

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JANE DOE, ET AL., )  
 )  
 Plaintiffs, )  
 )  
 v. ) Case No. 00-674 GK  
 )  
 MAJOR GENERAL JOHNY LUMINTANG )  
 )  
 Defendant. )  
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**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO SET ASIDE  
DEFAULT JUDGMENT AND ORDER AND JUDGMENT ON DAMAGES**

**I. History of Proceedings**

On March 28, 2000, six plaintiffs (identified as Jane Doe I and John Does I-V) filed a Complaint against Lieutenant General Johny Lumintang.<sup>1</sup> (Docket Entry #5) The Complaint alleged that the defendant had violated the Torture Victim Protection Act (“TVPA”), Pub. L. No. 102-256, 106 Stat. 73 (1992) and the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350, and had committed several state law torts

On June 27, 2000, the Clerk of Court entered default against Lt. Gen. Lumintang. (Docket Entry #10) On November 8, 2000, the Court entered default judgment against Lt. Gen. Lumintang for failing to file an Answer or otherwise appear before the Court. (Docket Entry #16)

On November 21, 2000, the Court ordered an evidentiary hearing be held on the issue of damages. (Docket Entry #15) On March 27-29, 2001, U.S. Magistrate Judge Kay conducted a non-jury trial to establish damages. On September 13, 2001, Magistrate Judge Kay issued Findings of Fact and Conclusions of Law. (Docket Entry #40) On September 13, 2001, the Court issued an

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<sup>1</sup> The defendant was promoted from Major General to Lieutenant General in 1998. Declaration of Lieutenant General Johny Lumintang at ¶ 2.

Order that judgment be entered on behalf of the plaintiffs against Lt. Gen. Lumintang for \$66 million in compensatory and punitive damages. (Docket Entry #41)

## II. Introduction

In accordance with Rule 60(b) of the Federal Rules of Civil Procedure, Lt. Gen. Lumintang moves to set aside the Order granting default judgment, the Findings and Conclusions of Law on the issue of damages and the Order and Judgment on the issue of damages. Setting aside these orders, judgments and other proceedings are in the interest of justice for several reasons.

First and foremost, those judgments are void as matters of law pursuant to Rule 60(b)(4). The Court lacked personal jurisdiction over Lt. Gen. Lumintang, thereby rendering those judgments void. Those judgments are also void because Lt. Gen. Lumintang was never served with process. Finally, those judgments are void because the Court lacked subject matter jurisdiction over the claims set forth in the Complaint under the TVPA or the ATCA. The Court lacked subject matter over the ATCA claims because the Complaint failed to sufficiently allege that Lt. Gen. Lumintang was acting under color of state law. The Court lacked subject matter jurisdiction over the TVPA claims because the plaintiffs failed to exhaust adequate and available remedies in East Timor and Indonesia. Furthermore, as the Court does not have original jurisdiction over any of the claims set forth in the Complaint, it does not have supplemental jurisdiction over the state law claims alleged therein.

Second, the default judgment and proceedings and judgments related to damages should be set aside under Rule 60(b)(6) because the extraordinary circumstances of this case and the demands of justice compel such relief. The Attorney General of the Republic of Indonesia has conducted a

comprehensive review of alleged human rights violations in East Timor. Lt. Gen. Lumintang was questioned by the Office of the Attorney General on the issue of gross violations of human rights in East Timor. In January 2002, the Attorney General's list of those suspected of gross human rights violations was published. Lt. Gen. Lumintang was not named as one of the nineteen suspects of human rights violations in East Timor. By letter dated January 31, 2002 the Attorney General of Indonesia also advised that Lt. Gen. Lumintang is not "a suspect in the case of gross human rights violations in East Timor."

At the time of the alleged incidents in the Complaint, Lt. Gen. Lumintang held the position of Deputy Army Chief of Staff in the Indonesian Army (TNI-AD). As Army Deputy Chief of Staff, he did not have any operational authority for planning, commanding, supervising or controlling military operations in East Timor or anywhere else. That authority rested with the Indonesian Armed Forces Commander (Tentara Nasional Indonesia ("TNI" or "Armed Forces/TNI High Command")). The Armed Forces/TNI High Command is a distinct and separate headquarters from the Army Headquarters with different duties and responsibilities from the Army. The Army Chief of Staff and Deputy Chief of Staff of the Indonesian Army have no command or control authority over troops and personnel engaged in operational matters or to carry out military operations. They are solely responsible for administrative matters such as training and education, payment and housing of personnel, procurement in general and provision of equipment. Therefore, Lt. Gen. Lumintang could not have been responsible, under a command responsibility theory or any other theory, for any of the occurrences in East Timor. Under Indonesian law, he had no control or authority over operational matters in East Timor.

Relief in the interests of justice is required under Rule 60(b)(6) where, following the filing

of the Complaint, the facts show that Lt. Gen. Lumintang was erroneously identified by plaintiffs as a superior officer with command authority, and was investigated and exonerated by the Attorney General of the Republic of Indonesia.

### **III. Statement of Facts**

Lieutenant General Johny Lumintang is a citizen and resident of the Republic of Indonesia. Declaration of Lieutenant General Johny Lumintang (“Lumintang Dec.”) at ¶ 1.<sup>2</sup> He has never been a resident of any State of the United States or the District of Columbia and has never resided in the United States. *Id.* at ¶ 8. He currently holds the position of Secretary General of Defense, of the Department of Defense of the Republic of Indonesia, located at Medan Merdeka Barat Street, Number 13-14, Jakarta, Indonesia. *Id.* at ¶ 1. While holding the rank of Lieutenant General in the Indonesian Army, the rank he holds at the current time, he has carried out a number of assignments. *Id.* at ¶ 2. He held the post of Commandant of the Command and Staff College of the Armed Forces from September 15, 1998 through January 1, 1999. *Id.* He was the Deputy Chief of Staff of the Army from January 1, 1999 through October 28, 1999. *Id.* He was the Governor of the National Defense Institute in Indonesia from October 28, 1999 through February 8, 2001. *Id.* He was appointed as Secretary General of the Department of Defense of the Republic of Indonesia on February 8, 2001. *Id.*

As Deputy Army Chief of Staff, Lt. Gen. Lumintang was the principle aide and advisor to the Army Chief of Staff who was responsible for the implementation of administrative matters, such

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The Declaration of Lieutenant General Johny Lumintang is attached hereto as Exhibit 1

as training and education, payment and housing of personnel, procurement in general and provision of equipment, for the command and its elements. Lumintang Dec. at ¶ 3; Declaration of Lieutenant Colonel Natsri Anshari (“Anshari Dec.”) at ¶ 14<sup>3</sup>; Declaration of Brigadier General Sihombing (“Sihombing Dec.”) at ¶ 7 and Exhibit E attached thereto.<sup>4</sup> He did not have any command or control over troops and personnel engaged in operational matters or authority for planning, commanding, supervising or controlling military operations. Id. That authority rested with the Armed Forces/TNI High Command. Lumintang Dec. at ¶ 3; Sihombing Dec. at ¶¶ 3-10 and Exhibits A-E attached thereto. Lt. Gen. Lumintang has never been a member of the Armed Forces/TNI High Command. Id.

On March 6, 2000, Lt. Gen. Lumintang received an invitation dated March 3, 2000 from Ambassador Edward Masters, the President of Usindo (United States Indonesian Society), 1625 Massachusetts Ave., N.W., Washington, DC 20036-2245, to participate in a panel discussion in Washington DC on March 28, 2000. Id. at ¶ 4. At the time Lt. Gen. Lumintang received the invitation, he was the Governor of the National Defense Institute in Indonesia. Id. Lt. Gen. Lumintang accepted the invitation. Lumintang Dec. at ¶ 4. He received no payment or compensation to participate in the panel discussion. Id. His transportation and hotel costs and all other expenses related to the trip were paid by the Government of Indonesia. Id.

