UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE, *ET AL*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 00-674 (GK)(AK)
MAJOR GENERAL JOHNY LUMINTANG,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT AND ORDER AND JUDGMENT ON DAMAGES

Plaintiffs, Jane Doe, et al. ("Plaintiffs"), hereby respond to and formally oppose the Motion to Set Aside Default Judgment and Order and Judgment on Damages ("Motion") by Defendant, Major General Johny Lumintang ("Defendant" or "Lumintang"). Plaintiffs respectfully submit that Defendant's Motion is without merit and ask the Court to deny the Defendant's Motion.

INTRODUCTION AND STATEMENT OF FACTS

Over two years ago, on March 30, 2000, Defendant was personally served with the Summons, Complaint and related papers in the above-captioned proceeding. Personal service was affected by John A. Bartelloni, a private process server, at Dulles International Airport ("Dulles"). (*See* Exhibits 1-3, Declaration of John A. Bartelloni ¶¶ 5-12 ("Bartelloni Decl."); Declaration of Lynn Fredricksson ¶¶ 7-14 ("Fredriksson Decl."); Return of Service.) Lynn Fredriksson, a human rights worker employed by the East Timorese Action Network, accompanied Mr. Bartelloni for the purpose of identifying the Defendant. (Fredriksson Decl. ¶ 3-7.) From her human rights work, Ms. Fredriksson was quite familiar with the Defendant's

personal appearance and had spoken with him just two days before. (*Id.*) The two began a search of the airport, and Ms. Fredriksson eventually spotted the Defendant standing near a magazine kiosk in a gate area and alerted Mr. Bartelloni to his presence and location. (Fredriksson Decl. ¶¶ 8-10; Bartelloni Decl. ¶¶ 8-9.) Mr. Bartelloni approached the Defendant and said "General Johny Lumintang, I am John Bartelloni and I am a process server, private investigator. I have been directed to serve you with these papers." (Bartelloni Decl. ¶¶ 10.) He then handed the Summons, Complaint and related papers to the Defendant and said to him "You have been served." (*Id.* ¶ 11; Fredriksson Decl. ¶ 12.) The Defendant accepted the Summons, Complaint and related papers, looked at them and then threw them to the ground. (Bartelloni Decl. ¶ 12; Fredriksson Decl. ¶ 12-13.) A man accompanying the Defendant immediately picked up the papers and took the papers with them as they departed. (Bartelloni Decl. ¶ 13; Fredriksson Decl. ¶ 14.)

Ms. Frekriksson could clearly see Mr. Bartelloni, the Defendant and the man accompanying him, though she was too far away to overhear their conversation. (Fredriksson Decl. ¶ 11.) She watched as Mr. Bartelloni approached the Defendant, exchanged words with him and then handed the papers to him. (*Id.* ¶ 12-13.) Ms. Fredriksson saw the Defendant accept the papers, look at them and then throw them to the ground. (*Id.*)

Having been personally served with a Summons and the Complaint, the Defendant chose to completely ignore these proceedings. He neither answered the Complaint nor moved for its dismissal. Faced with the Defendant's willful refusal to participate in these proceedings, the Plaintiffs requested an entry of default and, six months after service, moved this Court for a default judgment. On November 8, 2000, this Court entered a default judgment for Plaintiffs and scheduled a bench trial to establish the truth of Plaintiffs' allegations and to determine the

measure of damages. On March 27, 2001, nearly a year after the Defendant was personally served with the Complaint, this Court commenced a three day trial at which the Plaintiffs presented a number of witnesses and a host of other evidence to prove the facts as alleged in the Complaint. The trial was covered by CNN and as well as the Indonesian news media. (*See* Exhibits 4-5, Stephen Collinson, *General's U.S. Trial Told of Post-vote Horror*, AGENCE FRANCE-PRESSE-ASSOCIATED PRESS (March 29, 2001); *U.S. Court Set to Open Trial for Lumintang*, INDONESIAN OBSERVER (March 24, 2001). Several of the Plaintiffs traveled from East Timor to testify, the translator flew in from Portugal and one of the Plaintiffs' expert witnesses, Professor Richard Tanter, traveled from Japan for the hearing. After extensive post-trial briefing, on September 13, 2001 this Court issued its detailed Findings of Fact and Conclusions of Law ("FOF/COL") and awarded the Plaintiffs approximately $66 million in compensatory and punitive damages.

In so doing, this Court found that the "Defendant is both directly and indirectly responsible for the human rights violations committed against the Plaintiffs," (FOF/COL at 32), and concluded that Defendant "violated international law through summary execution, torture, crimes against humanity, and cruel, inhuman, or degrading treatment of plaintiffs and their relatives," (*Id.* at 33).

