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.	)	
	)	

OBJECTIONS OF DEFENDANT TO THE REPORT AND RECOMMENDATION ISSUED BY MAGISTRATE JUDGE ALAN KAY

Defendant Major General Johny Lumintang files the following objections to the Report and Recommendation issued by Magistrate Judge Alan Kay on March 3, 2004:

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.[1] (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 Gen. Lumintang. (Docket Entry #10) On November 8, 2000, the Court entered default judgment against 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

[1] The defendant was promoted from Major General to Lieutenant General in 1998. Declaration of Lieutenant General Johny Lumintang at ¶ 2. The Declaration of Johny Lumintang was filed as Exhibit 1 in support of the Motion to Set Aside Default Judgment and Order and Judgment on Damages (Docket Entry #43).

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

On March 25, 2002, Gen. Lumintang filed a motion to set aside the default judgment and order and judgment on damages. (Docket Entry #42). Gen. Lumintang asserted that all judgments of this Court issued against him were void as matters of law, under Rule 60(b)(4) of the Federal Rules of Civil Procedure, because the Court did not have personal jurisdiction over him or subject matter jurisdiction over the claims brought against him. Alternatively, Gen. Lumintang asserted that, even if the Court had personal and subject matter jurisdiction, the judgments against him should be set aside in accordance with Rule 60(b)(6), because the extraordinary circumstances of this case and the demands of justice compel such relief.

On March 3, 2004, Magistrate Judge Kay issued a report and recommendation that the motion to set aside be denied. Magistrate Judge Kay determined that Gen. Lumintang had been served with process while in the United States, and therefore, this Court had personal jurisdiction over him. Magistrate Judge Kay also determined that this Court had subject matter jurisdiction over the plaintiffs' claims and that there were no extraordinary circumstances compelling the setting aside of the default judgment.

II. Objection One — Magistrate Judge Kay Improperly Found that Gen. Lumintang Was Personally Served by the Plaintiffs at Dulles International Airport. Based on the Conflicting Evidence, an Evidentiary Hearing Should Have Been Held.

An in personam judgment entered without personal jurisdiction over a defendant is void as

to that defendant. Combs v. Garin Trucking, 825 F.2d 437, 442 (D.C. Cir. 1987). And, because 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 Corp. v. Walsh, 197 F.R.D. 196, 198 (D.D.C. 2000); MCI Telecommunications Corp. v. The Travel Specialist, 1991 U.S. Dist. LEXIS 12878, *2-5 (D.D.C. Sept. 17, 1991); Rogers v. Hartford Life and Accident Ins. Co., 167 F.3d 933, 940 (5th 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 (5th Cir. 1992).

Magistrate Judge Kay incorrectly determined that Gen. Lumintang was served with process. Report and Recommendation at 6-13. Gen. Lumintag is a citizen and resident of the Republic of Indonesia. Lumintang Dec. at ¶ 1. 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. On March 6, 2000, Gen. Lumintang received an invitation 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. Gen. Lumintang came to the United States to participate in the panel discussion. Id.

On March 30, 2000, Gen. Lumintang left the United States for Frankfurt, Germany on an Air France flight from Dulles International Airport. Id. at ¶ 5. On March 30, 2000, around 5:00 P.M., on the way to leaving for Jakarta, 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.[2] Gen. Lumintang and Gen. Susanto were in the concourse outside of the boarding area for 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 Gen. Lumintang identified himself, the man attempted to hand him a thick sheaf of papers. Lumintang Dec. at ¶ 9.; Susanto Dec. at ¶ 4. 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, Gen. Susanto simultaneously told 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. 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. Gen. Lumintang then went to the boarding area with Gen. Susanto and boarded his plane without ever touching or receiving the papers from the man. Id. Gen. Susanto instructed his driver to pick up the papers and take them to his car. Susanto Dec. at ¶ 5.

Thus, the summons and complaint were never personally delivered to Gen. Lumintang. Lumintang Dec. at ¶¶ 9-10; Susanto Dec. at ¶¶ 4-5. The attempt to serve the 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 General was never personally received a copy of the summons and complaint. The process server never attempted to explain his purpose. Lumintang Dec. at ¶ 9. After Gen. Susanto knocked the papers to the ground, the process server left

[2] The Declaration of Brig. Gen. Dadi Susanto was filed as Ex. 4 in support of the Motion to Set Aside Default Judgment and Order and Judgment on Damages (Docket Entry #43).

without effectuating service. Lumintang Dec. at ¶ 9; Susanto Dec. at ¶ 4. Gen. Lumintang was never aware that a process server was attempting to serve him with legal papers. Lumintang Dec. at ¶¶ 9-10. Thus, service is invalid because Gen. Lumintang never personally received process.

Plaintiffs submitted declarations from an employee of the East Timor Action Network and the process server it hired, alleging that defendant was properly served at Dulles International Airport. The statements in these declarations directly contradicted those of Gen. Lumintang and Gen. Dadi Susanto. Plaintiffs claim that their declarations are unchallengeable and the declarations of the Indonesians are false. Magistrate Judge Kay reaches the dubious conclusion that the affidavits of two Indonesian Generals and a driver are inherently less credible than the affidavits of a U.S. East Timorese activist and her paid process server.

The proper course of action for the Court to have followed in this situation would have been to allow discovery on the issue and conduct an evidentiary hearing so that the witnesses can be cross-examined and their credibility and veracity can be ascertained in open court. Magistrate Judge Kay incorrectly failed to follow Weiss v. Glemp, 792 F. Supp. 215 (S.D.N.Y. 1992), a case virtually identical to the instant matter, in which the court determined that an evidentiary hearing should be held in the face of conflicting evidence on the issue of service of process.

In Weiss, defendant Cardinal Josef Glemp sought to dismiss a complaint filed by Rabbi Avi Weiss based on insufficiency of service of process. Id. at 218. On September 25, 1991, a process server, attempted to serve the Cardinal with a summons and complaint. Id. at 217. In an affidavit, the Cardinal claimed that although he saw a hand extending papers toward him, at no time did papers ever touch him and he never knew that someone was attempting to give him official court papers. Id. at 218. Two affidavits substantially supported Cardinal Glemp's version. Id. In an opposing

affidavit, the process server, stated that she announced to Cardinal Glemp that she was an officer of the court, she had legal papers for him, she placed the papers under the Cardinal's arm, and that another priest knocked them to the ground and picked them up. Id. Another plaintiff witness essentially corroborated the process server's version of the events. Id. at 219.

Contrary to the Magistrate Judge's chosen manner to resolve this dispute by disregarding defendants' affidavits and adopting plaintiffs', the court in Weiss conducted an evidentiary hearing in which all of the witnesses were examined and cross-examined in open court to ascertain credibility and veracity. Id. at 220-223. The court found that the process server and her witness lied in their testimony and discredited both of them as witnesses. Id. at 223. As a result, the court concluded that the attempted service on Cardinal Glemp was not effected by the plaintiff. Id. at 225.