On March 26, 2000, Lt. Gen. Lumintang traveled from Jakarta, Indonesia to Dulles International Airport (“Dulles”) in Virginia. Id. at ¶ 5. On March 28, 2000, he attended the panel

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The Declaration of Lieutenant Colonel Natsri Anshari is attached hereto as Exhibit 2.

<sup>4</sup> The Declaration of Brigadier General Sihombing is attached hereto as Exhibit 3.

discussion of the U.S. Indonesian Society which took place at The Cosmos Club at 2121 Massachusetts Ave., N.W., Washington, D.C. Id. at ¶ 5. While in the Washington, D.C., metropolitan area, Lt. Gen. Lumintang stayed at the Park Hyatt Hotel in Washington, D.C. Id. at ¶ 6. He visited the Indonesian Embassy at 2020 Massachusetts Ave., N.W. to meet with colleagues on non-business matters. Id. at ¶ 6. He also paid a social call on Mr. Paul Wolfowitz, former U.S. Ambassador to Indonesia and Ms. Karen Brookes and did some sightseeing. Id. He made no other speeches, presentations or appearances of any kind and did not engage in any fund raising on behalf of the Government of Indonesia or any of its agencies. Id. Lt. Gen. Lumintang received no payment or compensation for any of his appearances, visits or activities while in the United States and never conducted any business while he was in the United States. Id. at ¶ 6, 8.

On March 30, 2000, Lt. Gen. Lumintang left the United States for Frankfurt, Germany on an Air France flight from Dulles. Id. at ¶ 5. Other than his visit from March 26 through March 30, 2000, Lt. Gen. Lumintang has only been in the United States five times: once to attend the Infantry Officer Advanced Course in Ft. Benning, Georgia in 1978; once to attend the IDMC at the NPC in Monterey, California in 1989; once to attend the Special Forces Seminar in Honolulu, Hawaii; once to participate in a study tour of students of the National Defense Institute in 1995; and once to attend the Roundtable Dialogue on Justice and Reconciliation at the Madison Hotel in Washington, D.C. on January 24, 2000. Id. at ¶ 7.

Lt. Gen. Lumintang has never transacted or conducted any business, contracted to supply any services or had an interest in or use of or possessed any real property in the District of Columbia or anywhere else in the United States or done so with any individual resident in the District of Columbia or the United States. Id. at ¶ 8. He has no relatives in the District of Columbia or

anywhere else in the United States. Id. He has caused no tortious injury in the District of Columbia or anywhere else in the United States. Id. He has never contracted to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia or anywhere else in the United States. Id. He has never engaged in a persistent course of conduct, or any course of conduct for that matter, in the District of Columbia or anywhere else in the United States or derived revenue from goods or services used, consumed or rendered in the District of Columbia or anywhere else in the United States. Id.

On March 30, 2000, around 5:00 P.M., on the way to leaving for Jakarta, Lt. Gen. Lumintang arrived at Dulles in the company of Brigadier General Dadi Susanto. Id. at ¶ 9; Declaration of Brigadier General Dadi Susanto (“Susanto Dec.”) at ¶ 4.<sup>5</sup> Lt. Gen. Lumintang and Brig. Gen. Susanto were in the concourse outside of the boarding area for Lt. Gen. Lumintang’s Air France flight, when they were approached by a Caucasian man who was a stranger to them. Id. The man sought to identify General Lumintang. Id. The man never identified himself or his purpose. Lumintang Dec. at ¶ 9. After Lt. Gen. Lumintang identified himself, the man attempted to hand him a thick sheaf of papers. Lumintang Dec. at ¶ 9.; Susanto Dec. at ¶ 4. Lt. Gen. Lumintang had no idea that this man was trying to serve him with legal papers. Lumintang Dec. at ¶ 9. Fearing that the papers were a weapon or explosive device, Brig. Gen. Susanto simultaneously told Lt. Gen. Lumintang not to take the papers and knocked the papers out of the man’s hand to the ground. Lumintang Dec. at ¶ 9.; Susanto Dec. at ¶ 4. Lt. Gen. Lumintang never touched or read the papers from the man. Id. The man left without saying anything else or picking up the papers. Id. Lt. Gen.

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The Declaration of Brigadier General Dadi Susanto is attached hereto as Exhibit

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Lumintang then went to the boarding area with Brig. Gen. Susanto and boarded his plane without ever touching or receiving the papers from the man. Id. Brig. Gen. Susanto instructed his driver to pick up the papers and take them to his car. Susanto Dec. at ¶ 5

By law enacted in 2000, the Indonesian Government established a Human Rights Court and authorized the Attorney General to investigate alleged gross violations of human rights in Indonesia, including East Timor. Lumintang Dec. at ¶ 11; Anshari Dec. at ¶¶ 3-4 and Exhibits A and B attached thereto. On May 4, 2000, Lt. Gen. Lumintang was called before the Office of the Attorney General of Indonesia and interrogated concerning gross violations of human rights by members of the military and others in East Timor. Lumintang Dec. at ¶ 1; Anshari Dec. at ¶ 5. On January 30, 2002, a list was published of the names of officers in the military and police who were suspected by the Attorney's General's Office of having committed human rights violations in East Timor. Lumintang Dec. at ¶ 11 and Exhibit A attached thereto; Anshari Dec. at ¶ 10. Lt. Gen. Lumintang was not listed as a suspect. Id. On January 31, 2002, Lt. Gen. Lumintang received a letter signed by the Attorney General of the Republic of Indonesia, Mr. H.M.A. Rachman, certifying that Lt. Gen. Lumintang was not a suspect in the case of gross violations of human rights in East Timor. Id. at ¶ 12 and Exhibit B attached thereto The letter states

**The Attorney General of The Republic of Indonesia hereby certifies that the Team of Investigation on Gross Violation of Human Rights in East Timor has interrogated Army Lieutenant General Johnny J Lumintang.**

**Based on the result of the interrogation Army Lieutenant General Johnny J Lumintang is stated not as a suspect in the case of gross violations of human rights in East Timor. (Emphasis in original.)**

Id.

#### IV. Argument

##### A Rule 60(b) of the Federal Rules of Civil Procedure

##### 1. The Purpose of a Rule 60(b) Motion

Rule 60(b), F.R.C.P., allows a district court to grant a motion for relief from a final judgment, order or proceeding, including default judgments or judgments for damages, for certain reasons enumerated in the Rule.<sup>6</sup> Properly applied, Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments. House v. Secretary of Health and Human Services, 668 F.2d 7, 9 (2d Cir. 1982); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5<sup>th</sup> Cir. 1981) Although final judgments should not be lightly reopened, Rule 60(b) should be broadly construed to do “substantial justice.” Seven Elves, 635 F.2d at 401. “Given the longstanding goal of allowing parties to prosecute the merits of contested lawsuits, courts grant relief from default judgments liberally.” MCI Telecommunications Corp. v. The Travel Specialist, 1991 U.S. Dist LEXIS 12878, \*2 (D.D.C. Sept. 17, 1991), citing, Jackson v. Beech, 636 F.2d 831, 835 (1980)

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<sup>6</sup> Rule 60(b), in relevant part, states:

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

## 2. Void Judgments — Rule 60(b)(4)

Under Rule 60(b)(4), relief from a judgment or order must be granted where the judgment or order is void. A judgment or order may be void where the court lacked jurisdiction over the subject matter, lacked personal jurisdiction over the parties, acted in some matter inconsistent with constitutional due process, or otherwise acted beyond the powers granted to it under the law. Gardner v. United States, 1999 U.S. Dist. LEXIS 2192, \*5-6 (D.D.C. 1999), citing, Hoult v. Hoult, 57 F.3d 1, 6 (1<sup>st</sup> Cir. 1995)

