Devi v. Silva: Roadblocking Justice with Diplomatic Immunity

I. OVERVIEW

Under the direction of Sri Lankan Army General Shavendra Silva, the Sri Lankan military tortured and killed innocent relatives of two Sri Lankan families in early 2009.[1] Silva served as commander of the Fifty-Eighth Division of the Sri Lankan Army during the relevant time and currently serves as Sri Lanka's Deputy Permanent Representative to the United Nations.[2] In 2008, the Sri Lankan government commenced military action against the Tamil ethnic minority population including ordering the shelling of unarmed civilians in Tamil-populated areas.[3] In further pursuit of its goal, the Sri Lankan military tortured and extrajudicially killed members of the Tamil militant group, the Liberation Tigers of Tamil Eelam.[4] Thurairajasingham Devi and Siththar Sivam were two victims of the heinous military acts carried out in early 2009.[5]

Devi, survived by his widow Vathsala, was a member of the Liberation Tigers of Tamil Eelam.[6] On May 18, 2009, Devi followed the government's instructions, negotiated his surrender, and reported to a predetermined location in order to turn himself over to Silva and the Sri Lankan military.[7] Under the command and control of Silva, the members of the military tortured and killed Devi.[8]

Sivam, survived by his son Seetharam, was a postmaster before retiring to the Sri Lankan village of Suthanphirapuram.[9] On February 3,

1. Devi v. Silva, 861 F. Supp. 2d 135, 138 (S.D.N.Y. 2012), *reconsideration denied* (S.D.N.Y. Apr. 9, 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

2009, the Sri Lankan military shelled Sivam's home, severely injuring his leg.[10] While waiting to have his leg amputated at the Puthukkudiyiruppu Hospital, Sri Lankan forces shelled the hospital, killing ten people, including Sivam.[11]

Devi's widow and Sivam's son seek relief from Silva under claims of torture, cruel, degrading, and inhumane treatment, intentional infliction of emotional distress, and wrongful death.[12] In October of 2011, Silva filed for dismissal of the suit on the grounds of diplomatic immunity.[13] The United States District Court for the Southern District of New York *held* that the court lacked subject matter jurisdiction over the claims brought against Silva because Silva is entitled to immunity under the Diplomatic Relations Act and denied the plaintiff's motion for reconsideration. *Devi v. Silva*, 861 F. Supp. 2d 135, 143 (S.D.N.Y. 2012), *reconsideration denied* (S.D.N.Y. Apr. 9, 2012).

II. BACKGROUND

Before the Vienna Convention on Diplomatic Relations (Vienna Convention), the United States extended absolute immunity to diplomats from both civil suits and criminal jurisdiction by statute.[14] That statute was repealed in 1978, giving way to the Vienna Convention.[15] The United Nations opened the Vienna Convention for signatures on April 18, 1961.[16] The treaty was ratified by the United States and put into force on December 13, 1972.[17] The near universally accepted treaty grants certain privileges and immunities, especially to diplomatic agents, in order to facilitate efficiency in diplomatic relations among parties.[18] The Vienna Convention takes a functional approach to diplomatic immunity and marks an exodus from classic diplomatic immunity theories.[19] The first theory posited that the state was being personified in the individual and therefore should be awarded the highest level of dignity.[20] The second

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10. *Id.*
11. *Id.*
12. *Id.* at 139. The claims are alleged to be actionable under the Alien Tort Claims Act, the Torture Victims Protection Act, the statutory and common laws of both New York and the United States, and under customary international law. *Id.*
13. *Id.*
14. Tabion v. Mufti, 73 F.3d 535, 537-38 (4th Cir. 1996).
15. *Id.*
16. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force Dec. 13, 1972) [hereinafter Vienna Convention].
17. *Id.*
18. *Id.* pmbl., cl. 4.
19. Fernandez v. Fernandez, 545 A.2d 1036, 1043 (Conn. 1988).
20. *Id.*

theory suggested that the diplomat was symbolically on the soil of the land that sent him wherever he went and thus extraterritorially immune.[21] However, the Vienna Convention works to limit the extent to which a diplomat is immune in order to minimize abuse.[22]