Over two years have passed since the Defendant personally accepted service of process. In that time, this Court, the Plaintiffs and their counsel have devoted hundreds of hours of time and significant resources to this civil action. Though the Defendant had actual notice of these very public proceedings, he deliberately chose to ignore them. He never filed a single motion or responsive pleading or otherwise demonstrated respect for this Court or its processes. In commenting on this Court's judgment shortly after it was filed, Defendant was quoted as saying

"I am an Indonesian citizen, I only bow to Indonesian law." (*See* Exhibit 6, Arif A. Kuswardano, *Human Rights Judgments Over-Easy—Executions Rare*, TEMPO MAGAZINE, October 9-15, 2001.) Defendant now has the brazen audacity to move this Court to vacate its judgment, and, in so doing, asks this Court to overlook his willful refusal to participate in these lawful proceedings. He presently claims that this Court lacks personal jurisdiction over him, that it lacks subject matter jurisdiction over the Plaintiffs' claims and that service of process was improper. His most incredible claim, however, is that justice compels this Court to set aside its considered judgment that Defendant "had an unquestionably 'evil motive' in authorizing and implementing the crimes against humanity and terror that encompassed the torture, summary execution and injuries suffered by plaintiffs and their families," FOF/COL at 38, in light of the Attorney General of Indonesia's statement that Defendant is "not a suspect in the case of gross human rights violations in East Timor."

As is explained more fully below, justice certainly does not compel nor even counsel in favor of this Court substituting its judgment for that of an Indonesian functionary operating in a justice system that the United States Department of State as corrupt, a system clearly under the thumb of the executive and the military. (*See* Exhibit 7, United States Department of State, *Indonesia Country Reports on Human Rights Practices-2001* (March 4, 2002) <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8314.htm>.) Moreover, this Court has personal jurisdiction over the Defendant, and this Court's exercise of jurisdiction over him is quite consistent with the Constitution and laws of the United States. Defendant's claims regarding subject matter jurisdiction are equally unavailing. Finally, Mr. Bartelloni's and Ms. Fredriksson's Declarations not only demonstrate that the Defendant was properly served, they

expose the Defendant's willingness to shade or simply ignore the truth in his attempt to escape the judgment of this Court.

DISCUSSION

I. THIS COURT HAS JURISDICTION OVER THE DEFENDANT—DEFENDANT HAS THE CONSTITUTIONALLY REQUISITE MINIMUM CONTACTS WITH THE UNITED STATES AND WAS PROPERLY SERVED WITH PROCESS.

Defendant's attack on the jurisdiction of this Court relies exclusively on self serving-and otherwise suspect declarations submitted by Defendant and Defendant's subordinate, Brigadier General Dadi Susanto. Defendant employs these suspect declarations to argue that: (1) he was not properly served, and (2) that this Court does not have jurisdiction over Defendant's person. As set forth in detail below, Defendant and Brigadier General Susanto could not have been telling the truth when they described the service of process. The declarations of Mr. Bartelloni and Ms. Fredriksson establish conclusively that service was indeed proper. The demonstrable falsity of Defendant's averments regarding service requires this Court to disregard the assertions in Defendant's declaration regarding his contacts with the United States. Without any evidence to contradict the allegations regarding personal jurisdiction made by Plaintiffs in their Complaint and this Court's own determination in its Findings of Fact and Conclusions of Law that it has jurisdiction over the Defendant, it is clear that Defendant has failed to rebut or even question the prima facie showing of personal jurisdiction made by Plaintiffs. Nevertheless, even if his admissions are accepted as true, this Court may exercise personal jurisdiction over Defendant pursuant to FED.R.CIV.P. 4(k)(2).

A. PURSUANT TO FED.R.CIV.P. 4(E)(2), DEFENDANT WAS PROPERLY SERVED—DEFENDANT PERSONALLY ACCEPTED THE SUMMONS AND COMPLAINT FROM THE PROCESS SERVER, LOOKED AT THE PAPERS, AND THREW THEM TO THE GROUND.

Defendant argues that the judgment entered against him must be voided pursuant to Rule 60(b)(4) because he was not personally served pursuant to FED.R.CIV.P. 4(e). If service was as Defendant has described it, Rule 60(b)(4) might offer the Defendant some relief. Charitably put however, Defendant's description of service is not at all accurate. As is apparent from Ms. Fredriksson's and Mr. Bartelloni's descriptions of service, Defendant personally accepted service, service that was proper pursuant to FED.R.CIV.P. 4(e)(2). A Return of Service to this effect was filed with the Court on June 16, 2001. (*See* Exhibit 4.)

The Federal Rules of Civil Procedure provide for service of process through presentment of a summons and complaint to a defendant personally "in any judicial district of the United States." *See* FED.R.CIV.P. 4(e) & 4(e)(2). Such service is effective if it is performed by a person who is 18 years of age and who is not a party to the proceedings. *See* FED.R.CIV.P. 4(c)(2). "A signed return of service constitutes prima facie evidence of valid service which can be overcome *only by strong and convincing evidence*." *O'Brien v. R.J. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1398 (7th Cir. 1993) (quoting *Hicklin v. Edwards*, 226 F.2d 410, 414 (8th Cir. 1955))(emphasis added). *Accord Oltremari v. Kansas Social & Rehabilitative Service*, 871 F.Supp. 1331, 1349-50 (D. Kan. 1994) (quoting *O'Brien*, 998 F.2d at 1398); *Greater St. Louis Construction Laborers Welfare Fund v. Little*, 182 F.R.D. 592, 595 (E.D. Missouri 1998) (quoting *Hicklin*, 226 F.2d at 414) (hereinafter "*Greater St. Louis*"). *See also Modern Electric Corp. v. Walsh*, 197 F.R.D. 196 (D.D.C. 2000)(citing *O'Brien*, 998 F.2d at 1398, but giving undue weight to one district court opinion and stating that "[c]ourts are divided on the issue of how much evidence is necessary to rebut the affidavit of a process server"). Thus, Defendant

bears a heavy burden in any attempt to overcome Plaintiffs' prima facie showing of proper service and to prove that he was not properly served.