As in Weiss, the proper way to resolve this "battle of the affidavits" is to allow discovery and hold an evidentiary hearing, not to unilaterally adopt plaintiffs' claims. At this stage, there simply is no way to ascertain which version of the facts is true.[3]

Magistrate Judge Kay's attempt to distinguish the Weiss decision from the instant matter is unavailing. Relying upon the decision in Doe v. Karadzic, 1996 U.S. Dist. LEXIS 5291, 5295-6 (S.D.N.Y. 1996), Magistrate Judge Kay asserts that Gen. Susanto acted as a door slamming in front

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[3] Courts have endorsed the conducting of an evidentiary hearing, as opposed to engaging in a "battle of affidavits," in order to obtain a more complete understanding of the underlying events prior to rendering a ruling. See, Reneer v. Wall, 916 F.2d 713, 1990 U.S. App. LEXIS 18213, *10-11 (6th Cir. 1990), cert. denied, 498 U.S. 1101 (1991); Virgin Enterprises Limited v. American Longevity, 2001 U.S. Dist LEXIS 11456, *43 (S.D.N.Y August 7, 2001). In fact, in the seminal case cited by plaintiffs in support of their position, the appellate court remanded the case back to the lower court to conduct a trial on whether the defendant's version or the process server's version of the facts surrounding service of process was correct. Hicklin v. Edwards, 226 F.2d 410, 414 (8th Cir. 1955). The majority of the cases cited by the Magistrate Judge involve service by federal marshals prior to the amendment of the rule that allows service by anyone over the age of eighteen. Allowing plaintiffs to hire their own process server opens the door to legitimate claims of process server falsification.

of the process server by knocking the summons and complaint to the ground, and therefore, there was nothing further that the process server needed to do to accomplish service. Report and Recommendation at 12-13. But in Weiss, there was an allegation that another priest accompanying Cardinal Glemp knocked the service papers to the ground out of Cardinal Glemp's arms and picked them up. Weiss, 792 F. Supp. at 217. And, in Karadzic, the body guard who swatted the papers to the ground was clearly an agent of the defendant, and the process server informed the defendant that he had been served with papers. 1996 U.S. Dist. LEXIS at 5296. Here, evidence has been presented that the process server never identified himself or his purpose. Furthermore, Gen. Susanto, the individual who picked-up the summons and complaint had never been appointed by Gen. Lumintang to be an agent for service of process for him. Lumintang Dec. at ¶ 10. 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.[4]

Thus, based on the conflicting evidence and "battle of the affidavits," Magistrate Judge Kay should have allowed limited discovery and an evidentiary hearing to ascertain whether defendant was properly served. Magistrate Judge Kay's determination, in the absence of an evidentiary hearing, that service of process was effected on General Lumintang was in error.

III. Objection Two — If Gen. Lumintang Was Personally Served at Dulles International Airport in Virginia, Magistrate Judge Kay Committed Legal Error in Determining that Such Service Gave This Court Personal Jurisdiction Over Gen. Lumintang.

It is undisputed that if personal service was properly effectuated on General Lumintang, that

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[4] See, Wham v. National Post Office Mail Handlers,. 99 LRRM 2980 (D. S.C. 1978); Ross v. Runyon, 156 F.R.D. 150, 153-154 (S.D. Tx. 1994); MCI Telecommunication Corp., 1991 U.S. Dist. LEXIS 12878 at *1-3; O'Meara v. New Orleans Legal Assistance Corp., 1991 U.S. Dist. LEXIS 8137 (E.D. La. 1991); 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).

personal service was effectuated at Dulles International Airport in Fairfax County, Virginia, not in the District of Columbia. Service of process on a person while physically within the Commonwealth of Virginia confers personal jurisdiction over General Lumintang upon the state courts of general jurisdiction of Virginia. Burnham v. Superior Court of California, 495 U.S. 604, 619 (1990)("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'")(plurality opinion); Kadic v. Karadzic, 70 F.3d 232, 246-47 (2d Cir. 1995)(upholding Southern District of New York's exercise of personal jurisdiction over foreign national served with summons while physically present in Southern District of New York). Service of process on a person while physically within the Commonwealth of Virginia, however, does not automatically confer personal jurisdiction over an individual upon the courts of general jurisdiction in the District of Columbia. El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp.2d 69, 78 (D.D.C. 1999), rev'd in part on other grounds, 216 F.3d 29 (D.C. Cir. 2000).

In El-Hadad, this Court held, "When a defendant resides in or is present in the forum state, due process concerns are minimal." 69 F. Supp.2d at 78 (citing Burnham v. Superior Court, 495 U.S. 604, 619 (1990); Begum v. Auvongazeb, 695 A.2d 112, 113 (D.C. 1997)). The Court then went on to hold, however, "If the defendant is not present within the forum territory, due process requires that 'he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"" Id. (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980)). Similarly, in Overseas Partners, Inc. v. Progen Musavirlik ve Yonetim Hizmetleri, Ltd., 15 F. Supp.2d 47, 50-51 (D.D.C. 1998), this Court held, "Physical service of

process on [individual] within the District [of Columbia] is clearly sufficient to support the Court's exercise of personal jurisdiction over him." But, the Court went on to hold, when personal service is not effectuated in the District of Columbia, personal jurisdiction over an individual "must be based on their personal contacts with the forum." Id. at 51.

In this case, it is indisputable that Gen. Lumintang was not personally served in the District of Columbia. If he was served at all, he was personally served in the Commonwealth of Virginia. Yet, Magistrate Judge Kay held, "Having found valid personal service [in the Commonwealth of Virginia], the [United States District Court for the District of Columbia] had personal jurisdiction over defendant; therefore, the issue of constitutional due process, *vel non*, is not implicated." Report and Recommendation at 13. This is an error of law. Personal service in the Commonwealth of Virginia confers jurisdiction on the courts general jurisdiction of Virginia, not the courts of the District of Columbia. As a matter of law, Magistrate Judge Kay was incorrect that personal service upon Gen. Lumintang in the Commonwealth of Virginia conferred personal jurisdiction of this Court over him, and that therefore, the Court need not examine whether this Court's assertion of personal jurisdiction over General Lumintang comports with the principles of constitutional due process.

Because Gen. Lumintang was not personally served within the borders of this forum, in order for this Court to have personal jurisdiction over Gen. Lumintang to enter judgments against him, the assertion of personal jurisdiction over him must satisfy the elements of constitutional due process. If these these constitutional due process requirements cannot be met, the assertion of personal jurisdiction over General Lumintang is invalid and the default judgment and other judgments entered against him are void as a matter of law and must be set aside. Thus, the Court cannot follow Magistrate Judge Kay's recommendations that personal service upon General Lumintang at Dulles

International Airport conferred jurisdiction over him by this Court and that the Court, therefore, did not have to inquire into whether the requirements of constitutional due process were met sufficiently for this Court to assert personal jurisdiction over General Lumintang.