Article 31 of the Vienna Convention addresses specifically that a diplomatic agent will be immune from civil jurisdiction with a few limited exceptions.[23] If the legal action is in regards to immovable property in the territory of the receiving state and not being held on behalf of the sending state, the diplomatic agent is not immune.[24] If the diplomatic agent is involved as a private person, and not on behalf of the sending state, in a succession action in the receiving state, he is not immune.[25] Also, a diplomatic agent is not immune if exercising professional or commercial activity in the receiving state outside of his official diplomatic functions.[26] In the United States, if action is brought against a diplomatic agent who is immune under the Vienna Convention, the Diplomatic Relations Act allows for immediate dismissal of the action or proceeding.[27]

A diplomatic agent, defined by the Vienna Convention, "is the head of the mission or a member of the diplomatic staff of the mission."[28] The United States Court of Appeals for the Second Circuit has expanded the definition of a diplomatic agent to include representatives of the United Nations.[29] In September of 2000, the President of Zimbabwe, Robert Mugabe, and the Zimbabwean Foreign Minister, Stan Mudenge, traveled to New York City to serve as delegates for the United Nations Millennium Summit.[30] President Mugabe was served with a complaint alleging violations of the Alien Tort Claims Act, Torture Victims Protection Act, and international human rights norms.[31] The plaintiffs, Zimbabwean nationals, alleged that they were victims of torture, assault, and execution at the hands of Mugabe.[32] The court determined that if an individual qualifies under section 11(g) of the Convention on Privileges and Immunities of the United Nations, he will be afforded the full

21. *Id.*
22. Vienna Convention, *supra* note 16, art. 31.
23. *Id.*
24. *Id.* art. 31(1)(a).
25. *Id.* art. 31(1)(b).
26. *Id.* art. 31(1)(c).
27. 22 U.S.C. § 254d (2006).
28. Vienna Convention, *supra* note 16, art. 1(e).
29. Tachiona v. United States, 386 F.3d 205, 216, 219 (2d Cir. 2004).
30. *Id.* at 209.
31. *Id.*
32. *Id.*

protection of article 31 of the Vienna Convention.[33] Therefore, even individuals serving as temporary U.N. representatives, as Mugabe was, may qualify for diplomatic immunity.[34]

The Second Circuit remained consistent to this rationale when deciding *Brzak v. United Nations*.[35] In that case, the plaintiff, Cynthia Brzak, was an American citizen working in Geneva, Switzerland, for the United Nations High Commissioner for Refugees (UNHCR).[36] Brzak contended that Ruud Lubbers, the High Commissioner, had grabbed her in a sexual manner while attending a UNHCR staff meeting.[37] Nasr Ishak, a French and Egyptian national who was also a staff member of the UNHCR, encouraged Brzak to file a complaint to the United Nations Office of Internal Oversight Services.[38] Following a report and appeal, Brzak and Ishak alleged that Lubbers and other U.N. officials retaliated against them by manipulating their work and denying them promotions.[39] The court went on to point out that it is abundantly clear that the Diplomatic Relations Act mandates "that American courts must dismiss a suit against anyone who is entitled to immunity under . . . the [Vienna Convention]."[40] Furthermore, the court reasoned that when determining whether a defendant is immune, the court must do so without giving weight to the underlying conduct that actually occurred, whether it was wrongful or not.[41]

In addition to the breadth of who is immune under the Vienna Convention, courts have also determined which actions performed by the diplomat would be within the scope of immunity.[42] Article 39 of the Vienna Convention describes generally that a person who is "entitled to privileges and immunities shall enjoy them from the moment [of appointment]," lasting until the appointment has ended.[43] The acts of such diplomat while in his official capacity will continue to be protected by immunity even after the appointment has ended.[44] The Second Circuit

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33. *Id.* at 219-20.
34. *Id.* at 216, 220.
35. 597 F.3d 107, 109-10 (2d Cir. 2010).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 113.
41. *Id.*
42. *See, e.g.*, Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004); Aidi v. Yaron, 672 F. Supp. 516 (D.D.C. 1987); Sabbithi v. Al Saleh, 605 F. Supp. 2d 122 (D.D.C. 2009); Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187 (D.D.C. 2007); Swarna v. Al-Awadi, 622 F.3d 123 (2d Cir. 2010).
43. Vienna Convention, *supra* note 16, art. 39(1).
44. *Id.* art. 39(2).

determined in *Tachiona v. United States* that diplomatic agents were still cloaked with immunity even though the actions related to the claim occurred before the diplomatic appointment.[45]