Here, Defendant was served by Mr. Bartelloni, a private process server, on March 30, 2000, and he executed a Return of Service on March 31, 2000. (*See* Bartelloni Decl. ¶¶ 13.) Plaintiffs filed the Return of Service with their Request for Entry of Default on June 16, 2000. Mr. Bartelloni's signed Return of Service thus constitutes prima facie evidence of valid service which Defendant must overcome with strong and convincing evidence. *See O'Brien*, 998 F.2d at 1398.

Defendant attempts to meet this high standard with his declaration and the declaration of his Subordinate Brigadier General Dadi Susanto. In his declaration, Defendant claims that, on March 30, 2000, he was awaiting a flight at Dulles, when he, Brigadier General Susanto,

> were approached by a Caucasian man who was a total stranger to us. The man asked if I was General Johny Lumintang when I said I was, he attempted to hand me a thick sheaf of papers. Brigadier General Dadi Susanto, who was standing next to me, told me not to take the papers. He reached out and knocked them to the ground. I never received the papers. After the papers had been knocked to the ground, Brigadier General Dadi Susanto and I went into the boarding area and shortly thereafter, I boarded my flight to Frankfurt.

(Lieutenant General Johny Lumintang ("Lumintang Decl.") ¶ 9.)

Standing alone, Defendant's declaration is insufficient to overcome the prima facie evidence of valid service which is established by the return of service. *See FROF, Inc. v. Harris*, 695 F.Supp. 827, 829 (E.D. Pa. 1988) ("a bare allegation by a defendant that he was improperly served cannot be allowed to bely (sic) the private process server's return"); *Modern Electric*, 197 F.R.D at 198 (quoting *FROF*, 695 F.Supp. at 829); *Greater St. Louis*, 182 F.R.D. at 595, 596; *Oltremari*, 871 F.Supp. at 1349-50 ("Other than bare assertions that the addresses on the summonses were [incorrect], the court should find no indication of improper service. The court

should not dismiss the action of plaintiff against these defendants on such bare assertions."). To buttress his inherently suspect assertions of improper service, Defendant offers the declaration of his subordinate, Brigadier General Susanto, who states that

> [s]ometime around 5 pm we were standing and talking near the gate when we were approached by a Caucasian man who was unknown to me and to General Lumintang. The man interrupted us and asked which one of us was Major General Johny Lumintang. At the time it looked like the man really did not know General Johny Lumintang before. When General Johny Lumintang identified himself, the man attempted to hand him a thick sheaf of papers which were folded over. I was concerned that the papers could have concealed a weapon or explosive device and simultaneously I told General Lumintang not to take the papers while I stepped forward and knocked the papers out of the man's hands. They fell to the ground. General Lumintang did not touch the papers. The man left without saying anything else to us or picking up the papers.
> ….
>
> I instructed the Defense Attache's (sic) driver, Mr. Wakidi, to pick up the papers and take them to the car. I went with General Lumintang into the gate boarding area. After he boarded, I left the terminal and went back to my office.
> ….
>
> The day after, I got the papers from my driver. I was surprised that someone unknown to General Lumintang would try to deliver papers at the airport when passengers are instructed, for reasons of security, not to accept any packages from strangers.

(Declaration of Brigadier General Dadi Susanto ("Susanto Decl.") ¶¶ 4-6.)

The self-serving nature of these declarations is difficult to ignore—in fact it colors every word that is averred to. The Defendant is himself desperate to escape the judgment of this Court, and a military officer who is subordinate to the Defendant in the chain-of-command has been required, has been asked or has volunteered to substantiate Defendant's version of the service of process. Notwithstanding these troubling considerations, Defendant's and Brigadier General Susanto's declarations are flatly contradicted by the facts.

As indicated above, Mr. Bartelloni was the process server who effected service upon Defendant. (*See* Bartelloni Decl. ¶¶ 10-12.) On March 30, 2002, Mr. Bartelloni traveled to

Dulles to serve the Defendant. (*Id.* ¶ 5.) Mr. Bartelloni had a photograph of the Defendant, and he was accompanied by Ms. Fredriksson. Ms. Fredriksson knew what Defendant looked like and was present to assist Mr. Bartelloni in identifying Defendant. (*Id*. ¶ 6.) Ms. Fredriksson saw the Defendant and alerted Mr. Bartelloni to his presence. (*Id*. ¶ 9.) Mr. Bartelloni then approached the Defendant and said "General Johny Lumintang, I am John Bartelloni, and I am a process server, private investigator. I have been directed to serve you with these papers." (*Id.* ¶ 10.) Mr. Bartelloni handed the Summons, Complaint and related papers to Defendant, and the Defendant accepted them. (*Id.* ¶ 11.) After he accepted the papers, Defendant looked at the papers, and threw them to the ground. (*Id.* ¶ 12.) A man accompanying the Defendant picked the papers up right away. (*Id.* ¶ 13.)