IV. Objection Three — Rule 4(k)(2) of the Federal Rules of Civil Procedure Does Not Confer Personal Jurisdiction of this Court Over General Lumintang Because He Is Subject to Personal Jurisdiction in the Courts of the Commonwealth of Virginia if He Was Personally Served in Virginia.

The plaintiffs have argued that this Court has jurisdiction under Rule 4(k)(2) of the Federal Rules of Civil Procedure because the appropriate forum to examine is not the state in which service was effected but the United States as a whole. Although Magistrate Judge Kay does not state that his decision that service in Virginia gives this Court personal jurisdiction over General Lumintang is based on Rule 4(k)(2), if that was his reason, he would be in error of law.

Rule 4(k)(2) allows, under certain circumstances, consideration of contacts with the United States as a whole as satisfying the constitutional due process requirements for personal jurisdiction, but only when the putative defendant is not subject to jurisdiction in any state court of general jurisdiction. Glencore Grain v. Shivnath Rai, 284 F.3d 1114, 1126-27 (9th Cir. 2002); Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 941 (7th Cir. 2000); United States v. Swiss American Bank, Ltd., 191 F.3d 30, 39 (1st Cir. 1999); In re: Vitamins Antitrust Litigation, 94 F. Supp.2d 26, 34-35 (D.D.C. 2000).[5]

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[5] According to the Advisory Committee notes following the Rule, this provision was intended to allow for jurisdiction over a nonresident of the United States whose contacts with the United States are "sufficient to justify the application of United States law ... but [that has] insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction." Fed.R.Civ.P. 4(k)(2), 1993 Advisory Committee Notes. For personal jurisdiction to be achieved under this Rule, the defendant must have "affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party," and must not be subject to personal jurisdiction in any state. Id.

In this case, if General Lumintang was personally served with process at Dulles International Airport, then he would clearly be subject to the courts of general jurisdiction of the Commonwealth of Virginia. Cannington v. Cannington, 50 Va. Cir. 165 (Va. Cir. Ct. 1999)(personal service on a defendant at Dulles Airport sufficient to confer over her the jurisdiction of the Virginia court); see also, Blackson v. Blackson, 579 S.E.2d 704, 711 (Va. App. 2003)("Generally, personal service on a non-resident defendant found within this jurisdiction is valid and will support a personal judgment against him."); Ragouzis v. Ragouzis, 391 S.E.2d 607, 608 (Va. App. 1990)(same)(citing Bank of Bristol v. Ashworth, 122 Va. 170, 174, 94 S.E. 469, 470 (1917)). Consequently, Rule 4(k)(2) cannot be applied to give this Court jurisdiction over Gen. Lumintang. Because Gen. Lumintang was not personally served within the borders of the District of Columbia, Magistrate Kay was compelled to determine that this Court had personal jurisdiction over him if, and only if, the constitutional due process test of minimum contacts was satisfied.

V. Objection Four — Magistrate Judge Kay Committed Reversible Error By Failing to Apply the Minimum Contacts Test and By Failing to Find that the Requirements for Constitutional Due Process Have Not Been Met for an Assertion by this Court of Personal Jurisdiction Over General Lumintang.

If General Lumintang was served at all, he was served outside the District of Columbia. Because he was served in Virginia, the only way this Court could have personal jurisdiction over him would be if the exercise of jurisdiction satisfied constitutional due process.

> The Supreme Court has recognized that when a defendant is not physically present in a forum, the Due Process Clause can nevertheless support the assertion of personal jurisdiction on at least two different grounds. The difference turns on whether the defendant's contacts with the forum are the basis for plaintiff's suit. If they are not, the rules of "general" personal jurisdiction apply, which allows a foreign defendant to be sued only if it maintains "continuous and systematic general business contacts" with the forum. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir.1996). In contrast, "specific"

> personal jurisdiction exists if defendants have "purposefully directed [their] activities at residents of the forum" and "the litigation results from alleged injuries that 'arise out of or relate to those activities.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

In re Baan Company Securities Litigation, 245 F. Supp.2d 117, 126-27 (D.D.C. 2003).

The Due Process Clause of the United States Constitution protects an individual from being subjected to the binding judgments of a forum with which he has established no meaningful "contacts, ties or relations." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-472 (1985), quoting, International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). The Due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners. American Dredging Company v. Miller, 510 U.S. 443, 462 (1994)(Stevens concur), citing, Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102, (1987).

Due process requirements are satisfied when personal jurisdiction is asserted over a nonresident defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984), quoting, International Shoe Co., 326 U.S. at 316, quoting, Milliken v. Meyer, 311 U.S. 457, 463 (1940). To determine this there is a four part test: (1) whether there is an appropriate forum; (2) whether defendant has had "minimum contacts" with that forum; (3) whether those contacts demonstrate a purposeful availment of the defendant of the privilege of conducting activities in that forum; and (4) whether maintenance of the suit does not offend traditional notions of fair play and substantial justice. Koteen v. Bermuda Cablevision, LTD., 913 F.2d 973, 975 (D.C. Cir. 1990)(citations omitted).

The minimum contacts analysis depends on whether the plaintiffs assert the court has personal jurisdiction based on specific jurisdiction or general jurisdiction. Helicopteros Nacionales,

466 U.S. at 414. Sufficient minimum contacts exist for specific jurisdiction when the claim underlying the litigation arises out of or is related to the defendant's forum activities. Id.; Dooley v. United Technologies Corp., 803 F. Supp. 428, 433-434 (D.D.C. 1992)(citations omitted). In contrast, for general jurisdiction to exist, the litigation need not arise out of or be related to the defendant's contacts with the forum. Rather, general jurisdiction may exist if the defendant's contacts with the forum have been "continuous and systematic," even though they are unrelated to the lawsuit. Helicopteros Nacionales, 466 U.S. at 414-416; In re: Baan Co. Securities Litigation, 81 F. Supp.2d 75, 82 (D.D.C. 2000).

To satisfy the purposeful availment test, the court must scrutinize the defendant's contacts with the forum to determine whether those forum contacts represent a purposeful availment of the privilege of conducting activities in the forum, thus invoking the benefits and protections of its laws. The question is whether those contacts constituted purposeful activity such that being haled into court there would be foreseeable. Dooley, 803 F. Supp. at 433-434.

Finally, even if minimum contacts between the defendant and the forum is established, the Court must still determine whether maintenance of the suit does not offend traditional notions of fair play and substantial justice. Under this test, the assertion of personal jurisdiction will still be denied if its assertion is, nevertheless, unreasonable and unfair. In re: Baan Co., 81 F. Supp.2d at 83, citing, Asahi, 480 U.S. at 114 and Burger King, 471 U.S. at 478.

