement agreements, and executive actions to set forth rules of international law, as *distinguished* from various domestic law systems.[74] The limited body of caselaw referring to the immunity of foreign officials to U.S. jurisdiction implies that there may not be an applicable common law at all.[75] Secondly, Senior Judge Randolph illustrated that section 2 of the TVPA does away with the Nuremberg defense in cases involving torture, requiring that 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."[76] The plain language seems to conflict with the Restatement, as the TVPA would hold accountable actors who, acting with foreign authority, subject others to torture, inclusive of those acting within the scope of their employment.[77] Therefore, the immunity of foreign officials, including heads of state, may remain a jurisdictional question under existing precedent.[78]

Circuit Judge Srinivasan also concurred in the judgement, holding in the alternative that the defendants do not qualify for immunity, either under the common law as stated in the opinion, or because the allegations in the complaint are outside the scope of the TVPA, as asserted in Judge Randolph's concurrence.[79]

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71. *Id.* at 147-48.
72. *Id.* at 148 (Randolph, J., concurring).
73. *Id.* (Randolph, J., concurring).
74. *Id.* at 149 (Randolph, J., concurring) (emphasis added).
75. *Id.* (Randolph, J., concurring).
76. *Id.* (Randolph, J., concurring).
77. *Id.* at 149-50 (Randolph, J., concurring).
78. *Id.* (Randolph, J., concurring).
79. *Id.* at 148 (Srinivasan, J., concurring).

IV. ANALYSIS

As the United States Court of Appeals for the Second Circuit held in 1980, "[O]fficial torture is now prohibited by the law of nations."[80] However, the United States does not practice the gold standard when it comes to prohibiting torture on our own soil.[81]

While in the opinion for the noted case, the D.C. Circuit prioritized human rights and protecting the right of an American citizen to recover under the TVPA, that was not necessarily the predictable outcome.[82] To determine whether the DRC officials were immune to suit, the district court conducted the *Samantar* analysis and concluded 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."[83] While the D.C. Circuit court did not provide analysis for the first two factors, they came to the opposite legal conclusion for factor three with a truncated explanation of the defendants' failure to show the suit would impact the DRC's sovereignty.[84]

Looking at the relevant caselaw in the aggregate, it appears the judicial decision whether to grant foreign official immunity is less dependent on satisfying a list of factors, turning more on whether the nation whose officer is being sued is friend or foe to the United States.[85]

The *Samantar* test itself demonstrates this bias, by granting jurisdictional immunity whenever the State Department recommends it.[86] If the State Department weighs the existing relationship between the United States and a foreign nation as more important than the allegations of torture within that nation's borders, then any legal recourse for the victims of torture can be stripped away with a written suggestion.[87] Compare the holding in the noted case with the holdings of *Matar* and *Belhas*.[88] In the noted case, the State Department refused to respond to the Congolese defendants' request for a recommendation of immunity, but

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80. Filartiqa v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

81. *See* Muneer I. Ahmad, *Resisting Guantanamo: Human Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009).

82. Torture Victims Protection Act of 1991, Pub. L. 102-256 (codified at 28 U.S.C. 1350 (1992)).

83. Lewis v. Motund, 258 F. Supp. 3d 168, 172 (D.D.C. 2017).

84. *Lewis*, 918 F.3d at 147.

85. Matar v. Dichter, 563 F.3d at 16-17 (2d Cir. 2009). *Compare Lewis*, 918 F.3d at 146, *with* Belhas v. Moshe Ya'Alon, 515 F.3d 1279, 1281 (D.C. Cir. 2008).

86. Samantar v. Yousef, 560 U.S. 305, 311 (2010).

87. *Matar*, 563 F.3d at 16-17; *Belhas*, 515 F.3d at 1281.

88. *See* Filartiqa v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

when defendants in similar cases were Israeli, the State Department quickly sent recommendations and immunity was ultimately granted.[89] One could conclude that when the parties injured are not American citizens, or when the parties sued are from closely allied nations, like Israel, the State Department is notably less concerned about enforcing international and domestic laws against torture.[90]

Additionally, Judge Randolph in his concurrence makes two crucial points on the conflict between the TVPA and the "common law" Restatement.[91] First, assuming that the Second Restatement for Foreign Relations Law, or any restatement, is an accurate representation of common law, is dangerous.[92] While the common law by nature builds upon itself and provides space for nuance and varied interpretation of the law, the Restatement is an aspirational code whose application requires different acumen.[93] While a Restatement may succeed in codifying most bright-line rules expressed in the common law of the topic, legal codes cannot contain the breadth or depth of the common law.[94] Nor is a Restatement necessarily impartial to the degree we expect from the judiciary—Judge Randolph points out that the executive branch State Department very well may have influenced the Restatement for Foreign Relations.[95]

Secondly, Judge Randolph's concurrence contains the stronger argument regarding the FSIA's applicability to the noted case.[96] The court concluded from the outset that the FSIA was irrelevant to the analysis of this case.[97] This can hardly be true in a case where foreign officials' immunity from suit is at issue.[98] The Supreme Court has glossed over the TVPA's plain language holding individuals acting under the authority of their respective nations accountable for their torturous actions, instead looking to the legislative history in which Congress stated the TVPA did