Ms. Fredrickson witnessed the service of the Complaint and Summons upon Defendant. (Fredriksson Decl. ¶¶ 11-13.) When she found the Defendant, she identified the Defendant for Mr. Bartelloni. (*Id.* ¶¶ 9-10.)[1] Ms. Fredriksson watched as the Defendant accepted the papers, looked at them and then threw them to the ground, apparently angered by the event. (*Id.* ¶ 13.) She then saw the man accompanying the Defendant (presumably Brigadier General Susanto) immediately pick up the papers. (*Id.* ¶ 14.)

The events surrounding Defendant's service, as described by Mr. Bartelloni and as witnessed by Ms. Fredriksson, clearly constitute valid service. Once Defendant is presented with service papers, he may not divest this Court of jurisdiction merely by refusing the papers. *See Modern Electric*, 197 F.R.D. at 197 & 199. When service is refused, service may be effected by leaving the papers at a location near that person. *See Novak v. World Bank*, 703 F.2d 1305, 1310

[1] Mr. Bartelloni carried a picture of the Defendant with him and Ms. Fredriksson positively identified the Defendant for Mr. Bartelloni. (*See* Bartelloni Decl. at ¶¶ 6-10; Fredriksson Decl. ar ¶¶ 7-11.) Yet Brigadier General Susanto claims that Mr. Bartelloni "interrupted us and asked which one of us was Major General Johny Lumintang. At the time it looked like the man really did not know General Johny Lumintang before." (Susanto Decl. ¶ 4.) This is, of

n. 14 (D.C. Cir. 1983)(citations omitted); *Republic Credit Corp. I v. Rance*, 172 F.Supp.2d 1178, 1181 (S.D. Iowa 2001)(quoting *Novak*, 703 F.2d at 1310); *Roth v. W.T. Cowan, Inc.*, 97 F.Supp. 675, 677 (E.D.N.Y. 1951). *See also* Wright & Miller, Federal Practice & Procedure: Civil 3d § 1095 (2002). This policy underscores the fact that the purpose of service is to place a defendant on notice of the suit against him. No more is needed for service to be effective: "This Court has no interest in forcing process servers to chase down defendants and jam court papers into their hands in order to effect personal service, as depicted on television." *Republic Credit Corp. I*, 172 F.Supp.2d 1181.

Moreover, when Defendant and Brigadier General Susanto's declarations are weighed against the prima facie assumption of valid service created by the filed Return of Service and the declarations of Mr. Bartelloni and Ms. Fredriksson, it is clear that Defendant has failed to make an even a remotely believable claim that service was improper, much less establish it with the requisite "strong and convincing evidence." *See O'Brien*, 998 F.2d at 1398. All of Defendant and Brigadier General's Susanto's claims regarding service are explicitly or implicitly contradicted by the Return of Service and the declarations of Mr. Bartelloni and Ms. Fredriksson. Where Plaintiffs evidence conflicts with Defendants, this Court is bound to construe all reasonable inferences in the Plaintiffs' favor. As the court noted in *Reifsteck v. Kelly-Springfield Tire Corp.*, when faced with a "battle of affidavits" it was bound to find that "defendant has not submitted strong and convincing evidence to rebut the presumption of valid service created by the return of service." 2002 WL 206488 *1, 2002 U.S. Dist. LEXIS 2111 *3 (N.D. Ill. Feb. 8, 2002)(slip opinion). Here, there is more than a battle of affidavits or declarations; there are two completely incongruous versions of the same event. This conflict alone would require the Court

course, just one of a number of facts averred to by Brigadier General Susanto that are directly contradicted by Ms. Fredriksson's and Mr. Bartelloni's declarations.

to accept the Plaintiffs' description of service as true. *See id.* Moreover, even without the presumption of truth that Plaintiffs' version is entitled as a matter of law, it is apparent that Defendant was properly served pursuant to FED.R.CIV.P. 4(e)(2). Defendant's claims regarding service fail as a result.

B. EVEN IF DEFENDANT'S ADMISSIONS REGARDING HIS CONTACTS WITH THE UNITED STATES ARE ACCEPTED AS TRUE, FED.R.CIV.P. 4(k)(2) ALLOWS THIS COURT TO EXERCISE PERSONAL JURISDICTION OVER DEFENDANT.

As is apparent from the discussion above, Defendant is willing to say anything to escape the judgment imposed by this Court. Not only should the Court disregard Defendant's version of service, it should also disregard the suspect information provided by Defendant regarding his contacts with the United States. Given that Defendant has presented no other evidence regarding his alleged lack of contacts with the United States—given that there is no factual basis for challenging this Court's exercise of jurisdiction over the Defendant—this Court should reject outright Defendant's claim that this Court lacks personal jurisdiction over him. However, even if Defendant's questionable claims are accepted as true, this Court may still exercise personal jurisdiction over Defendant pursuant to FED.R.CIV.P 4(k)(2).