A. Specific Jurisdiction Is Lacking Because No Allegations In the Complaint Arose Out of Any Contacts with the Forum.

"A 'relationship among the defendant, the forum, and the litigation' is the essential foundation of [specific] jurisdiction." Dooley, 803 F. Supp. at 433, quoting, Helicopteros Nacionales, 466 U.S. at 414, quoting, Shaffer v. Heitner, 433 U.S. 186, 204 (1977). A court may exercise

specific jurisdiction over a defendant only when his contacts with the forum give rise to the suit. Reese v. Geneva Enterprises, Inc., 1997 U.S. Dist. LEXIS 5727, *9 (D.D.C. April 16, 1997).

In this case, none of the plaintiffs' allegations relate to the defendant's contacts with the District of Columbia. Plaintiffs' Complaint alleges that defendant's conduct and actions while he was an Indonesian military officer in Indonesia make him liable for the summary execution, torture, cruel, inhuman or degrading treatment, crimes against humanity, wrongful death, assault and battery and intentional infliction of emotional distress of East Timorese nationals in East Timor. The alleged conduct of General Lumintang and the causes of action set forth by the plaintiffs have absolutely nothing to do with General Lumintang's sporadic contacts with the District of Columbia over the last seven years.

General Lumintang has been to the District of Columbia only three times for a total of approximately 20 days over a 7 year period. He first participated in a study tour of the National Defense Institute in Washington, D.C. from September 15-26, 1995. Second Declaration of Johny Lumintang ("2nd Lumintang Dec.") at ¶ 5.[6] That tour consisted of visits to the Pentagon and other military establishments, the U.S. Congress and the U.S. Supreme Court. Id. The second instance occurred in January 2000 when he attended the Roundtable Dialogue on Justice and Reconciliation at The Madison Hotel on January 24. Id. at ¶ 6. On January 25, together with the Indonesian Minister of Justice and the Minister for Human Rights, and the Indonesian Attorney General, he met with then U.S. Secretary of State Madeline Albright, Attorney General Janet Reno and National Security Advisor Samuel R. Berger. Id. From March 26 to March 30, 2000, he was in Washington,

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[6] The Second Declaration of Johny Lumintang was attached to the Reply by Defendant Johny Lumintang in Support of the Motion to Set Aside Default Judgment and Order and Judgment on Damages. (Docket Entry #49).

D.C. to attend a panel discussion of the U.S. Indonesian Society which took place at The Cosmos Club, on March 28, 2000. Lumintang Dec. at ¶¶ 4-6. Other than these trips, he has not been anywhere else in the District of Columbia at any other time. Id. at ¶ 7. Obviously, none of these contacts had anything to do with allegations of human rights violations in East Timor in 1999. This Court cannot assert specific jurisdiction over Gen. Lumintang.

B. General Jurisdiction Is Lacking Because General Lumintang Did Not Have Continuous and Systematic Contacts with the Forum.

It is well established that the due process requirements for general personal jurisdiction are more stringent than for specific personal jurisdiction.[7] The "continuous and systematic" contacts requirement requires that the defendant's contacts with the forum be substantial in order to warrant the exercise of general personal jurisdiction. "[T]he 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 (5th Cir. 2001), citing, 16 James Wm. Moore et al., Moore's Federal Practice, ¶ 108.41 3 (3d ed. 1999). [8] Broad constructions of general jurisdiction are disfavored. Nichols v. G. D. Searle & Company, 991 F.2d 1195, 1200 (4th

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[7] See, Glater v. Eli Lilly & Co., 744 F.2d 213, (1st Cir.); Metropolitan Life Insurance v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996); People's Insurance Company of China v. M/V Damodar Tanabe, 903 F.2d 675, 679 (9th Cir. 1990); OMI Holdings, Inc. v. Royal Insurance Company of Canada, 149 F.3d 1086, 1091 (10th Cir. 1998); Meier v. Sun International Hotels, 2002 U.S. App. LEXIS 7239, *25 (11th Cir. 2002); Northlake Cardiology Assoc. v. Alpha Gulf Coast, 1995 U.S. Dist. LEXIS 18640, *7 (E.D. La. Dec. 11, 1995); Medtronic, Inc. v. Camp, 2002 U.S. Dist. LEXIS 6587, *7 (D. Minn. April 1, 2002); Provident National Bank v. California Federal Savings & Loan Assoc., 624 F. Supp. 858, 862, (E.D. Pa. 1985), aff'd., 819 F.2d 434 (3d Cir. 1987), citing, Reliance Steel Products v. Watson, Ess, Marshall, 675 F.2d 587, 588-89 (3d Cir. 1982).

[8] See also, Reliance Steel Products v. Watson, Ess, Marshall, 675 F.2d 587, 588-89 (3d Cir. 1982); Consolidated Development Corporation v. Sherritt, Inc., 216 F.3d 1286, 1292 (11th Cir. 2000), cert. denied, 122 S. Ct. 68 (2001); Meier v. Sun International Hotels, 2002 U.S. App. LEXIS 7239, *25 (11th Cir. 2002).

Cir. 1993). In fact, several courts, including the Supreme Court, have expressed reservations as to whether general jurisdiction may extend to non-resident individuals. See, Burnham v. Superior Court of California, 495 U.S. 604, 610 n. 1 (1990)(declining to address the issue in detail, but recognizing that "it may be that [general jurisdiction] applies only to corporations. . ."); In re: Daimlerchrysler AG Securities Litigation, 2002 U.S. Dist. LEXIS 6460, *28 (D. Del. March 22, 2002); Hoechst Celanese Corp. v. Nylon Engineering Resins, 896 F. Supp. 1190, 1193, n. 4 (M.D. Fla. 1995)("Nor is it clear that general jurisdiction can ever be held over a private, non-resident defendant.").

Nevertheless, when this Court examines the defendant's contacts with the forum, it is clear that General Lumintang's sporadic contacts with the District of Columbia over the past seven years have not been "continuous and systematic." See, Metropolitan Life Insurance v. Robertson-Ceco Corp., 84 F.3d 560, 569-70 (2d Cir. 1996), cert. denied, 519 U.S. 1006 (1996).

There is no evidence that 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 with any individual resident of the District of Columbia. Lumintang Dec. at ¶ 8. His only contacts with the District of Columbia consist of three visits over a seven year period to participate in seminars and forums for which he received no payment or other compensation from any District of Columbia. 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 (5th 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 (9th 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, 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 general personal jurisdiction.[9] His contacts with the forum do not even come close to establishing the "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " Helicopteros Nacionales, 466 U.S. at 414. Magistrate Judge Kay's failure to make this finding is reversible error.