Unlike under Rule 60(b)(1), (2) and (3), there is no question of discretion on the part of the Court when a motion is made under Rule 60(b)(4). Combs v. Garin Trucking, 825 F.2d 437, 441 (D.C. Cir. 1987). If the judgment is void as a matter of law, then relief from the judgment is mandatory. Id.<sup>7</sup> Moreover, unlike setting aside a default judgment under Rule 60(b)(1), (2) or (3) where the defaulting party needs to establish the absence of willfulness on its part, the absence of prejudice to the plaintiff, and a meritorious defense, “a party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity.” Id. at 441-442 (citations omitted). Finally, the one year statute of limitations applicable to Rule 60(b)(1), (2) and (3) motions is expressly inapplicable to Rule 60(b)(4) motions. There is no time limit on an attack on a judgment as void. Austin v. Smith, 312

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<sup>7</sup> Void judgments are “legal nullities”, and the court’s refusal to vacate such judgments is a *per se* abuse of discretion. See, e.g., Robinson Eng’g Co. Pension Plan & Trust v. George, 223 F.3d 445 (7<sup>th</sup> Cir.2000) (if underlying judgment is void, trial judge abuses discretion to deny motion to vacate); Carter v. Fenner, 136 F.3d 1000, 1005 (5<sup>th</sup> Cir.1998), cert. denied, 525 U.S. 1041 (1998) (where judgment is attacked as void, district judge has no discretion; if judgment is void, it must be vacated).

F.2d 337, 343 (D.C. Cir. 1962); Hertz Corp. V. Alamo Rent-A-Car, Inc., 16 F.3d 126, 1130 (11<sup>th</sup> Cir.1994). Moreover, a void judgment cannot acquire validity because of laches on the part of the party who applies for relief from it. Austin, 312 F.2d at 343

Although relief under Rule 60(b)(4) is not available merely because a disposition is erroneous, a judgment may be deemed void within the meaning of the rule if “it [is] determined that the rendering court was powerless to enter it.” Combs, 825 F.2d at 442 (citations omitted). An in personam judgment entered without personal jurisdiction over a defendant is void as to that defendant. Id. A judgment entered when the court has no subject matter jurisdiction over the claims is equally void.

As shown below, the default judgment entered against Lt. Gen. Lumintang and the orders and judgments on damages are void as a matter of law. The Court lacked personal jurisdiction over Lt. Gen. Lumintang because he lacked minimum contacts with the District of Columbia or the United States. As a second ground, the orders and judgments are void because service of process upon Lt. Gen. Lumintang was deficient. Finally, the Court did not have subject matter jurisdiction over the claims brought against him

**B**     Lt. Gen. Lumintang Did Not Have Minimum Contacts with the District of Columbia or the United States, and therefore, the Court Lacked Personal Jurisdiction Over Him Rendering the Default Judgment and Judgment on Damages Void.

This Court never had personal jurisdiction over Lt. Gen. Lumintang. Therefore, any judgment involving him is void as a matter of law. Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994); Combs, 825 F.2d at 442. To establish personal jurisdiction over a non-resident, such as Lt. Gen. Lumintang, a court must engage in a two-part inquiry: First, a court

must examine whether jurisdiction occurs under the applicable state's long-arm statute and second, then determine whether a finding of jurisdiction satisfies the constitutional requirements of due process. GTE New Media Services Inc. v. Bellsouth Corp., 199 F.3d 1343, 1347 (D.C. Cir. 2000); United States of America v. Ferrara, 54 F.3d 825, 828 (D.C. Cir. 1995). As there is no applicable federal long-arm statute, jurisdiction over Lt. Gen. Lumintang must be determined by reference to District of Columbia law. Id., citing, Edmond v. United States Postal Service General Counsel, 949 F.2d 415, 424 (D.C. Cir. 1991).

### The District of Columbia Long-Arm Statute

This Court does not have jurisdiction over Lt. Gen. Lumintang under the District of Columbia Long-Arm Statute.<sup>8</sup> A review of the provisions of the D.C. Code shows that the District

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<sup>8</sup> The District of Columbia Code provides:

§ 13-423. Personal jurisdiction based upon conduct

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia;

(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing; or

of Columbia courts could not assert jurisdiction over Lt. Gen. Lumintang. He has never transacted or conducted any business, contracted to supply any services or had an interest in or use of or possessed any real property in the District of Columbia or anywhere else in the United States or done so with any individual resident in the District of Columbia or the United States. Lumintang Dec. at ¶ 8.<sup>9</sup> He has no relatives in the District of Columbia or anywhere else in the United States. *Id.* He has caused no tortious injury in the District of Columbia or anywhere else in the United States. Complaint; Lumintang Dec. at ¶ 8. He has never contracted to insure or act as surety for or on any

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(7) marital or parent and child relationship in the District of Columbia if:

(A) the plaintiff resides in the District of Columbia at the time the suit is filed;

(B) such person is personally served with process; and

(C) in the case of a claim arising from a marital relationship:

(i) the District of Columbia was the matrimonial domicile of the parties immediately prior to their separation, or

(ii) the cause of action to pay spousal support arose under the laws of the District of Columbia or under an agreement executed by the parties in the District of Columbia; or

(D) in the case of a claim affecting the parent and child relationship:

(i) the child was conceived in the District of Columbia and such person is the parent or alleged parent of the child;

(ii) the child resides in the District of Columbia as a result of the acts, directives, or approval of such person; or

(iii) such person has resided with the child in the District of Columbia.

(E) Notwithstanding the provisions of subparagraphs (A) through (D), the court may exercise personal jurisdiction if there is any basis consistent with the United States Constitution for the exercise of personal jurisdiction.

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

<sup>9</sup> The scope of the “transacting any business” clause is limited by the rule that contact with a federal instrumentality located in the District will not give rise to personal jurisdiction. *Ferrara*, 54 F.3d at 831, citing, *Environmental Research Int’l, Inc. v. Lockwood Greene Eng’rs, Inc.*, 355 A.2d 808, 813 (D.C. App. 1976)(en banc); see also, *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 6 (D.D.C. 1998)(District of Columbia’s “long-arm” statute excludes activities involving the solicitation of funds from government agencies).

person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia or anywhere else in the United States. Lumintang Dec. at ¶ 8. He has never engaged in a persistent course of conduct, or any course of conduct for that matter, in the District of Columbia or anywhere else in the United States or derived revenue from goods or services used, consumed or rendered in the District of Columbia or anywhere else in the United States. Id.

Lt. Gen. Lumintang is not and has never been a resident of the District of Columbia, or anywhere else in the United States for that matter, and he has not engaged in any of the activities enumerated in the District of Columbia long-arm statute. Therefore, the Court does not have personal jurisdiction over him. Nevertheless, even if the literal terms of the long-arm statute could be satisfied, it still must be established that the exercise of personal jurisdiction over the Lieutenant General is within the permissible bounds of the Due Process Clause of the U.S. Constitution. GTE New Media Service Inc., 199 F.3d at 1347.<sup>10</sup> This cannot be shown.

## 2. The “Minimum Contacts” Standard

In order to satisfy the Constitutional due process standards for personal jurisdiction, it must be established that there were “minimum contacts” between the defendant, Lt. Gen. Lumintang, and the forum, the District of Columbia, establishing that “the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.” GTE New Media Service Inc., 199 F.3d at 1347, quoting, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)(internal quotation

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<sup>10</sup> Additionally, because the District of Columbia long-arm statute reaches as far as the Due Process Clause of the U.S. Constitution, personal jurisdiction would be satisfied if the Court’s exercise of jurisdiction complied with Constitutional due process.

marks omitted). Under the “minimum contacts” standard, courts must insure that “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” GTE New Media Service Inc., 199 F.3d at 1347, quoting, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). It is “essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Hanson v. Denckla, 357 U.S. 235, 253 (1958). These minimum contacts must be “purposeful.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). This “purposeful” requirement “helps ensure that non-residents have fair warning that a particular activity may subject them to litigation within the forum.” Bonney v. Wolfgang Roelle, 1997 U.S. App. LEXIS 18179, \*20 (4<sup>th</sup> Cir. July 21, 1997), citing, Burger King, 471 U.S. at 472 and World-Wide Volkswagen Corp., 444 U.S. at 297.