Rule 4(k)(2) of the Federal Rules of Civil Procedure provides that

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

FED.R.CIV.P. 4(k)(2). Rule 4(k)(2) effectively functions as a federal long arm statute, allowing a federal district court to exercise personal jurisdiction over a defendant, provided such jurisdiction complies with the Fifth Amendment's due process clause. *See United States v. Swiss American Bank Ltd.*, 191 F.3d 30, 36 & 40 (1st Cir. 1999)(citations omitted)("*Swiss I*"). Because the

statutory authorization for personal jurisdiction is federal rather than state law, the "minimum contacts" test which serves as the Constitutional check upon state long-arm statutes is modified when applied under Rule 4(k)(z). *See United States v. Swiss American Bank Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001) ("*Swiss II*").

Instead of looking to one United States' jurisdiction for the requisite minimum contacts, a court may aggregate all of a defendant's contacts with the United States to determine if personal jurisdiction may be exercised. *See Vitamins Antitrust Litigation*, 94 F.Supp.2d 26, 31 (D.D.C. 2000). *See also Swiss II*, 274 F.3d at 618; *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 420 (5th Cir. 2001); *Consolidated Development Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1291 (11th Cir. 2000). Although the scope of the minimum contacts inquiry is thus broadened by Rule 4(k)(2), the nature of the Constitutional inquiry is the same, and a court may exercise specific or general jurisdiction consistent with the Supreme Court's personal jurisdiction jurisprudence. *See Consolidated*, 216 F.3d at 1291-92; *Swiss II*, 274 F.3d at 618.

Here, Plaintiffs have made a prima facie showing under Rule 4(k)(2) that this Court has jurisdiction over the Defendant's person given that: (1) Defendant was effectively served with process; (2) Plaintiffs' claims arise under federal law—the Alien Tort Claims Act, 28 U.S.C. § 1350, and Torture Victim Protection Act, Pub.L. No. 102-256, 106 Stat. 78 (1992); and (3) personal jurisdiction over Defendant is not available under any situation-specific federal statute. *See* Fed.R.Civ.P. 4(k)(2); *Vitamins Antitrust Litigation*, 94 F.Supp.2d at 34-35 (citing *Swiss I*, 191 F.3d at 41).[2] Finally, as discussed more fully below, Defendant's contacts with the United States as a whole satisfy the requirements of constitutional due process. *See id.*

[2] The undersigned counsel certifies that based on the information that is readily available to the Plaintiffs and their counsel, Defendant is not subject to suit in the courts of general jurisdiction of any state. *See Vitamins Antitrust Litigation*, 94 F.Supp.2d at 34-35 (quoting *Swiss I*, 191 F.3d at 41).

Due process permits the exercise of jurisdiction over a non-resident defendant's person only when the defendant 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." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). It is well settled that there are two types of personal jurisdiction, specific and general jurisdiction, and that the minimum contacts analysis differs for each. Specific jurisdiction is personal jurisdiction that occurs when there is a relationship between the case or controversy and a defendant's contacts with the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). General jurisdiction is a theory of personal jurisdiction that allows a court to exercise jurisdiction over a defendant for claims that are unrelated to the defendant's contacts with the forum. *See id.* at 415. To find general jurisdiction, the defendant's contacts with the forum must be continuous and systematic, such that allowing a court to exercise personal jurisdiction over the defendant, for a claim that is unrelated to the defendant's contacts with the forum, is "reasonable and just." *Id.* The minimum contacts test for both specific and general jurisdiction is grounded in fairness: "It assures that the defendant's conduct and connection with the forum State is such that he should reasonably expect to be haled into court there." *Consolidated Development Corp.*, 216 F.3d at 1291-92 (quoting *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). For specific jurisdiction, the constitutional requirements are usually satisfied when a defendant has purposefully availed himself "of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denkla*, 357 U.S. 235, 253 (1958)(citing *International Shoe Co.*, 326 U.S. at 319). Put differently, when a defendant "deliberately has engaged in significant activities" within a forum, or his contacts with that forum proximately result from actions by the defendant himself that create a "substantial

connection" with the forum, specific jurisdiction is constitutionally permissible. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)(citations omitted).

Here, Defendant admits in his declaration that he has been in the United States six times: (1) to attend Infantry Officer Advanced Course at Fort Benning, Georgia, in 1978; (2) in 1989, to attend the "IDMC" in Monterey, California; (3) in 1995 to attend a "Special Forces Seminar," in Honolulu, Hawaii; (4) in 1995 to participate in a "study tour of students of the National Defense Institute; (5) to attend a "Roundtable Dialogue on Justice and Reconciliation" in Washington, DC., in 2000; and (6) to attend a United States-Indonesia Society panel discussion in March of 2000. (Lumintang Decl. ¶ 7.) Defendant has, of course, been deliberately vague about even these contacts with the United States, substituting titles and acronyms for detail in an attempt to obfuscate the true purpose and duration of his visits. He has omitted the duration of all but one of his visits to the United States—his visit in March of 2000 when he accepted service in this proceeding. (*See* Lumintang Decl. ¶ 5). Defendant does not describe the content, purpose or scope of the "Infantry Officer Advanced Course," the "IDMC" or the "Special Forces Seminar" coursework. Defendant mentions a "study tour" of the National Defense Institute, but he never gives the location of the Institute nor indicates where the tour took him. The details that the Defendant has conveniently omitted from his declaration strongly suggest that his contacts with the United States are more substantial and directly related to the Plaintiffs' allegations than he would care to admit.