C. General Lumintang Did Not Purposely Avail Himself of the Forum.

Even if minimum contacts are found, the contacts between the defendant and the forum cannot satisfy due process concerns unless activities of the defendant were purposefully directed

[9] 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.

toward the residents of the forum, the District of Columbia. Burger King, 471 U.S. at 472, citing, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984). Purposeful availment of a forum has an element of voluntariness and an element of foreseeability. Id. at 474 ("the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."). Neither element is present in this case.

D. It Is Unreasonable for the Court to Assert Jurisdiction Over General Lumintang.

Even if the plaintiffs could establish contacts sufficient to comport with constitutional due process, the Court should find no personal jurisdiction because exercising jurisdiction over the defendant would not be fair or reasonable. Once a plaintiff has demonstrated the requisite minimum contacts between the defendant and the forum, a court is required to continue to the "reasonableness" stage of the inquiry and apply the Asahi test to assess whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." Metropolitan Life Insurance Co., 84 F.3d at 573, citing, Asahi, 480 U.S. at 113. Making this determination requires a balancing of factors which include (1) the burden upon the defendant if compelled to litigate in the forum, (2) the interests of the forum in resolution of the controversy, (3) the most efficient resolution of the controversy, and (4) the availability of relief in another forum. In re: Baan Co., 81 F. Supp.2d at 83, citing, Asahi, 480 U.S. at 113-14 and Burger King, 471 U.S. at 478.

With respect to the first factor, the burden on General Lumintang to litigate in the United States is severe. General Lumintang is a citizen and resident of Indonesia. He rarely travels to the United States. All of his records, files and witnesses are located in Indonesia. He is unfamiliar with American law and the American legal system. According to the Supreme Court, "the unique burdens

placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." Asahi, 480 U.S. at 114; see also, Glencore Grain, 284 F.3d at 1125-26.

Under the second factor, because plaintiffs are not United States residents and none of the alleged torts occurred in the United States, the United States' legitimate interests in the case are considerably diminished. Asahi, 480 U.S. at 114. The underlying dispute involves foreign parties concerning activities that occurred in foreign lands. "Where, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction." Glencore Grain, 284 F.3d at 1126 (citations omitted).

As for the third and final factor, the most efficient resolution of the controversy is by taking advantage of the relief afforded in other forums. Id. There are several forums available to the plaintiffs to redress their claims, including the District Court in Dili, East Timor; the human rights tribunal established by the United Nations Transitional Administration in East Timor; civil court in Indonesia; or the Human Rights Court in Indonesia.

Thus, Magistrate Judge Kay should have determined that an assertion of personal jurisdiction over defendant would not comport with constitutional due process, and, consequently, the Court had no authority to enter judgments against him.

VI. Objection Five — Magistrate Judge Kay Erred By Failing to Set Aside the Judgments Entered Against General Lumintang on the Ground that They Are Void Because this Court Has No Personal Jurisdiction Over Him.

This Court never had personal jurisdiction over Gen. Lumintang. He was not personally served in the District of Columbia, the claims alleged against him do not arise out of any activities that occurred in the District of Columbia, and he has not had sufficient contacts with the District of

Columbia such that an exercise of due process over him would comport with the Due Process Clause of the Constitution. Therefore, any judgment involving him issued by this Court is void as a matter of law. Burnham v. Superior Court, 495 U.S. 604, 608-09 (1990)(holding that for a court to render a binding decision consonant with due process, it must have personal jurisdiction over the parties, that is, the power to require the parties to obey its decrees); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995); Combs, 825 F.2d at 442. "A default judgment rendered by a court which lacked personal jurisdiction over the defendant is void and may be attacked either directly in the rendering court or through collateral attack upon enforcement of the judgment." 10 James Wm. Moore, Moore's Federal Practice § 55.50[2][b] [i] (3d ed. 2003); Wolf-Tec, Inc. v. Miller's Sausage, 899 F.2d 727, 728 (8th Cir. 1990).

Under Rule 60(b)(4), relief from a judgment or order must be granted where the judgment or order is void because 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 (1st Cir. 1995). An in personam judgment entered without personal jurisdiction over a defendant is void as to that defendant. Combs, 825 F.2d at 442. 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, 825 F.2d at 441. If the judgment is void as a matter of law, then relief from the judgment is mandatory. Id.[10]

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[10] 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 (7th Cir.2000)(if underlying judgment is void, trial judge abuses discretion to deny motion to vacate); Carter v. Fenner, 136 F.3d 1000, 1005 (5th 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).

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 441-42.[11]

As Magistrate Judge Kay was compelled to find that this Court lacked personal jurisdiction over General Lumintang, his recommendations should be rejected by the Court. The judgments rendered against General Lumintang are void. Under Rule 60(b)(4), setting aside the judgments entered against General Lumintang as void is mandatory. See, Iowa State University Research Foundation, Inc. v. Greater Continents Inc., 81 Fed. Appx. 344, 349-50 (Fed. Cir. 2003).

VII. Objection Six — Magistrate Judge Kay Erroneously Concluded that the Court Had Subject Matter Jurisdiction Over the Alien Tort Claims Act and Torture Victims Protection Act Claim.

Although the judgments rendered by this Court against Gen. Lumintang should be set aside as void for a lack of personal jurisdiction, if the Court finds that it had personal jurisdiction over Gen. Lumintang to render judgments of the plaintiffs' claims, the judgments would still be void because the Court lacks subject matter jurisdiction over the ATCA and TVPA claims.

A. The Alien Tort Claim Act Does Not Provide Plaintiffs with a Cause of Action Against General Lumintang or, in the Alternative, Is Unconstiutional.

The intended purpose and scope of the ATCA never have been definitively established by

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[11] Additionally, 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 F.2d 337, 343 (D.C. Cir. 1962); Hetz Corp. V. Alamo Rent-A-Car, Inc., 16 F.3d 1126, 1130 (11th 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.