The Second Circuit pumped the brakes on the scope of immunity in *Swarna v. Al-Awadi*.[46] Vishranthamma Swarna, an Indian national, was invited to work for Badar Al-Awadi in 1996 at Al-Awadi's home in New York.[47] Al-Awadi was Third Secretary to the Permanent Mission of the State of Kuwait to the United Nations.[48] After arriving in New York to serve as a live-in domestic worker for Al-Awadi, Swarna claimed she was stripped of her passport, forced to work seventeen hours a day, seven days a week, and received 10% of the promised wages.[49] Swarna further alleged she was abused, assaulted, and repeatedly raped by Al-Awadi.[50] After approximately four years, Swarna escaped and filed suit against Al-Awadi, other members of Al-Awadi's house, and Kuwait.[51] After the complaint went unanswered, the Southern District of New York granted Swarna's motion for default judgment.[52] On appeal, the Second Circuit considered whether the scope of diplomatic immunity included Al-Awadi's actions against Swarna.[53] The court reasoned that even though Al-Awadi was undisputedly a diplomat, article 39(2) of the Vienna Convention does not immunize acts incidental to the functions as a member of a diplomatic mission.[54] The court held that Al-Awadi's actions toward Swarna and her employment were not included within his official acts as a diplomat and therefore the Vienna Convention did not bar Swarna's claims.[55]

The United States District Court for the District of Columbia has encountered similar challenges in determining the scope of immunity for diplomats.[56] In *Aidi v. Yaron*, the plaintiffs filed suit against Amos Yaron to recover for the wrongful death of relatives and for personal injuries.[57] Yaron was a general in the Israeli armed forces at the time of the alleged

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45. 386 F.3d at 217-20.
46. 622 F.3d at 140.
47. *Id.* at 127-28.
48. *Id.*
49. *Id.* at 128-29.
50. *Id.* at 129-30.
51. *Id.* at 130.
52. *Id.* at 131.
53. *Id.* at 132.
54. *Id.* at 134.
55. *Id.* at 140.
56. *See, e.g.*, Aidi v. Yaron, 672 F. Supp. 516 (D.D.C. 1987); Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187 (D.D.C. 2007); Sabbithi v. Al Saleh, 605 F. Supp. 2d 122 (D.D.C. 2009).
57. 672 F. Supp. at 516.

injuries and wrongful deaths, but held the title of Defense, Military, Naval and Air Attaché at the Embassy of Israel in Washington D.C. at the time the complaint was filed.[58] The plaintiffs contended that the scope of immunity granted to Yaron should not extend to his (alleged) international war crimes.[59] The plaintiffs acknowledged that the Vienna Convention's specific enumerated exceptions do not apply, but argued that the Vienna Convention is merely a codification of customary international law on diplomatic immunity, and thus no person should be cloaked with immunity from prosecution for international crimes.[60] The court reasoned that even if the Vienna Convention was meant to represent such customs, diplomatic immunity still applied because the case at bar was a civil action to recover damages and not a criminal prosecution.[61]

Years later, the same district court upheld diplomatic immunity in *Gonzalez Paredes v. Vila*.[62] In a fact pattern similar to *Swarna*, the plaintiff, Lucia Mabel Gonzalez Paredes, came to the United States to perform house work for diplomats.[63] Gonzalez brought action against the Argentinian diplomats, Jose Luis Vila and his wife, Monica Nielsen, for violation of wage laws, breach of contract, and unjust enrichment.[64] The court held that Vila and Nielsen were immune under article 31 of the Vienna Convention.[65] The court spent part of its opinion empathizing with Gonzalez about the phenomenon of leaving those in a similar position without recourse within the United States.[66]

Two years later in a factually similar case, *Sabbithi v. Al Saleh*, the same district court again held fast to diplomatic immunity.[67] The plaintiffs in this case were domestic workers from India who were brought to the United States to work at the house of Major Waleed KH