89. *See Matar*, 563 F.3d at 16-17; *see also Belhas*, 515 F.3d at 1281.
90. *See Matar*, 563 F.3d at 16-17; *see also Belhas*, 515 F.3d at 1281.
91. Lewis v. Motund, 918 F.3d at 149-50 (Randolph, J., concurring).
92. *Id.* at 148-49 (Randolph, J., concurring).
93. *JD Curriculum*, TULANE, https://law.tulane.edu/admissions/jd/curriculum (last visited Jan. 18, 2020). As a student at Tulane Law School, the author and many of her classmates are confronted with the unique challenges of learning to apply the common law in a civil law, code-based jurisdiction, as well as the different skills each form of analysis requires.
94. *See* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 677-78 (2000). For a detailed analysis on the differences and similarities of various legal traditions.
95. *Lewis,* 918 F.3d 142 at 149 (Randolph, J., concurring).
96. *Id.* at 150 (Randolph, J., concurring).
97. *Id.* at 145.
98. *Id.*

not displace the FSIA.[99] While legislative history shows that Congress did not *intend* to displace the FSIA with the TVPA, they nonetheless created a looping analytical structure where, in situations like in the noted case, one must yield to the other.[100] The hypothetical scenario described below demonstrates the potential for harmful ramifications resulting from this conflation.

If Congress in enacting the TVPA truly intended to preserve the FSIA in its entirety, the Nuremberg defense would have remained valid for a government official acting within the scope of his/her office, as Judge Randolph asserts in his concurrence in the noted case.[101] The United States' role in the Nuremberg trials illustrates that, as a nation and members of the international community, we do not accept a defense based in the assertion that the defendants were just doing their job.[102] However, the FSIA as it has been applied leaves room for such a defense.[103]

Consider the facts of *Matar*, in which an Israeli General was found to be immune from liability for the wrongful deaths of fourteen civilians because his actions were, as asserted by the Israeli Ambassador, "in the course of [his] official duties, and in furtherance of official policies of the State of Israel."[104] While in that case, the suit against the Israeli General was for wrongful deaths of non-American citizens, but imagine the conflict that would necessarily arise if he were being sued for the torture of American citizens under the TVPA.[105] Either the FSIA exempts the General from suit because the torturous actions were within the scope of his official duties, or the TVPA establishes liability for the General's actions under actual or apparent color of law.[106] The two laws cannot coexist and serve their unique functions.[107] The FSIA as it is written renders the TVPA toothless.[108]

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99. *See, e.g.*, Samantar v. Yousef, 560 U.S. 305, 314 (2010).

100. *See* H.R. REP. 102-367 (Nov. 25, 1991).

101. *See Lewis,* 918 F.3d at 149-50 (Randolph, J., concurring).

102. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, U.K.-U.S.-Fr.-U.S.S.R. arts. 5, 7, Mar. 15, 1951.

103. *See Lewis*, 918 F.3d at 149-50 (Randolph, J., concurring).

104. Matar v. Dichter, 563 F.3d 9, 11 (2d Cir. 2009).

105. *Id.*

106. *Id.*

107. 28 U.S.C.S. § 1330 (2019); Torture Victims Protection Act of 1991, Pub. L. 102-256 (codified at 28 U.S.C. § 1350 (1992)).

108. 28 U.S.C.S. § 1330; 28 U.S.C § 1350.

V. CONCLUSION

After Darryl Lewis was arrested, detained, and allegedly tortured by DRC officials, his right to recover for that atrocious, dehumanizing harm was placed in the hands of the federal executive branch, turning against the express intentions of Congress and usurping the independence of the judiciary.[109] While the Court of Appeals failed to analyze some important aspects of this case, including the applicability of the FSIA and the first two *Samantar* factors, the court ultimately came to the correct holding.[110] The court correctly held that the DRC officials' motion to dismiss could not be granted on the basis of head of state or diplomatic immunity. However, generally speaking, current applications of the TVPA and FSIA grant too much deference to the U.S. State Department, violating separation of powers doctrine.[111]

Additionally, the FSIA's grant of jurisdictional immunity to foreign individuals accused of torture, based on either their status as a head of state or diplomat or on their conduct being within the scope of their official duties, violates the plain text of the TVPA.[112] The United States, by ratifying the Convention Against Torture, swore to prohibit and punish torture within its borders and on the international stage.[113] If any exemptions exist, they undermine the Convention in its entirety and promulgate continued torture around the world. Because torture can effectively be allowed by a permission slip from the U.S. State Department, the first arm of the *Samantar* test should be overturned to allow for judicial review of all allegations of torture that invoke the TVPA, regardless of the wishes of the executive branch. In cases where the common law has not yet caught up to legislation and the needs of the modern world, it must be amended, especially when human rights are at stake.

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109. Lewis v. Motund, 918 F.3d 142, 144 (D.C. Cir. 2019).

110. 28 U.S.C.S. § 1330; Samantar v.Yousef, 560 U.S. 305, 314 (2010); *Lewis*, 918 F.3d at 142.

111. Catherine Powell, *Tinkering with Torture in the Aftermath of Hamdan: Testing the Relationship Between Internationalism and Constitutionalism*, 40 N.Y.U. J. INT'L L. & POL. 723, 747-48 (2008); *see also Lewis*, 918 F.3d at 142.

112. Torture Victims Protection Act of 1991, Pub. L. 102-256.

113. *Id.*

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