legal historians or by the Supreme Court, and the ATCA lacks a legislative history that could provide courts with guidance as to its intended meaning. However, the United States Circuit Court for the District of Columbia Circuit has criticized the ATCA in concurring opinions in both Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir.1984) (Bork, J., concurring, and Robb, J., concurring), cert. denied, 470 U.S. 1003 (1985), and Al Odah v. United States, 321 F.3d 1134, 1146 (D.C.Cir.2003) (Randolph, J., concurring), cert. granted, Rasul v. Bush, 124 S. Ct. 534 (2003). Magistrate Judge Kay chose to follow Judge Edwards' concurring opinion in Tel-Oren which adopted the Second Circuit's opinion in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Report and Recommendation at 16-17. Yet, Judge Edwards' opinion in Tel-Oren was the minority view regarding the ATCA. The concurring opinions of Judge Bork and Judge Robb in Tel- Oren and the concurring opinion of Judge Randolph in Al Odah reject Filartiga's holding that the ATCA creates a private right of action for violations of United States treaties or customary international law. See, Al Odah, 321 F.3d at 1146-47 (Randolph, J., concurring); Tel-Oren, 726 F.2d at 811 (Bork, J., concurring); id. at 826 (Robb, J., concurring). The rejection of Filartiga's understanding of the ATCA by two of the three judges on the Tel-Oren panel suggests that the law of the District of Columbia Circuit stands in contrast to that of the Second Circuit and of the other Circuits that have followed the holding in Filartiga. See, Al Odah, 321 F.3d at 1146 (Randolph, J., concurring) ("The meaning of § 1350 has been an open question in our court. But what § 1350 does not mean has been decided. In the Tel-Oren case both Judge Bork and Judge Robb, in their separate concurring opinions, rejected the Second Circuit's Filartiga decision ....") (internal citations omitted)); see also, Flores v. Southern Peru Copper Corp., 343 F.3d 140, 151 (2d Cir. 2003).

Judge Bork in Tel-Oren and Judge Randolph in Al Odah construed the ATCA to be purely

jurisdictional and rejected the position that customary international law is part of general federal common law that courts may apply absent a specific statutory grant. See, Al Odah, 321 F.3d at 1146-47 (Randolph, *J.,* concurring); Tel-Oren, 726 F.2d at 801, 811 (Bork, J., concurring). According to Judge Randolph, "[t]o hold that the [ATCA] creates a cause of action ..., as the Filartiga [line of] decisions indicate[s], would be to grant aliens greater rights in the nation's courts than American citizens enjoy." Al Odah, 321 F.3d at 1146. Judge Robb in Tel- Oren took a different position, arguing that the political question doctrine prohibits courts from "determin[ing] the international status of terrorist acts" at issue in that case. See, Tel-Oren, 726 F.2d at 823 (Robb, J., concurring). In Al Odah, Judge Randolph went further in his criticism of Filartiga, maintaining that the Second Circuit's interpretation of the ATCA renders the statute unconstitutional because it permits the federal courts to define the law of nations. Al Odah, 321 F.3d at 1147 (Randolph, J., concurring). According to Judge Randolph, the Constitution grants exclusively to Congress the authority to "*define* and punish ... Offences against the Law of Nations." Id. (quoting U.S. Const. art. I, § 8, cl. 10)(internal quotation marks omitted)(emphasis added). Analyzing the legislative history of this clause, commonly referred to as the "Define and Punish Clause," Judge Randolph noted that "the Framers' original draft merely stated that Congress had the power to *punish* offenses against the law of nations, but when Gouverneur Morris ... objected that the law of nations was 'often too vague and deficient to be a rule,' the clause was amended to its present form [which also gives Congress power to define such offenses]." Al Odah, 321 F.3d at 1147 (citation omitted) (emphasis added). "[I]n light of the history" of the Define and Punish Clause, Judge Randolph argued, "it [is] abundantly clear that Congress-- not the Judiciary--is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." Id. Yet, Judge Randolph noted that "under

Filartiga, it is the courts, not Congress who decide both questions." Id.

Thus, under prevailing District of Columbia Circuit law, the ATCA does not afford plaintiffs with a cause of action against General Lumintang. Alternatively, the statute is unconstitutional as applied by plaintiffs. Magistrate Judge Kay incorrectly relied upon Judge Edwards' concurring opinion in Tel-Oren and the Second Circuit's opinion in Filartiga. Those decisions are not the law of this Circuit, and consequently, Magistrate Judge Kay's recommendations cannot be followed.

B. The Torture Victims Protection Act Is Unconstiutional.

Congress passed the Torture Victim Protection Act of 1991 ("TVPA"), Pub.L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to 28 U.S.C. § 1350), which created a cause of action for individuals subjected to official torture or extrajudicial executions. The TVPA provides a cause of action for damages to anyone — aliens and citizens alike — who suffered torture anywhere in the world at the hands of any individual acting under the law of anyone acting under the law of any foreign nation. Al Odah, 321 F.3d at 1146 (Randolph, J. concurring). The TVPA does not contain its own jurisdictional provision. But it is clear that any case brought pursuant to that statute would arise under federal law and thus come within 28 U.S.C. § 1331, the grant of general federal question jurisdiction. Id. Judge Randolph, however, specifically noted that he was not ruling on the constitutionality of the TVPA.

Magistrate Judge Kay improperly found that the Court has subject matter jurisdiction over plaintiffs' claims under the TVPA. The TVPA is unconstitutional because it is so unconstitutionally vague that it violates the Due Process Clause of the Fifth Amendment of the United States Constitution. The TVPA provides a cause of action for damages to any individual or his survivors,

against any individual, acting with real or apparent authority, to act on behalf of a foreign nation who: (1) subjects an individual to torture; or (2) subjects an individual to extra-judicial killing. TVPA § 2(a), 28 U.S.C. § 1350. The Act is unconstitutionally vague because it fails to define what is necessary to "subject" an individual to torture or extra-judicial killing. It is unclear whether the statute only applies to the actual individuals who commit the acts or whether it also applies to those who had "effective control" or "command responsibility" over the wrongful actors. A law is unconstitutionally vague if it fails either to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or is so indefinite that it allows arbitrary and discriminatory enforcement as it places no limit on the exercise of the discretion of the enforcer. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Given that the language of the TVPA allows for the imposition of varying and unpredictable standards of direct and imputed liability, it is established that the TVPA is constitutionally vague in that it fails to provide defendants with a reasonable opportunity to know what it prohibits and is so indefinite that it allows for arbitrary and discriminatory enforcement of its provisions.

VIII. Objection Seven — Magistrate Judge Kay Erroneously Concluded that the Indonesian Government's Refusal to Allow General Lumintang to Come to the United States to Defend Himself Was Not an Extraordinary Circumstance Warranting Setting Aside the Default Judgment Under Rule 60(b)(6).

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 (7th 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 "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); Empresa Electrica del Equador, 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). Magistrate Judge Kay misapplied this standard in concluding that there were no extraordinary circumstances present entitling General Lumintang to relief from the judgments under Rule 60(b)(6). In fact, in the event that the Court were to determine that the judgments were not void as matters of law, there are numerous reasons, both singularly and in the aggregate, that compel the Court to set aside the judgments in the interests of justice due to the presence of extraordinary circumstances.

For instance, Magistrate Judge Kay concluded, "Defendant here made a calculated, strategic election in choosing not to respond to Plaintiffs' lawsuit." Report and Recommendation at 22. Magistrate Judge Kay, however, does not offer any evidentiary support for this conclusion. That is likely because there is absolutely no evidence that General Lumintang, himself, made the decision not to come to the United States to defend himself in this lawsuit. The evidence shows that it was the Indonesian Government that would not allow General Lumintang to come to the United States to defend himself in this action.