There are two types of personal jurisdiction; specific jurisdiction and general jurisdiction. Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 414-16 (1984). Specific jurisdiction refers to jurisdiction over a defendant based on that party’s actions within the forum State which gave rise to or relate to the cause of action being pursued in the litigation. Id. at 414. General jurisdiction refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose. Id. at 415. None of the actions alleged in the Complaint occurred in the District of Columbia. See, Complaint. Any contact Lt. Gen. Lumintang had with the District of Columbia is unrelated to the conduct that gave rise to the present claims. Therefore, general rather than specific jurisdiction, is at issue. In order to support the exercise of general jurisdiction, it must be established that Lt. Gen. Lumintang had “continuous and systematic” contacts with the District of Columbia. Helicopteros Nacionales, 466 U.S. at 416.

However, “the continuous and systematic contacts test is a difficult one to meet, requiring extensive contacts between a defendant and a forum.” Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V., 249 F.3d 413, 419 (5<sup>th</sup> Cir. 2001), citing, 16 James Wm. Moore et al., Moore’s Federal Practice, ¶ 108.41 3 (3d ed. 1999).

There is no evidence that Lt. Gen. Lumintang purposefully directed his efforts towards the District of Columbia or availed himself of conducting business there or had continuous and systematic contacts there. See, e.g., Travelers Health Ass’n v. Virginia, 339 U.S. 643, 648-49 (1950). He has never transacted or conducted any business in the District of Columbia or the United States or with any individual resident of the District of Columbia or the United States. Lumintang Dec. at ¶ 8. Although conducting non-governmental business in the District of Columbia will, under certain circumstances, establish the requisite minimum contacts with the forum, Lt. Gen. Lumintang has not engaged in such activities. See, Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 6 (D.D.C. 1998). His only contacts with the District of Columbia and the United States consisted of six visits over a twenty-four year period to participate in training courses, seminars and forums for which he received no payment or other compensation from any District of Columbia or United States resident. Lumintang Dec. at ¶¶ 4-8. Mere personal visits to a forum State are insufficient to establish the minimum contacts necessary to establish personal jurisdiction over an individual. See, Bonney, 1997 U.S. App. LEXIS 18179 at \*23, n. 3 (attendance at a wedding in the forum State insufficient to establish sufficient contacts with the jurisdiction); Burger King, 471 U.S. at 478 (merely contracting with an individual in the forum State insufficient to establish minimum contacts); Submersible Systems, Inc., 249 F.3d at 419 (5<sup>th</sup> Cir. 2001)(traveling to a forum is insufficient to confer personal jurisdiction when the plaintiff’s cause of action does not arise out of that activity).

In An v. Chun, a plaintiff brought suit against two generals and several other military leaders of the Korean army on behalf of his deceased father, under the Alien Tort Claims Act, alleging that they had tortured his father to death. 1998 U.S. App. LEXIS 1303, \*2 (9<sup>th</sup> Cir. Jan. 28, 1998). Where the only contacts with the United States on behalf of the military leaders had been official visits on behalf of the Korean government and a vacation to Hawaii, all unrelated to the cause of action, the Ninth Circuit held that the military leaders had not engaged in the necessary activity in the United States to confer either general or specific personal jurisdiction. Id. at \*6. Similarly, Lt. Gen. Lumintang did not engage in the requisite quality and quantity of contacts or activity with the District of Columbia, or the United States for that matter, necessary to support the exercise of specific or general personal jurisdiction.<sup>11</sup> Therefore, the Court has no personal jurisdiction over Lt. Gen. Lumintang, and the judgments entered are void and they should be set aside.

C. General Lumintang Was Not Served with Process, and therefore, the Court Lacked Personal Jurisdiction Over Him Rendering the Default Judgment and Judgment on Damages Void.

An in personam judgment entered without personal jurisdiction over a defendant is void as to that defendant. Combs, 825 F.2d at 442. And, since service of process is the means by which a court asserts jurisdiction to adjudicate the rights of a party, it is uniformly held that a judgment is void where the requirements for effective service have not been satisfied. Id. (reversing default judgment because defendant was never properly served with process); see also, Mobern Electric

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<sup>11</sup> The circumstances of this case are distinguishable from those in Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998). In Islamic Salvation Front, the Court found personal jurisdiction over the individual defendant because he operated the Washington, D.C. office of Islamic Salvation Front (FIS) and conducted numerous activities on behalf of the FIS from that office.

Corp. v. Walsh, 197 F.R.D. 196, 198 (D.D.C. 2000); MCI Telecommunications Corp., 1991 U.S. Dist. LEXIS 12878 at \*2-5; Rogers v. Hartford Life and Accident Ins. Co., 167 F.3d 933, 940 (5<sup>th</sup> Cir. 1999)(“When a district court lacks jurisdiction over a defendant because of improper service of process, the default judgment is void and must be set aside under Federal Rule of Civil Procedure 60(4)(b)); Carimi v. Royal Carribean Cruise Line, Inc., 959 F.2d 1344, 1345 (5<sup>th</sup> Cir. 1992).

There are two ways that service of process might be insufficient and that the judgment would therefore be void. First, if Lt. Gen. Lumintang was never served with process, the judgment would be void. Mobern Electric Corp., 197 F.R.D. at 198. Second, if the service of process was insufficient then the default judgment would be void. Id. In this case, Lt. Gen. Lumintang was never served with process.

Under Rule 4(e) of the Federal Rules of Civil Procedure, service upon Lt. Gen. Lumintang as an individual could be effected pursuant to the law of the District of Columbia or by delivering a copy of the summons and the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode, or by delivering a copy of the summons and of the complaint to an agent authorized by appointment by the Lieutenant General or by law to receive service of process.<sup>12</sup> In this case, the only issues are whether Lt. Gen. Lumintang was personally served or whether an agent of his was served with the summons and complaint.

Lt. Gen. Lumintang was never served with process. The summons and complaint were never personally delivered to Lt. Gen. Lumintang. Lumintang Dec. at ¶¶ 9-10; Susanto Dec. at ¶¶ 4-5. The

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<sup>12</sup> Under Rule 4 of the District of Columbia Rules of Civil Procedure, service upon an individual may be effected by serving him with a copy of the summons and of the complaint personally, or by leaving a copy at the individual’s dwelling house or usual place of abode, or by serving the individual’s appointed or legal agent, or by mailing the summons and complaint to the individual by registered or certified mail.

attempt to serve the Lieutenant General by the process server was not sufficient to effectuate service. Liberal construction of Rule 4 “cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process can be had.” Combs, 825 F.2d at 446. Under the clear rules, an individual is only served when he personally receives a copy of the summons and complaint. The Lieutenant General never personally received a copy of the summons and complaint. The process server never attempted to explain his purpose. Lumintang Dec. at ¶ 9 After Brig. Gen. Susanto knocked the papers to the ground, the process server left without effectuating service. Lumintang Dec. at ¶ 9; Susanto Dec. at ¶ 4. Lt. Gen. Lumintang was never aware that a process server was attempting to serve him with legal papers. Lumintang Dec. at ¶¶ 9-10. The service is invalid because Lt. Gen. Lumintang never personally received the summons and complaint. Thus, the Court had no personal jurisdiction over the Lieutenant General and the default judgment and the judgment for damages should be set aside.