Nevertheless, the information that Defendant has provided establishes that he has deliberately initiated and maintained contact with the United States and purposefully availed himself of the benefits of the laws and privileges of this country. He has traveled to the United States on at least two occasions to receive extensive instruction in military operations and

command and control from instructors employed by the United States government in schools operated by the United States military. The training the Defendant sought and received in the United States almost certainly allowed him to advance through the ranks of the Indonesian military. With the training he received here in the United States, he was able to improve his knowledge base and add to his skill set, and, as a result, was in a better position to make plans for East Timor, train personnel for operations there and, ultimately, ensure that those plans were carried out. This Court found the Defendant liable on the principle of command responsibility and looked to the Defendant's issuance of the telegram of May 5, 1999 and his authorship of the TNI special operations manual as evidence of his responsibility. (FOF/LOL at 32-33.) Therefore, there is a direct relationship between Defendant's contacts with the United States and Plaintiffs' claims against Defendant.

The Infantry Officer Advanced Course ("IOAC") at Fort Benning, Georgia, was likely a multiple-week school operated by the United States Army through the International Student Training Detachment. (*See* Exhibit 8, *International Student Training Detachment-Mission Statement* (May 3, 2002) <http://www.benning.army.mil/11th/1-11INF/ISTD1_11/homepage.htm>.) The subject matter of this course was likely extensive instruction in combat operations and command and control decision making. (*See* Exhibit 9, *Infantry Officer Basic Course* (May 3, 2002) <http://www.benning.army.mil/11th/2-11INF/Index.htm>.) The "IDMC" in Monterey, California, is the International Defense Management Course, which is offered by the Naval Postgraduate School. (*See* Exhibit 10, *Defense Resources Management Institute*, <http://www.nps.navy.mil/ofcinst/drmi.htm>.) The IDMC is an eleven week course that instructs foreign military officers in the defense management environment, quantitative

and economic analysis, and management systems in the context of strategy, implementation, and operations. (*See id.*)

Most importantly, however, at least a portion of this training is paid for by the United States. The International Military Education and Training program is authorized by the Foreign Assistance Act of 1961. (*See* Exhibit 11, *Defense Security Cooperation Agency-International Training Programs* (May 7, 2002) <http://129.48.104.198/programs/imet/imet2.htm >.) It provides training on a grant basis to foreign military students. (*See id.*) Defendant was assigned an IMET student identification number--#23294. (*See* Exhibit 12, Alan Nairn, *General Lumintang Trained by the U.S.* (March 28, 2000) <http://www.etan.org/news/2000a/suit/nairn.htm>.) Thus, at least a portion of Defendant's military training was paid for by the government of the United States.

This Court has found Defendant liable to Plaintiffs under the principles of command responsibility. (*See* FOF/COL at pp. 30-33 & ¶ 17.) The Court based its determination, in part, on the fact that Defendant signed the telegram of May 5, 1999 and authored the TNI special operations manual, in which instruction was given on training in abduction, killing, torture and agitation, in addition to education, training and examination of army personnel. (*Id.* at pp. 30-33 & ¶¶ 16-17.) Defendant's liability is thus predicated on his ability and clear authority to command and control troops under his command, as well as his personal knowledge of field operations and field command—subjects on which Defendant almost certainly received instruction during his training in the United States.[3]

The substantive benefit that Defendant has received, in the form of military training, from the United States, establishes sufficient contacts between the United States and Defendant such

[3] At a minimum, this may be inferred from the very title of Defendant's course at Fort Benning: "Infantry Officer Advanced Course." (*See* Lumintang Decl. ¶ 7.)

that this Court's exercise of personal jurisdiction over Defendant "does not offend traditional notions of fair play and substantial justice." *International Shoe Co.*, 326 U.S. at 316. Defendant has purposely availed himself of the benefits of our laws and government institutions, received training which he then utilized to in planning the Indonesian military's actions in East Timor, his training of troops to carry out those actions and his command and control of the Indonesian forces on the ground in East Timor. In so doing, Defendant has deliberately created a substantial connection between himself and the United States. As a result, it was certainly foreseeable that Defendant could be held to account for his use of the training he received from the United States in a United States court. Thus, because Defendant has intimate contacts with the United States, and because there is a direct relationship between Defendant's contacts and the Plaintiffs' claim this Court has exercised jurisdiction over Defendant's person in a constitutionally permissible manner.