Gen. Lumintang had no control over his ability to appear before this Court at the time the lawsuit was filed. The first time he became aware of the suit was when he returned to Jakarta after his March 2000 Washington, D.C. trip, when he received a copy of the summons and complaint sent by the Military Attache, General Dadi Susanto, from the Indonesian Embassy in Washington, D.C. 2nd Lumintang Dec. at ¶ 9. As Gen. Lumintang was sued in his official capacity, he first referred the lawsuit to the Indonesian Ministry of Defense which in turn referred it to the Ministry of Foreign Affairs with the request that the Ministry of Foreign Affairs undertake the appropriate "legal measures" in accordance with the laws of the United States. Id. at ¶¶ 9-10. Gen. Lumintang never received any response from the Ministry of Foreign Affairs. Id. at ¶ 10. Under applicable Ministry of Defense Regulations, he was not able to travel to the United States to appear and defend himself, absent permission from the appropriate authorities and no such permission was granted. Id. at ¶ 11. Second Declaration of Lt. Col. Natsri Anshari at ¶ 8; Exhibits B and C.[12] Now that he is retired from the Army, Gen. Lumintang does not need clearance from his Government to defend himself in the

[12] The Second Declaration of Lt. Col. Natsri Anshari was attached to the Reply by Defendant Johny Lumintang in Support of the Motion to Set Aside Default Judgment and Order and Judgment on Damages. (Docket Entry #49).

lawsuit. At most, his failure to appear and defend himself is attributable to a foreign citizen's and his Government's lack of understanding of U.S. laws and the United States judicial process, and not a strategic choice. A government's refusal to allow one of its citizens the opportunity to come to the United States to defend himself in a lawsuit is exactly the type of situation that should qualify itself as an extraordinary circumstance warranting setting aside a judgment under Rule 60(b)(6).

IX. Objection Eight — Magistrate Judge Kay Failed to Consider Plaintiffs' Failure to Utilize Other Legal Areas of Relief As Grounds for Setting Aside the Judgments.

Although the TVPA provides a cause of action for official torture and extrajudicial killing, the statute requires that a plaintiff exhaust adequate and available local remedies. TVPA at § 2(b). Plaintiffs argued that the failure to exhaust remedies at the situs of the torts is an affirmative defense, not a required element of their cause of action. Magistrate Judge Kay concluded that he need not reach the adequacy or availability of any remedies available in Indonesia, because the TVPA is a jurisdictional statute. Report and Recommendation at 18-19. But, even if the failure to exhaust available remedies does not render the Court's subject matter jurisdiction void, Magistrate Judge Kay erred by failing to consider whether the failure to exhaust available alternative remedies rendered the extraordinary circumstances necessary to set aside the judgment under Rule 60(b)(6).

In this case, the plaintiffs circumvented numerous available domestic legal remedies that could have addressed their claims. First, the plaintiffs could have brought their claims to District Court in Dili, East Timor. The Declaration of Lt. Col. Natsri Anshari ("Anshari Dec.") at ¶ 7.[13] Pursuant to Regulation No. 2000/11 of the United Nations Transitional Administration in East Timor

[13] The Declaration of Lt. Col. Natsri Anshari was attached as Ex. 2 to the Motion to Set Aside Default Judgment and Order and Judgment on Damages. (Docket Entry #42).

(UNTAET) of March 6, 2000, Section 10, the District Court in Dili has exclusive jurisdiction over genocide, war crimes and crimes against humanity. Id. and Exhibit C attached thereto. Pursuant to Section 6 of the same Regulation, the District Courts have civil jurisdiction "as courts of first instance. . ."

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. 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 ¶ 11. 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. Id. and Exhibit B 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 twelve career Judges were appointed to the Human Rights Court in January 2002. 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.[14] Magistrate Judge Kay's failure to consider these available

[14] 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 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 ¶ 9. 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. At the time the motion to set aside was filed, seven of these 19 suspects have been indicted and are scheduled for trial before the Human Rights Court. Id. at ¶ 10.

avenues of relief as grounds for setting aside the judgments under Rule 60(b)(6) was an error.

X. Objection Nine — Magistrate Judge Kay Failed to Consider the Misinterpretation of the Telegram at Issue an Extraordinary Circumstance.

In finding for the plaintiffs, the Court relied on a telegram purportedly drafted by the defendant. General Lumintang provided evidence that the telegram at issue was incorrectly translated by the plaintiffs. The telegram does not state "prepare for a security plan with the aim of preventing the outbreak of civil war. . .," but in actuality, it states, "prepare for a campaign plan with the aim of preventing the outbreak of civil war. . . ." 2nd Anshari Dec. at ¶ 2-3.

General Lumintang then explained that the telegram was administrative in nature and not military or operational in nature. The telegram was administrative in character and directed the Commander of the Udayana 9th Military Area Command to prepare a campaign plan in "the framework of preventing civil war" and be ready to respond to any plan issued by the Commander of the Armed Forces/TNI, that is, the operational commander of troops in East Timor. Id. at ¶ 4. A campaign plan should not be confused with a security plan. A campaign plan, in keeping with the administrative nature of Gen. Lumintang's then-duties, consists of preventative action including the development of an evacuation plan to withdraw the Army, families of personnel and property in the event civil war broke out between the pro-independence and pro-integration East Timorese factions. Id. at ¶ 4. The campaign plan set forth in the telegram had nothing to do with the civilian population in East Timor. The telegram was issued by the Army Chief of Staff and signed by his subordinate, General Lumintang, on his behalf as an administrative function. 2nd Anshari Dec. at ¶ 5.

Magistrate Judge Kay concludes that the disagreement over the translation of the telegram does not create an extraordinary circumstance worthy of overturning the judgment against General

Lumintang. Report and Recommendation at 23. This determination is contrary to all principles of justice. Magistrate Judge Kay equates a plan to prevent the outbreak of civil war by suppressing the citizenry who oppose Indonesian authority over East Timor by using military power with a plan to prevent the outbreak of civil war by evacuating from East Timor the individuals who support Indonesian authority over East Timor. It is undeniable that to hold a person guilty based on a misinterpretation of a document is a grievous miscarriage of justice. The fact that Gen. Lumintang was found guilty on a possible misinterpretation and misapplication of a key document in and of itself offers the extraordinary circumstances to set aside the default judgment under Rule 60(b)(6).

XI. Objection Ten — Magistrate Judge Kay Incorrectly Determined that General Lumintang's Position in the Indonesian Army Meant that He Had Influence and Control Over Members of the Indonesian Armed Forces.