Furthermore, General Susanto, the individual who took the summons and complaint had never been appointed by Lt. Gen. Lumintang to be an agent for service of process for him. Lumintang Dec. at ¶ 10. The individual who took the papers was not an employee of his nor was he authorized to accept the papers nor did he promise that he would deliver them to the Lieutenant General. Id. Based on these facts, Lt. Gen. Lumintang was never served with process. The courts have uniformly held that service upon an individual not authorized to accept service of process on behalf of the defendant does not effectuate service upon the defendant.<sup>13</sup>

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<sup>13</sup> See, Wham v. National Post Office Mail Handlers, 99 LRRM 2980 (D. S.C. 1978)(leaving a summons and complaint with the secretary of the president of the union, who was not authorized to accept service of process on behalf of the president, did not effectuate service upon the president); Ross v. Runyon, 156 F.R.D. 150, 153-154 (S.D. Tx. 1994)(a secretary stating that she could accept service of process for the president of a union did not

D. The Court Did Not Have Subject Matter Jurisdiction Over the Alien Tort Claims Act Claims or the Torture Victims Protection Act Claims, and therefore, the Judgments Are Void.

In addition to the judgments entered in this case being void due to a lack of in personam jurisdiction, the judgments are void because the Court did not have subject matter jurisdiction over the claims brought by the plaintiffs. Under Article 3 of the U.S. Constitution, federal courts are courts of limited jurisdiction. A federal court cannot adjudicate a claim before it unless it is established that the court has subject matter jurisdiction over the matter before it. Plaintiffs in this matter have asserted that the Court has jurisdiction over their claims under the Alien Tort Claims Act (“ATCA”) and the Torture Victims Protection Act (“TVPA”). The Court, however, did not have subject matter jurisdiction over those claims and consequently did not have supplemental jurisdiction over the state law claims. Therefore, the judgments rendered against Lt. Gen. Lumintang are void and thus subject to being set aside.

1 The Alien Tort Claims Act

The ATCA, 28 U.S.C. § 1350, provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” This section has been interpreted as providing both a private cause of action

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mean that she was authorized to accept service of process); MCI Telecommunication Corp., 1991 U.S. Dist. LEXIS 12878 at \*1-3 (service upon a part-time employee of a corporation not sufficient to effectuate service on corporation); O’Meara v. New Orleans Legal Assistance Corp., 1991 U.S. Dist. LEXIS 8137 (E.D. La. 1991)(service on individual not agent authorized to accept service is invalid); Haldane v. Crockford, 1998 U.S. Dist. LEXIS 6450, \*8-9 (D.D.C. 1998); Lennon v. McClory, 3 F. Supp.2d 1461, 1462-63 (D.D.C. 1998); but see, Clipper v. Frank, 704 F. Supp. 285, 287 (D.D.C. 1989)(a secretary’s representation that she was authorized to accept service of process on behalf of a union president sufficient to effectuate service of process on the president).

and a federal forum where aliens may seek redress for violations of international law. Abere-Jira v. Negewo, 72 F.3d 844, 847 (11<sup>th</sup> Cir. 1996)(citations omitted). Three conditions must be met in order for there to be subject matter jurisdiction under the ATCA: (1) the plaintiff must be an alien; (2) the cause of action must be for a tort; and (3) the tort must be committed in violation of the law of nations or treaty of the United States. Islamic Salvation Front, 993 F. Supp. at 7, citing, Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).

The law of nations, currently known as international customary law, is formed by the “general assent of civilized nations.” Id., citing, Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). If upon inquiry, defendant’s alleged conduct violates “well-established, universally recognized norms of international law,” as opposed to “idiosyncratic legal rules,” then federal jurisdiction exists under the ATCA. Kadic, 70 F.3d at 239. The law of nations does not confine its reach to state action. Id. Certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. Id. Examples of action by private individuals and entities that would violate international law include piracy, slave trade, war crimes, genocide and aircraft hijacking. Id. at 239-240. “Offenses of ‘universal concern’” were capable of being committed by private actors. Id. at 240. Torture and summary execution, unless perpetrated in the course of genocide or war crimes, are proscribed by international law only when committed by state officials or under color of law. Id. at 243. A private individual acts under color of law when he acts together with state officials or with significant state aid. Id. at 245.

The allegations set forth in the Complaint, such as summary execution and torture, are proscribed by international law only when committed by state officials or under color of law. Thus, to the extent that the plaintiffs are alleging that Lt. Gen. Lumintang acted in an individual capacity,

the Court has no subject matter jurisdiction over the ATCA claims. To the extent that the plaintiffs are alleging that Lt. Gen. Lumintang acted under color of law, the Court has no subject matter jurisdiction over the ATCA claims because the plaintiffs have failed to allege how he acted with state officials or with significant state aid.<sup>14</sup>

## 2. The Torture Victim Protection Act

The TVPA, enacted in 1992, provides a cause of action for official torture and extrajudicial killing:

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.

TVPA § 2(a). The statute requires that a plaintiff exhaust adequate and available local remedies. Id. at § 2(b).

In this case, the plaintiffs circumvented numerous available domestic legal remedies that could have addressed their claims. Plaintiffs were required to exhaust these avenues of relief prior to filing a lawsuit in a United States federal court. First, the plaintiffs could have brought their claims to District Court in Dili, East Timor. Anshari Dec. at ¶ 7. Pursuant to Regulation No. 2000/11 of the United Nations Transitional Administration in East Timor (UNTAET) of March 6, 2000, Section 10, the District Court in Dili has exclusive jurisdiction over genocide, war crimes and

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<sup>14</sup> As shown below, under Indonesian law, Lt. Gen. Lumintang had no command control or authority over the troops and personnel in East Timor, therefore, he could not have acted with state officials or with significant state aid in engaging in the conduct alleged in the Complaint.

crimes against humanity. Id. and Exhibit C attached thereto. Pursuant to Section 5.3 of the same Regulation, the District Courts have civil jurisdiction “in respect of civil claims.

Second, plaintiffs could have brought their claims to the East Timorese General Prosecutor for investigation and possible indictment in the human rights tribunal established by UNTAET. Id. In July 2001, UNTAET established a human rights tribunal as the Dili District Court’s Special Panel for Serious Crimes to try human rights abuses committed in the territory. Id. As of November 23, 2001, the Office of East Timor’s General Prosecutor had filed thirty-three serious crimes indictments, four of which allege crimes against humanity, against over twenty-one persons alleging the commission of crimes including murder, torture, prosecution, inhumane acts, forced deportation and extermination related to the violence that occurred after the announcement that East Timor would have the opportunity to vote for its independence. Id. and Exhibit D attached thereto. Some officers of the Indonesian Armed Forces have been indicted and the indictments have been presented to the Dili District Court. Id. Lt. Gen. Lumintang has not been among those Officers indicted. Id.

Third, the plaintiffs could have filed their claims in civil court in Indonesia. Id. at ¶ 12. Articles 1365, 1367, 1370 and 1371 of the Indonesian Civil Code provide that any person who commits an act in violation of law and causes damage to another is liable to compensate the injured party, or in the event of a deliberate killing or death due to negligence of another, is liable to the husband, wife, children or parents of the victim. Id. and Exhibit E attached thereto.

Finally, in 2000, Indonesia established a special Human Rights Court in Jakarta to address violations of human rights in East Timor and authorized the Attorney General’s Office to investigate those individuals in the Indonesian military and police accused of committing those violations. Id. at ¶¶ 3-6, 8-10.