As set forth above, this Court may properly exercise personal jurisdiction over Defendant under Rule 4(k)(2). Because Plaintiffs have made out a prima facie case for the application of Rule 4(k)(2), the burden is now upon Defendant to produce some evidence which, if credible, demonstrates the existence of at least one jurisdiction in the United States exist where Defendant is subject to suit.[4] *See Vitamins Antitrust Litigation*, 94 F.Supp.2d at 35 (citing *Swiss I*, 191 F.3d at 41). Because Defendant's aggregate contacts with the U.S. satisfy the Constitutional requirements, if Defendant fails or refuses to identify a United States jurisdiction where Defendant is amenable to suit, this Court may, pursuant to Rule 4(k)(2), exercise jurisdiction

[4] If the Defendant does identify a jurisdiction in the United States where he is subject to suit, Plaintiffs respectfully request this Court to transfer this action to that jurisdiction pursuant to 28 U.S.C. § 1404(a). As the court stated in *Sinclair v. Kleindeinst*, "[t]he procedural obstacles which may be removed by a transfer include the lack of personal jurisdiction, improper venue and statute of limitations bars." 711 F.2d. 291, 294, (D.C. Cir. 1983); *see also Hoffman v. Blaski*, 363 U.S. 342-43 (1960.. Transfer is therefore appropriate where "it would enable the Plaintiff to obtain personal jurisdiction" over the defendant. *Id.* at 294.

over Defendant. *See ISI International v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001)(Easterbrook, J.).[5]

II. THIS COURT HAS JURISDICTION OVER THE SUBJECT MATTER OF PLAINTIFFS' CLAIMS—PLAINTIFFS HAVE PLEAD AND PROVED THEIR CLAIMS UNDER THE ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT AND THIS COURT HAS DETERMINED THAT IT HAS JURISDICTION OVER THOSE CLAIMS.

Defendant's claim that this Court's judgment is void per FED.R.CIV.P. 60(b)(4) for lack of subject matter jurisdiction is absurd. Federal courts have been uniform in their treatment of the jurisdictional requirements for suits under the Alien Tort Claims Act ("ATCA") and the Torture Victim Protection Act ("TVPA"), and Plaintiffs claims clearly met those requirements here. Alone, this Court's findings and conclusions regarding its jurisdiction over the Plaintiffs' claims justify casting aside Defendant's jurisdictional argument as without merit.

A. THIS COURT'S PREVIOUS DETERMINATION THAT IT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS IS BINDING BECAUSE THE ASSERTION OF JURISDICTION BY THIS COURT IS NOT FRIVOLOUS.

Subject matter jurisdiction is proper if "the well-pleaded factual allegations contained in the complaint" support any jurisdictional element in dispute. *Ge v. Peng*, -- F. Supp.2d --, 2000 WL 33726878, *3 (D.D.C. 2000). Further, as this Court has stated, "a party against which a default has been entered is not entitled *ipso facto* to have that default set aside merely because it may have meritorious defenses, including jurisdictional defenses." *See Steinberg v. International Criminal Police Org.*, 103 F.R.D. 392, 396-97 (D.D.C. 1984)(hereinafter "*Interpol*"). Under Rule 60(b)(4), a court's determination that it has jurisdiction is binding "as

[5] In the event that this Court determines that there are insufficient grounds to support personal jurisdiction, Plaintiffs are, at a minimum, entitled to discovery concerning Defendant's contacts with the United States. *See GTE Media Services Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1351 (D.C.Cir. 2000)("This Court has previously held that if a party demonstrates that it can supplement its jurisdictional allegations through discovery, then discovery is justified."); *Hasson El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C.Cir. 1996)("A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum."). Thus, Plaintiffs respectfully request

long as the assertion of jurisdiction is not frivolous." *Id.* *See* also *Kocher v. Dow Chem. Co.*, 132 F.3d 1225, 1230 (8th Cir. 1997)(Rule 60(b)(4) motion requires showing that absence of jurisdiction was "so glaring as to constitute a 'total want of jurisdiction' or a 'plain usurpation of power' so as to render the judgment void from its inception").

This rule has been applied to implicit determinations of subject matter jurisdiction in default judgments, in addition to judgments in contested cases. *See, e.g.*, *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982)(default judgment not void where diversity jurisdiction sufficiently, even if improperly, alleged; court has not "clearly usurped" its powers); *Government Employees' Ins. Co. v. Jackson*, 1995 WL 672830, *1 (E.D.Pa. 1995)(default judgment not void for lack of subject matter jurisdiction unless court has "clearly usurped" its power). As one commentator notes: "In the context of Rule 60(b)(4), a lack of subject-matter jurisdiction for the purpose of making a judgment void means a court's lack of jurisdiction over an entire category of cases, not whether a court makes a proper or improper determination of subject matter jurisdiction in a particular case." 3D Moore's Federal Practice & Procedure ¶ 60.44[2][a].

This Court's explicit determination in its Findings of Fact and Conclusions of Law that it had subject matter jurisdiction over this action under the ATCA and TVPA is amply supported by Plaintiffs' allegations and evidence, and is in no way "frivolous" or a clear usurpation of its powers. Accordingly, the default judgment is not void for lack of subject matter jurisdiction.

---

that they be permitted to conduct discovery should this Court determine that, on the record presently before it, it is unable to take jurisdiction over the Defendant.

B. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS AS THEY WERE BROUGHT PURSUANT TO THE ALIEN TORT CLAIMS ACT.