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58. *Id.*
59. *Id.*
60. *Id.* at 518.
61. *Id.* at 518-19.
62. 479 F. Supp. 2d 187, 195 (D.D.C. 2007).
63. *Id.* at 189.
64. *Id.* at 189-90.
65. *Id.* at 195.
66. *Id.* at 194-95 (citing Tabion v. Mufti, 73 F.3d 535, 539 (4th Cir. 1996). The United States Court of Appeals for the Fourth Circuit in that case pointed out that there appeared to be "some unfairness" to the person trying to bring the suit. *Id.* (quoting *Tabion*, 73 F.3d at 539). The court went on to say that the outcome is a reflection of policy choices already made by Congress and the Executive Branch to maintain the fostering of goodwill and relationships with foreign states that is brought about through diplomatic immunity. *Id.* (quoting *Tabion*, 73 F.3d at 539). The benefits to the greater public of efficient functioning of diplomatic missions in foreign states and enhanced foreign relations greatly outweighs any inequity to a private individual. *Id.* (quoting *Tabion*, 73 F.3d at 539)
67. 605 F. Supp. 2d 122, 128-30 (D.D.C. 2009).

N.S. Al Saleh.[68] At the time, Al Saleh was a Kuwaiti diplomat serving as Attaché to the Embassy of Kuwait.[69] According to the plaintiffs, Al Saleh breached their employment contract by overworking them, underpaying them, depriving them of their passports, and threatening them with physical harm.[70] As is common in these cases, the court granted diplomatic immunity to the defendants, but the plaintiffs contended that the diplomatic immunity should not apply due to the factual circumstances of the case.[71] The plaintiffs argued, inter alia, that the diplomatic immunity could not shield Al Saleh because his actions violated *jus cogens* norms.[72]

Jus cogens norms "are peremptory norms of international law which enjoy the highest status in international law and prevail over both customary international law and treaties."[73] There is some debate globally as to which specific acts violate *jus cogens* norms.[74] A two-part test can be applied to determine whether a crime can be considered *jus cogens*: if it threatens the security and peace of humankind and if it shocks humanity's conscience.[75] Even if only one of these elements is present, a strong argument can still be made that it is a *jus cogens* crime.[76] Natural law advocates posture "that *jus cogens* is based on a higher legal value" that must be observed.[77] Today there are insufficient state practices in place to provide a solid foundation regarding the obligations derived from *jus cogens* crimes.[78]

The plaintiffs in *Sabbithi* argued that human trafficking is a *jus cogens* violation and therefore the defendant's immunity under the Vienna Convention should be denied.[79] The court, not persuaded, reasoned that Al Saleh's actions fell short of constituting a *jus cogens*

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68. *Id.* at 124.
69. *Id.* at 124-25.
70. *Id.* at 125.
71. *Id.* at 126-27.
72. *Id.* at 126.
73. *Id.* at 129 (citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988)).
74. M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 67-69 (1996). Some specific international crimes recognized as *jus cogens* include "aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture." *Id.* at 68.
75. *Id.* at 69.
76. *Id.*
77. *Id.* at 71.
78. *See id.* at 69-71.
79. Sabbithi v. Al Saleh, 605 F. Supp. 2d 122, 129 (D.D.C. 2009).

violation and, more importantly, that "there is no *jus cogens* exception to diplomatic immunity."[80]

The House of Lords has also held that there is no *jus cogens* exception to diplomatic immunity.[81] In *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, four British nationals who were imprisoned and tortured in Saudi Arabia brought suit against Saudi nationals.[82] The Vienna Convention gave rise to the relevant United Kingdom 1978 Act of "General immunity from jurisdiction" that gave diplomats specific immunities from certain legal actions.[83] The Court in this case weighed the plaintiffs' argument "that acts contrary to *jus cogens* cannot be official acts" and therefore may be actionable in court.[84] After rejecting that argument, the Court concluded that it would not lift the immunity cloaked over the Saudi nationals.[85] The Court concluded that the state of immunity is imposed by international law exclusive of favoritism between states and that for a court to allow investigations into allegations of *jus cogens* violations against some officials but not others would be wholly invidious.[86]

III. THE COURT'S DECISION

In the noted case, the United States District Court for the Southern District of New York held that the court lacked subject matter jurisdiction over Silva because Silva was entitled to diplomatic immunity via the Vienna Convention and the Diplomatic Relations Act.[87] First, the court examined whether Silva qualified as a diplomatic agent for the purposes of qualified immunity.[88] Primarily, the court gave deference to the diplomatic note executed by the Minister Counselor for Host Country Affairs of the United States Mission to the United Nations that established Silva as diplomat.[89] Giving some credence to the plaintiffs' argument that the diplomatic note should not suffice, the court established that even without the diplomatic note, Second Circuit precedent binds them to the proposition that accredited diplomats of the

80. *Id.* (internal quotation marks omitted).

81. Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 [101] (appeal taken from Eng.).

82. *Id.* ¶¶ 2-3.

83. *Id.* ¶ 7.

84. *Id.* ¶ 84.

85. *Id.* ¶ 101.

86. *Id.*

87. Devi v. Silva, 861 F. Supp. 2d 135, 141-43 (S.D.N.Y. 2012), *reconsideration denied*, (S.D.N.Y. Apr. 9, 2012).

88. *Id.* at 140.

89. *Id.* at 140-41.

United Nations are afforded the same diplomatic immunity as accredited U.S. diplomats.[90] After determining Silva was a bona fide diplomatic agent, the court examined the plaintiffs' challenge that the scope of Silva's immunity should extend neither to his actions prior to the diplomatic mission, nor his acts violating *jus cogens* norms.[91] Relying on the plain language, the Convention on the Privileges and Immunities of the United Nations, the United Nations Headquarters Agreement, and Second Circuit precedent, the court held that there were no judicially created exceptions to the scope of immunity.[92] The district court declined to be the first U.S. court to recognize a *jus cogens* exception to diplomatic immunity.[93] Finally, the court denied the plaintiffs' motion for reconsideration, rejecting it on all four grounds upon which the motion was brought.[94]

The court laid the appropriate legal framework for determining who is eligible for diplomatic immunity and what that immunity covers.[95] The apposite federal statute is the Diplomatic Relations Act of 1978, which provides that when a proceeding or action is brought against one who is entitled to immunity under the Vienna Convention, that proceeding or action shall be dismissed.[96] The court pointed out that the Vienna Convention provides only three exceptions to immunity: an action relating to immovable private property in receiving state territory, an action involving succession when the diplomat is an heir, executor, or administrator as a private person, or an action stemming from an agent's professional or commercial activity exercised outside of his official functions.[97] There was no argument from either side that any of these three exceptions applied here.[98]

The court offered two justifications for holding that Silva was a diplomatic agent entitled to immunity.[99] The court first reasoned that a diplomatic note executed by the Minister for Host Country Affairs of the United States to the United Nations formally recognized Silva's diplomatic credentials.[100] The diplomatic note declared that Silva is an "Ambassador, Deputy Permanent Representative" and that he is entitled

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90. *Id.* at 141.
91. *Id.*
92. *Id.*
93. *Id.* at 142.
94. *Id.* at 143-45.
95. *Id.* at 140-41.
96. *Id.* at 139; 22 U.S.C. § 254d (2006).
97. *Devi*, 861 F. Supp. 2d at 140; Vienna Convention, *supra* note 16, art. 31.
98. *Devi*, 861 F. Supp. 2d at 140.
99. *Id.* at 140-41.
100. *Id.* at 140.

to the privileges and immunities as defined in the Vienna Convention.[101] The court, to the chagrin of the plaintiffs, explained that the Diplomatic Relations Act allows immunity to be established upon "suggestion by or on behalf of the individual," and there is no legal requirement or need for a formal suggestion of immunity by the United States.[102]

The second justification for establishing Silva as a diplomatic agent was based on binding authority of the Second Circuit.[103] The court in *Tachiona v. United States* held that if the United Nations accredits a diplomat and accords diplomatic immunity, the United States accredits the same level of diplomatic immunity.[104] The court cemented its position further by stating that because "'resident' U.N. representatives" have been bestowed with full diplomatic immunity, there is little question that a permanent representative like Silva should be afforded full diplomatic immunity.[105]

The court then examined—and rejected—the plaintiffs' challenge that the scope of diplomatic immunity should not encompass Silva's acts that were committed prior to his appointment or his acts that violated international *jus cogens* norms.[106] The court concluded that no language in the Diplomatic Relations Act offers any categorical exceptions to the scope of immunity.[107] Furthermore, the court pointed out that the only language in the Vienna Convention that suggests scope are the three inapplicable exceptions of article 31.[108] Turning to case law, the court found zero governing authority that supports a judicially created exception to diplomatic immunity.[109] Instead, the court followed the logic of the Second Circuit's decision in *Tachiona*, concluding that the defendant's diplomatic immunity extended to the actions he committed prior to his diplomatic mission.[110]