Law of the Republic of Indonesia No. 26 of 2000, dated November 23, 2000 Concerning the Human Rights Court, established a Human Rights Court in Indonesia and authorized the Attorney General to investigate allegations of gross human rights violations, including those in East Timor. Id. at ¶ 3 and Exhibit A attached thereto. Article 43 (1) Law No. 26 of 2000 determined that gross violations of human rights which occurred before Law No. 26 became applicable, should be examined and judged by an Ad Hoc Human Rights Court. Id. In order to implement this provision, the President of the Republic of Indonesia issued Presidential Decree No. 53 of 2001, dated April 23, 2001, Concerning the Establishment of the Ad Hoc Human Rights Court, within the Central Jakarta District Court, amended by Presidential Decree No. 96 of 2001, dated August 1, 2001, Concerning the Amendment of the Presidential Decree No. 53 Of 2001. Id. and Exhibits B and B-1, attached thereto. Because the alleged gross violation of human rights in East Timor set forth in the plaintiffs' Complaint occurred before the issuance of Law No. 26 of 2000, jurisdiction over such claims in that Complaint lie with the Ad Hoc Human Rights Court in the Central Jakarta District Court. Id. This court is functioning and fifteen Judges were appointed to the Human Rights Court. Id. Thus, plaintiffs could have brought their claims against Lt. Gen. Lumintang before the Ad Hoc Human Rights Court in the Central Jakarta District Court. Id.<sup>15</sup>

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<sup>15</sup> As a result of the investigations of the National Commission which were turned over to the Attorney General's Office, members of the military were investigated or interrogated by the Attorney General's Office beginning in January 2000 and continuing through February 2002. Id. at ¶ 8. As a result of the investigations, a list of 19 persons suspected of having committed gross violations of human rights in East Timor was released by the Attorney General's Office to the official Indonesian press. Id. at ¶ 10. This list was published on January 30, 2002 and included one Army Major General, one Army Brigadier General, three Army Colonels, three Army Lt. Colonels, one Police Brigadier General, three Police Lt. Colonels and various other military personnel. Id. Seven of these 19 suspects have been indicted and are scheduled for trial before the Human Rights Court. Id. at ¶ 11.

Thus, there are local procedures in both East Timor and Indonesia available to the plaintiffs to redress their claims. The plaintiffs have failed to pursue and exhaust those procedures. Therefore, the Court lacks subject matter jurisdiction over the TVPA claims and judgments based on the TVPA are void as a matter of law and should be set aside.<sup>16</sup>

**E. The Judgments Should Be Set Aside Under Rule 60(b)(6) Based on the Extraordinary Circumstances of the Case and the Substantial Interests of Justice.**

Under Rule 60(b)(6), relief from a judgment or order is also permitted when relief will further the interests of justice without affecting the substantial rights of the parties. The relief provided by Rule 60(b) is equitable in character and is to be administered upon equitable principles. DiVito v. Fidelity and Deposit Company of Maryland, 361 F.2d 936, 939 (7<sup>th</sup> Cir. 1966). In Klapprott v. United States, 335 U.S. 601 (1949), the Supreme Court stressed that courts should apply Rule 60(b)(6) whenever such action is appropriate to accomplish justice. See, Anderson v. Chevron Corp., 190 F.R.D. 5, 9 (D.D.C. 1999)(citations omitted).

The District of Columbia Circuit has stated:

In fact, we have construed Rule 60(b)(6)'s catchall provision, allowing correction for

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<sup>16</sup> Moreover, by its plain language, the TVPA renders liable only those individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Kadic, 70 F.3d at 245. Legislative history confirms that this language was intended to "make clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim" and that the statute "does not attempt to deal with torture or killing by purely private groups." Id. Private individuals may act under color of law for TVPA purposes when they act in concert with state officials or with significant state aid. Id. at 245-246. To the extent that the plaintiffs are alleging that Lt. Gen. Lumintang acted in an individual capacity, the Court has no subject matter jurisdiction over the TVPA claims. To the extent that the plaintiffs are alleging that Lt. Gen. Lumintang acted under color of law, the Court has no subject matter jurisdiction over the TVPA claims because the plaintiffs have failed to allege how he acted with state officials or with significant state aid.

“any other reason justifying relief,” as calling for relief in extreme cases even where the moving party has been guilty of inexcusable neglect:

When a party timely presents a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust, reconsideration under rule 60(b)(6) is proper even though the original failure to present that information was inexcusable. Computer Professionals for Social Responsibility v. United States Secret Service, 315 U.S. App. D.C. 258, 72 F.3d 897, 903 (D.C. Cir. 1996)(quoting and following, Good Luck Nursing Home, Inc. v. Harris, 204 U.S. App. D.C. 300, 636 F.2d 572, 577 (D.C. Cir. 1980)).

Twelve John Does v. District of Columbia, 117 F.3d 571, 578 (D.C. Cir. 1997).

Although this “catch-all” category is reserved for extraordinary circumstances, relief under this category is available when justice so demands. Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897, 903 (D.C.Cir.1996)(Rule 60(b)(6) applies only to “extraordinary circumstances;” however, relief is appropriate where previously undisclosed evidence indicated that government sources had reasonable expectation of confidentiality; order directing disclosure of source’s identity should therefore be modified under Rule 60(b)(6)); Empresa Electrica del Ecuador, Inc. v. Republic of Ecuador, 191 F.R.D. 323, 324 (D.D.C. 2000); Anderson, 190 F.R.D. at 9 (a court must balance the need for the finality of judgments with the demand that justice be done).

This case presents the extraordinary circumstances and demand for justice that qualifies for relief under Rule 60(b)(6). A \$66 million judgment has been issued against a foreign citizen, unfamiliar with the laws and procedures of the United States judicial system, who never appeared in Court to defend himself against accusations of heinous atrocities. Furthermore, there is considerable evidence that plaintiffs have sued the wrong person and the individual accused is innocent of the claims against him. Thus, the Court should not let stand a judgment that in effect

renders a guilty verdict against Lt. Gen. Lumintang that he committed summary execution, torture and other crimes against humanity when he did not appear to contest those charges and there exists substantial evidence proving his innocence.

1. The Attorney General of The Republic of Indonesia Investigated the Crimes and Acts Set Forth in Plaintiffs' Complaint and Found Lt. Gen. Lumintang Not Responsible for their Commission or Omission.

The Attorney General's Office of the Republic of Indonesia was authorized by Indonesian law to investigate and prosecute human rights violations in East Timor. Lumintang Dec. at ¶ 11; Anshari Dec. at ¶¶ 3-6. Law No. 26 of 2000 authorizes the Attorney General's Office to investigate allegations of gross violations of human rights and specifically includes in such investigatory authority, power to interrogate members of the Indonesian military. *Id.* at ¶ 4 and Exhibit A attached thereto. Article 21 (1) states that the interrogation of those suspected of gross violation of human rights is to be carried out by the Attorney General. *Id.*

Upon passage of the law, the Attorney General conducted interrogation of persons suspected of committing gross violations of human rights based on the result of inquiries conducted by the National Commission of Human Rights, pursuant to Articles 18, 19 and 20 of Law No. 26 of 2000. *Id.* at ¶ 5.<sup>17</sup> The National Commission of Human Rights is an independent, non-governmental body.

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<sup>17</sup> Article 18 of Law No. 26 of 2000 states that the inquiry concerning allegations of gross violations of human rights is to be carried out by a National Commission of Human Rights. *Id.* Article 20 (1) provides that if the National Commission of Human Rights finds that there is sufficient initial evidence of gross violations of human rights, the findings and conclusions of its inquiry is to be delivered to the interrogator (*in casu* the Attorney General). *Id.* Article 20 (2) states that the National Commission of Human Rights is to deliver all results of its inquiry to the interrogator not later than 7 working days after reaching its findings conclusions. *Id.*

Id.<sup>18</sup>

In conducting an investigation, based upon the referred findings and conclusions from the National Commission of Human Rights, the Attorney General's representatives review the Commission's inquiries and all available evidence, including testimony of witnesses, victims and their families. Id. at ¶ 6. The Attorney General's representatives can conduct an inquiry at the place the crime allegedly occurred, including East Timor, in cooperation with UNTAET. Id.

Members of the military were investigated or interrogated by the Attorney General's Office beginning in January 2000 and continuing through February 2002. Id. at ¶ 8. These investigations and interrogations of military personnel by representatives of the Attorney General's office and took place at the Attorney General's Office, Kebayoran Baru, in southern Jakarta. Id. The military personnel were interrogated based on subpoenas issued by the Attorney General's Office. Id. They were accompanied by legal counsel during the interrogation and written minutes of the interrogations were taken and kept. Id.

On May 4, 2000, Lt. Gen. Lumintang was called before the Office of the Attorney General of Indonesia and interrogated about the occurrences in East Timor. Lumintang Dec. at ¶ 11.