Despite considerable and uncontested evidence to the contrary, Magistrate Judge Kay, in a conclusory fashion, pronounced that General Lumintang's position in the Indonesian Army equated to influence and control over members of the Indonesian Armed Forces in East Timor. Report and Recommendation at 24. Magistrate Judge Kay's failure to consider the evidence that General Lumintang's position in the Indonesian Army was administrative in nature and not operational is grounds for setting aside the default judgment was an error.

During the time period in which the allegations set forth in the Complaint were alleged to have occurred, 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.

Declaration of Brigadier General Sihombing ("Sihombing Dec.") at ¶ 3.[15] As Army Deputy Chief of Staff, 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. 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 ¶ 13. Therefore, as Army Deputy Chief of Staff, under a command responsibility theory, 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.

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[15] The Declaration of Brig. Gen. Sihombing was attached as Ex. 3 to the Motion to Set Aside Default Judgment and Order and Judgment on Damages. (Docket Entry #42).

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 Forced 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, Gen. Lumintang was not a member of the General Staff 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 Ex. 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 Ex. 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 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.[16] Gen.

[16] 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

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.[17]

Thus, Magistrate Judge's Kay's conclusion that General Lumintang had influence and control over the troops who committed the atrocities in East Timor is not correct. Justice demands that a judgment be set aside when there is reliable and uncontradicted evidence that the individual found liable had no authority to authorize or stop the alleged wrongful actions.

XII. Objection Eleven — Magistrate Judge Kay Failed to Apply the Principles of Command Responsibility.

Magistrate Judge Kay initially found General Lumintang liable on a theory of command

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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.

[17] 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 ¶ 12 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. 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.

responsibility. Findings of Fact and Conclusions of Law at 30-33. It is now well established that an essential element of command responsibility is "effective control," defined as the legal authority and the practical ability of the defendant to control the guilty troops. Ford v. Garcia, 289 F.3d 1283, 1288-90 (11th Cir. 2002), cert. denied, 537 U.S. 1147 (2003). A second essential element is that the defendant failed to take all reasonable steps to prevent or repress the atrocities. Id. The Eleventh Circuit cited several recent international cases which consistently found that "effective control of a commander over his troops is required before liability will be imposed under the command responsibility doctrine. The consensus is that 'the concept of effective *control* over a subordinate--in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised--is the threshold to be reached in establishing a superior-subordinate relationship. . . ." Id. at 1290. (citations omitted).

In the papers supporting the motion to set aside, defendant set forth compelling evidence that as Army Deputy Chief of Staff, he had no operational authority for planning, commanding, supervising or controlling military operations in East Timor at the time of the atrocities set forth in the Complaint. General Lumintang had no *de jure* or *de facto* command or control over the troops alleged to have committed the gross violations of human rights in East Timor. As Deputy Chief of Staff, he had no command authority over military units operating in East Timor. He was not a member of the Armed Forces chain of command responsible for the planning and design and directing the military operation in East Timor. Furthermore, he had no power or authority to punish or take corrective action in response to any of the occurrences by the military in East Timor.

Magistrate Judge Kay failed to consider whether under the accepted principles of command responsibility, General Lumintang had effective control over the troops who committed the atrocities

in East Timor. This failure presents the extraordinary circumstances warranting setting aside the default judgment. Because of this failure, the Court should not follow his recommendations. Instead the Court should apply the principles of "effective command" to determine whether General Lumintang had the legal authority and practical ability to control the troops who committed the atrocities, and, upon finding that the facts do not support "effective command," the Court should set aside the judgments against General Lumintang as an affront to justice.

XIII. Objection Twelve — Magistrate Judge Kay Incorrectly Stated that General Lumintang Failed to Support His Claims that He Is Not Liable for the Atrocities that Occurred in East Timor.

Magistrate Judge Kay, unfairly, stated, "Defendant alleges a bevy of unverified explanations in his Motion and Reply to persuade the Court to excuse his ignoring the default judgment and the evidentiary trial on damages." Report and Recommendation at 21. This is not true. Gen. Lumintang submitted several sources of evidence to establish that he had no responsibility for the atrocities that occurred in East Timor. In addition to the command structures of the Army and the Armed Forces, Gen. Lumintang provided evidence that his own country investigated and cleared him.

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 ¶¶ 4-10. 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.[18] The National Commission of Human Rights is an independent, non-governmental body. Id.[19] 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 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

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[18] 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.

[19] 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.

were taken and kept. Id.

On May 4, 2000, 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 ¶ 9. 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. 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 Gen. Lumintang was not suspected of committing human rights violations in East Timor. Lumintang Dec. at ¶ 12 and Exhibit B attached thereto. Magistrate Judge Kay failed to consider this evidence in determining whether extraordinary circumstances existed to set aside a default judgment and a $66 million damage award where the defendant was tried in absentia.[20]

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[20] Furthermore, the manual at issue has no relationship to the occurrences in East Timor. The manual was developed in the beginning of 1998, well before East Timor was given the right to vote for its independence. The manual was an administrative manual, not a field manual, and was not intended or directed to be used in any operations in East Timor. It was not distributed to any individual soldiers. Anshari Dec.at ¶ 9. There is no connection between the issuance of the manual with the conduct of the operation and behavior of the troops in the field in East Timor. It is improper to hold General Lumintang responsible under a theory of command responsibility based solely on his signing the manual, without proof that he instructed officers to follow the manual in the field or that the manual was used in the field.

XIV. Objection Thirteen — Magistrate Judge Kay Failed to Consider the Interests of Justice in Determining whether Extraordinary Circumstances Existed in Which to Set Aside the Judgments Entered Against General Lumintang.

Under the facts and well established case law, General Lumintang did not have any command responsibility over the troops guilty of committing the atrocities in East Timor. Therefore, it is likely that a $66 million judgment has been entered against the wrong person, unfamiliar with the laws of the United States who was prevented from defending himself at the time by his Government. An Indonesian General who traveled to the United States after the occurrences in East Timor was found and had a lawsuit filed against him, regardless of whether he had any hand in the operations or authority to prevent, control or discipline the troops in East Timor. Now, based on circumstances beyond his control, he is being denied the due process afforded by the United States Constitution and courts of the United States and the ability to defend himself and establish his innocence.

The unique circumstances of this case compel the setting aside of the judgments entered against General Lumintang. This case presents a substantial judgment against a foreign resident 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. In the interests of justice and based on the circumstances of this case, General Lumintang should have the opportunity to explain the procedures and policies of his country and cross-examine the witnesses against him. 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. Therefore, the strict criteria set forth under Rule 60(b)(6) has been met and the Court should not follow the recommendations of the Magistrate Judge.

V. Conclusion

For the above set of reasons, the Court should reject the Report and Recommendation issued by Magistrate Judge Kay. Instead, 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 18, 2004

Respectfully submitted,

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Certificate of Service

I 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 Objections of Defendant to the Report and Recommendation Issued by Magistrate Judge Alan Kay:

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