After dispatching the challenge that Silva's actions prior to his diplomatic appointment should not be immune, the court efficiently denied the challenge that a violation of a *jus cogens* norm is an exception to diplomatic immunity.[111] The plaintiffs argued that the Diplomatic Relations Act and the Vienna Convention should not immunize acts that

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101. *Id.*
102. *Id.* (quoting 22 U.S.C. § 254d (2006) (internal quotation marks omitted)).
103. *Id.* at 141.
104. *Id.*; Tachiona v. United States, 386 F.3d 205, 217-18 (2d Cir. 2004).
105. *Devi*, 861 F. Supp. 2d at 141 (citing *Tachiona*, 386 F.3d at 217).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 141-43; *Tachiona*, 386 F.3d at 220.
111. *Devi*, 861 F. Supp. 2d at 142.

violate *jus cogens*.[112] The court first defined *jus cogens* as "peremptory norms of international law which enjoy the highest status in international law and prevail over both customary international law and treaties."[113] It then pointed out that no U.S. court has yet acknowledged that a *jus cogens* violation creates an exception to diplomatic immunity.[114] The court backed this statement by citing the United States District Court for the District of Columbia's opinion in *Sabbithi*.[115] In *Sabbithi*, the court postured that not only does a *jus cogens* exception to diplomatic immunity not exist, but that there is nothing to suggest that the international community is moving to recognize the exception either.[116] The court in *Devi* shut the door on the argument, opining that if the United States departed from the international consensus that no *jus cogens* exception to diplomatic immunity exists, they would be at risk of reciprocation by other states, which could potentially bring a windfall of litigation upon U.S. diplomats in foreign jurisdictions.[117]

Finally, the court examined and denied the plaintiffs' motion for reconsideration.[118] The plaintiffs' motion for reconsideration, governed by rule 60(b) of the Federal Rules of Civil Procedure, was predicated on the argument that, inter alia, the court overlooked certain international sources and applied diplomatic immunity in such a way that contravenes congressional intent.[119] The court, in its response to the motion, reasoned that a "Working Document" authored by the United Nations Committee Against Torture is not binding legal authority, and the decision formed on the basis of federal statutes, treaties, and court authorities should stand.[120] The court then promptly rejected the argument that the court's decision contravenes congressional intent.[121] According to the court, the decision does not, as the plaintiffs contended, repeal the Alien Tort Claims Act or the Torture Victims Protection Act.[122] Both of those statutes still have effect so long as the defendant does not have immunity.[123]

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112. *Id.*
113. *Id.* (quoting Sabbithi v. Al Saleh, 605 F. Supp. 2d 122, 129 (D.D.C. 2009) (internal quotation marks omitted)).
114. *Id.*
115. *Id.*
116. 605 F. Supp. 2d at 129.
117. 861 F. Supp. 2d at 142.
118. *Id.* at 143.
119. *Id.*
120. *Id.* at 144.
121. *Id.*
122. *Id.*
123. *Id.*

IV. ANALYSIS

The district court's decision in the noted case represents a lost opportunity in equity by carefully following the letter of the law and the appropriately applicable case law. The Vienna Convention is explicitly clear about which situations present an opportunity for an exception to diplomatic immunity.[124] If none of the three unambiguous circumstances exist in a particular dispute, diplomatic immunity will be granted.[125] Furthermore, the language of the Diplomatic Relations Act, which gives effect to the Vienna Convention, is unmistakable, mandating that any action or proceeding brought against one who is entitled to immunity shall be dismissed.[126]

Notwithstanding the unmistakable clarity of the Vienna Convention and the Diplomatic Relations Act, diplomatic immunity has been challenged in courts across the world[127] and in the United States.[128] The court did not need to give much deference to persuasive authority in other jurisdictions because the binding authority of the Second Circuit gave the district court the confidence to grant the diplomatic immunity and the motion to dismiss.[129] Initially, the court relied on the Second Circuit in order to determine whether Silva would qualify as a diplomatic agent or not.[130] If an individual is accredited as a diplomat to the United Nations and accorded diplomatic immunity, the United States will grant the same level of diplomatic immunity.[131] The district court was also able to rely on the Second Circuit's opinion of how broad the scope of immunity should be.[132] The Second Circuit established in *Tachiona* that there are no judicially created exceptions to diplomatic immunity and thus activities that a diplomat carried out prior to his diplomatic mission are protected under his cloak of immunity.[133] With binding statutes and case law favoring its opinion, the district court can rest comfortably in its consistency.