As a result of the investigations conducted by the Attorney General's Office, pursuant to Articles 21 and 22 of Law No. 26 of 2000, a list of 19 persons suspected of having committed gross violations of human rights in East Timor was released by the Attorney General's Office to the official Indonesian press. Lumintang Dec. at ¶ 11 and Exhibit A attached thereto; Anshari Dec. at

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<sup>18</sup> The National Commission of Human Rights is not part of the Executive Branch of the Government. Id. It consists of approximately 20 Commissioners and the Chief Commissioner is a former Judge of the Supreme Court, which is the highest court in the Republic of Indonesia. Id. Other Commissioners are practicing lawyers and legal experts from Indonesian law schools.

¶ 10. This list was published on January 30, 2002 and included one Army Major General, one Army Brigadier General, three Army Colonels, three Army Lt. Colonels, one Police Brigadier General, three Police Lt. Colonels and various other military personnel. Id. Lt. Gen. Lumintang was not listed as one of the nineteen suspects. Id. Additionally, on January 31, 2002, the Attorney General of the Republic of Indonesia issued a letter certifying that Lt. Gen. Lumintang was not suspected of committing human rights violations in East Timor. Lumintang Dec. at ¶ 12 and Exhibit B attached thereto.

2. The Command Structure of the Indonesian Military Establishes that Lt. Gen. Lumintang Could Not Have Been Responsible Under the Principle of Command Responsibility for the Crimes Committed by Subordinate Soldiers as Alleged in the Complaint.

During the time period in which the allegations set forth in the Complaint were alleged to have occurred, Lt. Gen. Lumintang was the Army Deputy Chief-of-Staff, the second highest ranking officer in the Army. Lumintang Dec. at ¶ 2. The Army (TNI AD) and the Armed Forces (TNI) are separate and distinct entities under Indonesian law and have different duties and responsibilities. Sihombing Dec. at ¶ 3. As Army Deputy Chief of Staff, Lt. Gen. Lumintang had no operational authority for planning, commanding, supervising or controlling military operations. Lumintang Dec. at ¶ 3. That authority rested with the Armed Forces Commander and the High Command of the Armed Forces/TNI. Id. Lt. Gen. Lumintang has never been a member of the Armed Forces/TNI. Id.

The command structure of the Indonesian military forces is set up so that the Commander of the Armed Forces and his staff have the duty and responsibility for operational activities of the military, such as the planning, commanding, supervising, controlling and execution of military

operations. The Army Chief of Staff, on the other hand, only has responsibility for administrative matters related to the military, such as training and education, payment and housing of personnel, procurement in general and provision of equipment. Anshari Dec. at ¶ 14. Therefore, as Army Deputy Chief of Staff, under a command responsibility theory, Lt. Gen. Lumintang could not have been responsible for any of the allegations in the Complaint.

Articles 37 and 38 of Act No. 20 of 1982 addressing the basic provisions on State defense and security of the Republic of Indonesia delineate the separate roles of the Commander of the Armed Forces and the Chiefs-of-Staff of the Services, such as the Army. Article 37(2) states:

**The Commander of the Armed Forces heads the Headquarters of the Armed Forces in the execution of the duties and the responsibilities on the administration and operations of the Armed Forces. (Emphasis added)**

Sihombing Dec. at ¶ 5 and Exhibit C attached thereto.

Article 38(2) states:

**The Chiefs-of-Staff of the Services head the Headquarters of the Services in the execution of the duties and responsibilities on the administration of the capabilities of the Services. (Emphasis added)**

Id.

In 1983, Presidential Decree No. 60 was issued addressing and refining the basics and the structural organization of the Armed Forces of the Republic of Indonesia. Id. at ¶ 4 and Exhibit A attached thereto. Chapter I addressed the Positions, Principal Duties and Functions of the Armed Forces. Articles 1 and 2 address the principal duties and responsibilities of the Armed Forces Commander.

Article 1(1) states:

**The Armed Forces of the Republic of Indonesia is led by the Commander of the Armed Forces of the Republic of Indonesia . . . who is directly responsible to the**

President.

Article 1(2) states:

The Armed Forces Commander assists the President in the execution of the commanding authority in the conduct of the state defense and security.

Article 2(1) states:

The Armed Forces Commander has the principal duty of leading the Armed Forces of the Republic of Indonesia in the performance of the duties and responsibilities of **administration and operations** of the Armed Forces of the Republic of Indonesia and to undertake the **administration and operations** of the entire components of the forces of the state defense and security in compliance with the applicable laws and in line with the Government's policies. (Emphasis added)

Article 2(2) states:

The Armed Forces Commander together with the Chiefs-of-Staff of the Services and the Chief of the Police of the Republic of Indonesia assists the Minister for Defense and Security in the performance of duties and responsibilities in the area of **administration** of the management of the capabilities of state defense and security. (Emphasis added)

Article 3(1) states:

The Armed Forces of the Republic of Indonesia has the function of state defense and security force and social force.

Article 3(1) states:

The Armed Forces of the Republic of Indonesia as state defense and security force is a state apparatus which serves as the first line of strike and deterrence against every external as well as internal threats, as law enforces and people's trainer in the performance of state defense and security.

Thus, Articles 1 through 3 of Presidential Decree No. 60 establish that the Commander of the Armed Forces has operational authority for conducting military forces to respond to internal and external threats. The Chiefs-of-Staff of the Services, such as the Army, solely have authority to assist the Commander of the Armed Forces with administrative matters, not operational matters.

Chapter II of Presidential Decree No. 60 addressed structural organization of Armed Forces. Article 4 establishes the Army, the Navy, the Air Force and the Police as subsets of the Armed Forces of the Republic of Indonesia. Id. Article 5 establishes that the Armed Forces are organized into three levels: the Armed Forces Headquarters level, the Services and Police level (the Army, Navy, Air Force and Police) and the Operational Command level. A copy of the command structure of Armed Forces is attached as Exhibit B to the Sihombing Dec.

On December 20, 1983, the Commander of the Armed Forces issued Decree No. Kep/03/P/XII/1983 addressing the structure and organizational procedure of the General Staff of the Armed Forces of the Republic of Indonesia (the Sum ABRI). Id. at ¶ 6 and Exhibit D attached thereto. Under Articles 1 and 2, the General Staff has the duty of assisting the Armed Forces Commander in carrying out the administration and operations of the Armed Forces of the Republic of Indonesia. Article 2, titled duties, states:

The Sum ABRI has the duty of assisting the Armed Forces Commander in carrying out the administration and operations of the Armed Forces of the Republic of Indonesia and of the other components of the state defense and security forces by executing the Staff functions of planning, conduct and control in the framework of preparing the readiness of the forces of the component of the Services/Police of the Republic of Indonesia and other state defense and security components and the commands and control of operations of the Operational Commands of the Armed Forces of the Republic of Indonesia.

Article 3 details the main functions of the Sum ABRI:

In view of performing the duties as mentioned in Article 2 hereinabove, the Sum ABRI carries out the following main functions:

- a. To plan and to draw up policies and strategy in the setting-up of state defense and security forces.
- b. To prepare, to form and to control strategy and operations plans for the state defense and security forces.
- c. To prepare and to draw up work plans and programs in the scope of preparing state defense and security resources and to control its

- execution.
- d. To prepare, to draw up an estimated requirement for mobilization and demobilization of the resources of the Armed Forces of the Republic of Indonesia as well as other state defense and security components which cover manpower, materials, facilities and services and to control their executions.
  - e. To continuously monitor and assess situations and the developing conditions which may have an impact on the preparations and operations of the forces.
  - f. To conduct coordination and supervision on the executions of the above functions as mentioned in points a, b, c, d and e above, including to prepare directives, direction and other instructions which may be required in order to ensure the proper, successful and effective execution thereof.

As a Deputy Chief of Staff of the Army, Lt. Gen. Lumintang was not a member of the General Staff of the Armed Forces at the time of the occurrences in East Timor set forth in the Complaint. See, Articles 4 through 16 of Decree No. Kep/03/P/XII/1983 attached as Exhibit D to the Sihombing Dec.; Lumintang Dec. at ¶ 2-3.

On October 5, 1992, the Commander of the Armed Forces issued a decree, Kep/08/X/1992, addressing improvements to the basics of organization and procedure of the Indonesian Army (TNI AD). Sihombing at ¶ 7 and Exhibit E attached thereto. Article 7 of that decree sets forth the duties and responsibilities of the Army Deputy Chief of Staff, the position held by Lt. Gen. Lumintang. Id. Under Article 7 of the Decree, the Army Chief Deputy Chief of Staff is responsible solely for the implementation of administrative matters for the command and its elements, not operational matters.

Article 7 states:

#### The Army Deputy Chief-of-Staff

- a. The Army Deputy Chief-of-Staff is the principal aide and advisor of the Army Chief-of-Staff in the leadership, coordination and administration of the assisting boards of the heads/staff, services and executing staff and central executive staff and in the performance of other tasks assigned to him by the Army Chief -of-Staff with the following duties:

- 1) To propose considerations and advice to the Army Chief-of -Staff regarding matters under his scope of duty.
  - 2) To direct the Inspectorate-General of the Army, the General Staff of the Army, the Special Staff of the Army, the Planning Staff of the Army, the Expert Staff to the Army Chief-of-Staff, and to formulate directives, plans and programs for the execution of the main duties of the Indonesian Army.
  - 3) To ensure the guarantee and the maintenance of coordination:
    - a) between the staff of the Headquarters of the Army with the boards and the Commands within the Army circle of the Indonesian Armed Forces;
    - b) between the staff of the Headquarters of the Army and the staff of the Headquarters of the other Forces/the police of the Republic of Indonesia,;
    - c) between the staff of the Headquarters of the Army and the staff of the Headquarters of the Armed Forces of the Republic of Indonesia and the staff of the Ministry of Defense and Security.
  - 4) To coordinate, to control and to supervise the execution of directives/regulations, plans and programs of the Army and the arrangements of personnel, materials and finances.
  - 5) To coordinate, to supervise and to direct guidelines for the performance of tasks of the board staff, the service agency, and the central executive board.
- b. In the event the Army Deputy Chief-of-Staff is unable to carry out his duties and obligations, he shall be represented by an official appointed by the Army Chief-of-Staff.
  - c. The Army Deputy Chief-of-Staff is responsible in the execution of his duties and obligations to the Army Chief-of-Staff.

Under these laws and decrees, the Chief of Staff for the Army does not have authority over operational matters of the Indonesian Army, only administrative matters. Sihombing Dec. at ¶ 8. Although the Army Chief of Staff is directly responsible to the Commander of the Armed Forces, his responsibility is limited to administrative matters. *Id.* The Army Deputy Chief of Staff is directly responsible to the Army Chief-of-Staff. *Id.* Neither the Army Chief of Staff nor the Deputy Chief of Staff have any operational authority for planning, commanding, supervising or controlling military operations, Deputy Chief-of-Staff of the Army certainly did not possess such authority. *Id.*

Thus, Lt. Gen. Lumintang had no authority to command or control troops or personnel in East Timor or to review the manner in which military operations there were implemented or executed. Id.<sup>19</sup> Lt. Gen. Lumintang also did not have the authority or power to discipline or punish those personnel and troops. Id. at ¶ 9. The authority for law enforcement and disciplinary actions within military operations rests with the Commander of Military Area Command and the Commander of the Armed Forces, not the Army Chief-Of-Staff or deputies. Id.<sup>20</sup>

The claims set forth in the Complaint relate to operational matters and command and control authority over the troops and personnel in East Timor engaged in those operational matters. Lt. Gen. Lumintang cannot be held liable for the alleged gross human violation crimes committed by

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<sup>19</sup> The High Command of the Armed Forces/TNI (the Sum ABRI) is responsible for conducting military operations overseen by the Armed Forces Commander. Sihimbing Dec. at ¶ 9. The Armed Forces has the responsibility to plan and implement operations. Id. The duty and obligation to inspect the manner in which operations and strategic planning of operations is progressing rests with the Inspector General of the Armed Forces. Id.

<sup>20</sup> Decree Number Kep /02/III/1987 of the Commander of the Armed Forces, regarding The Appointment of Officers Authorised to Convene Cases of the Members of the Armed Forces of the Republic of Indonesia, dated March 21, 1987 provides in Article 7 that the Commander of the Military Resort/Commander of the Infantry Brigade has authority, for the Army, to convene cases involving crimes committed by the Military. Anshari Dec. at ¶ 13 and Exhibit F attached thereto. Pursuant to Article 8, in areas of operations unless otherwise instructed, “the Officer Authorised to Convene on Cases shall be the Commander/Operations Commander concerned.” Id. Law Number. 31 of 1997 regarding The Military Judiciary, establishes procedures for investigating and trying crimes committed by members of the military. Id. and Exhibit G attached thereto. Article 69 of that Law provides that investigators of crimes committed by the military are the superior who holds disciplinary powers, the Military Police and The Military Prosecutor. Id. Assistant Investigating Officers for the Army is the Provost of the Indonesian Army. Id. Article 122 of that Law provides that the Convening Authority for the Army is the Chief of Staff of the Army and the Convening Authority has the authority to order the Investigator to conduct investigations, receive the report on the investigation, extend detention and to file the case in the competent court for examination and trial, settle the case or close it. Id. Lt. Gen. Lumintang has no authority under either this Decree or Law to investigate, try or punish subordinates for crimes committed during an operational matter. Id.

subordinate soldiers in East Timor under the theory of command responsibility because he did not have responsibility over the troops or personnel operating in East Timor. Lt. Gen. Lumintang is not in the chain of command for military operations. He was not entitled to receive reports from subordinate commanders. Such reports were sent to the Armed Forces Headquarters which has command and control over the troops in East Timor. Lt. Gen. Lumintang, as the Army Deputy Chief of Staff, was a staff officer beyond the chain of command of military operations and had no duty or authority to review the manner in which the operation was conducted. Thus, he could not have participated in or been responsible for the commission or omission of torts or criminal acts by troops or personnel in East Timor.

Therefore, the rare circumstances contemplated by Rule 60(b)(6) have been met based on the extraordinary facts of this case; a foreign citizen being accused, in a court in the United States, of heinous atrocities, has been investigated and exonerated by the Attorney General of his own country; the accused is not responsible for acts of subordinate officers under the principle of military command responsibility because he had no authority over such military personnel; other military officers have been indicted both in Indonesia and East Timor and plaintiffs could have brought charges before the appropriate legal entities investigating gross violations of human rights or sued in civil courts or both; and the substantial interests of justice at stake, that is a potentially innocent individual has a judgment rendered against him branding him a murderer and torturer.

## **V Conclusion**

For the above set of reasons, the Court should set aside the default judgment entered on November 8, 2000 and the Findings of Fact and Conclusions of Law and the Order and Judgment

on the issue of damages entered on September 13, 2001 under Rule 60(b)(4) as they are void as a matter of law. Alternatively, the Court should set aside those orders and judgments under Rule 60(b)(6) based on the extraordinary circumstances present and the substantial demands of justice.

Dated: March 25, 2002

Respectfully submitted,

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**Certificate of Service**

hereby certify that I have this day caused the following people to be served by first class mail postage pre-paid with a copy of the foregoing Motion to Set Aside Default Judgment and Order and Judgment on Damages; Memorandum of Law in Support Thereof; the Declarations of Lt. Gen. Lumintang, Brigadier General Dadi Susanto, Brigadier General Shihombing, SH. LLM. and Lieutenant Colonel Natsri Anshari with attached Exhibits and proposed Order:

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