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124. Vienna Convention, *supra* note 16, art. 31.

125. *Id.*

126. 22 U.S.C. § 254d (2006).

127. *See, e.g.*, Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 [101] (appeal taken from Eng.).

128. *See, e.g.*, Sabbithi v. Al Saleh, 605 F. Supp. 2d 122 (D.D.C. 2009); Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187 (D.D.C. 2007).

129. *See* Devi v. Silva, 861 F. Supp. 2d 135, 141-43 (S.D.N.Y. 2012), *reconsideration denied*, (S.D.N.Y. Apr. 9, 2012).

130. *Id.* at 141.

131. Tachiona v. United States, 386 F.3d 205, 215 (2d Cir. 2004).

132. *Devi*, 861 F. Supp. 2d at 141.

133. *Tachiona*, 386 F.3d at 220.

The district court can also feel confident it is promoting sound policy in regards to foreign relations. Judge Marrero, a judge for the Southern District of New York, wrote that the purpose of diplomatic immunity is to protect the interests of sovereign states by mutually recognizing their legislative, executive, and judicial acts and to promote friendly relations and international comity.[134] Diplomatic immunity is not promoted in order to protect nations' leaders from punishments or shield them from accountability.[135] Judge Marrero described the crux of the debate eloquently, recounting how judges can feel bound to deliver decisions that may not please everybody because of the more compelling pressures that define justice.[136]

Even though the court here conveyed a decision based in sound law and jurisprudence, it does not mean that justice was served and equity restored. The complaints brought against Silva were serious allegations of torture, inhuman and degrading treatment, intentional infliction of emotional distress, and wrongful death.[137] The plaintiffs claimed that Silva's actions of torture and extrajudicial killings constitute violations of *jus cogens* norms.[138] Unfortunately, it is not established that a state must give effect to the obligations generated by the violation of a *jus cogens* norm beyond international law.[139] Even if a state were allowed to give effect to a *jus cogens* violation, would that choice prevail over diplomatic immunity?[140] The answer should be in the affirmative. Collectively, we owe a duty to humanity first and foremost. Globally, unfortunately, the International Court of Justice and the European Court of Human Rights have continued to hold the grant of immunity in higher esteem than the right to recover for *jus cogens* violations.[141] By allowing society to value immunity over egregious crimes, we continue to tip the scales in favor of the elite while bludgeoning the victims.

The court is put in the uncomfortable position of weighing the injuries and suffering of the plaintiffs against the political agendas of every nation's executive branch. Unfortunately, there is not a fully equitable result in this case, nor can there be. If the court had chosen instead to reject the motion to dismiss and allowed the plaintiffs to proceed with the charges against Silva, the court would not only be in

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134. Tachiona v. Mugabe, 169 F. Supp. 2d 259, 317 (S.D.N.Y. 2001).
135. *Id.*
136. *Id.*
137. *Devi*, 861 F. Supp. 2d at 139.
138. *Id.* at 141.
139. HAZEL FOX, THE LAW OF STATE IMMUNITY 525 (2002).
140. *See id.*
141. *Id.* at 524.

direct conflict with the case law of its circuit, but with the precedent of the United States, foreign, and international courts as well. Additionally, as reasoned by Judge Oetken in the noted case, a decision to reject diplomatic immunity could disrupt foreign relations dramatically and potentially subject many U.S. diplomats to litigation in foreign jurisdictions.[142] In the alternative, the court can follow the letter of the law as it did here, but miss the opportunity to redress wrongdoings and administer justice. If Silva's status as a diplomat ever ends, he likely will not return to the United States to avoid being served when he is no longer immune. This leaves the plaintiffs with no redress and no opportunity for justice.

V. CONCLUSION

The district court made the easy decision in deciding not to blaze a new trail of case law. However, this issue must be advanced through both U.S. courts and international tribunals. The policy objective of promoting healthy international relationships cannot be undervalued, but there is a simultaneous responsibility to recognize victims in times of injustice. Unfortunately, one country alone cannot achieve such a goal. There needs to be an international consciousness and recognition of the injustice in order to have legitimate reformation of the policy of diplomatic immunity. Until that recognition occurs, the harmed class will continue to suffer.

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142. *Devi*, 861 F. Supp. 2d at 142.

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