The ATCA confers federal subject matter jurisdiction when three conditions are satisfied: (1) the plaintiff is an alien; (2) the claim is for a tort; and (3) the tort is committed in violation of the law of nations or a treaty of the United States. *See Doe I v. Islamic Salvation Front,* 993 F. Supp. 3, 7 (D.D.C. 1998) (hereinafter "*FIS*")(citing *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)). Defendant does not and cannot dispute that the first two of these three conditions have been satisfied. Defendant does not even challenge that each of Plaintiffs' causes of action are for torts recognized as violations of "the law of nations." Rather, Defendant claims that the third condition is not satisfied because he believes that Plaintiffs failed to allege how Defendant acted under color of official authority, a necessary element of certain of Plaintiffs' causes of action. Defendant is simply wrong.

Flatly contrary to Defendant's claims, Plaintiffs specifically asserted—from the first sentence of the Complaint and throughout this litigation—that Defendant committed the acts or omissions that harmed Plaintiffs under color of official authority. Plaintiffs alleged and at trial proved how Defendant so acted. Plaintiffs averred in their Complaint that Lumintang "designed, ordered, implemented, or directed" violations of customary international law in his capacity as Vice Chief of Staff of the Indonesian army, and that he was responsible in this position for violations committed by Indonesian forces under his authority. (*See* Complaint, ¶¶ 1, 3, 15, 17, 18, 19, 31 and 32). In support, the Complaint points, among other things, to: (1) Lumintang's authorship of a secret Covert Operations Manual for the Army Special Forces ("Kopassus"), that ordered training in the use, *inter alia*, of kidnapping, terror, and sabotage; (2) his issuance of a telegram authorizing repressive actions after East Timor's 1999 referendum if the vote favored independence, and (3) the widespread and systematic nature of atrocities and other human rights

violations committed by the Indonesian Army and militias in East Timor surrounding the independence referendum. (*Id.* ¶¶ 15-32).

At the hearing on damages, Plaintiffs introduced further evidence and argument of Defendant's role in, and responsibilities as an army commander for the reign of terror perpetrated by Indonesian troops in 1999 in East Timor. (*See* Trial Transcript, March 27, 2001, Testimony of Prof. Richard Tanter, 25:19-136:25). This court's own conclusions provide that Defendant had both direct responsibility for plaintiff's injuries by virtue of his "official acts," and command responsibility in light of his military offices for grave abuses committed by subordinate forces. (*See* FOF/COL at 32-33).

As Plaintiffs provided credible and specific allegations that Defendant committed violations of customary international law in his official capacity as a high-ranking officer in the Indonesian military, this Court's assertion of subject matter jurisdiction is proper. Further, the Court clearly did not usurp its authority in determining, after considering evidence and argument presented by Plaintiffs, that it had jurisdiction under the ATCA. Accordingly, the default judgment is not void for lack of subject matter jurisdiction.

While the judgment is clearly not void in light of this Court's proper assertion of subject matter jurisdiction under the ATCA, Plaintiffs briefly address, for the record, Defendant's misguided claim that the court lacked jurisdiction over Plaintiffs' claims under the TVPA. Defendant mistakenly claims that subject matter jurisdiction under the TVPA doe not lie here because Plaintiffs failed to exhaust "adequate and available" local remedies.

Exhaustion of domestic remedies simply is not a jurisdictional element under the TVPA. [6] The TVPA provides a cause of action against "[a]n individual who, under actual or apparent

[6] The TVPA "is not itself a jurisdictional statute," but rather provides a cause of action for official torture "under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of [28

authority, or color of law, of any foreign nation . . . subjects an individual to torture." TVPA, § 2(a) (28 U.S.C. § 1350, note). Nothing more is required to state a cause of action under the statute. *See, e.g.*, *FIS*, 992 F. Supp. at 9. Subsection 2(b) of the TVPA provides that a court shall "*decline to hear a claim* under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA, § 2(a) (28 U.S.C. § 1350, note)(Emphasis added). However, as indicated by the legislative history of this provision, exhaustion of domestic remedies is an *affirmative defense* under the statute, not an element of a plaintiff's cause of action. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (noting Senate Report on TVPA providing with "remarkable clarity" that exhaustion requirement should be interpreted by general principles of international law, which generally require defendants to plead and prove non-exhaustion as an affirmative defense). Accordingly, exhaustion of remedies is a defense that Defendant could have raised had he chosen not to answer Plaintiffs' Complaint. Because Defendant chose default, he has foregone his right to contest the merits of Plaintiffs claims, to raise affirmative and other defenses, and may not now attempt to do so under the guise of subject matter jurisdiction.

III. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER FED.R.CIV.P. 60(b)(6)—DEFENDANT MADE A CONSCIOUS DECISION TO IGNORE THESE PROCEEDINGS AND SHOULD NOT BE REWARDED FOR THAT DECISION.

Under Rule 60(b)(6) of the Federal Rules of Civil Procedure, this Court may relieve a party from a final judgment for "any other reason justifying relief from operation of the judgment." Fed.R.Civ.P. 60(b)(6) (2002). Defendant claims this Court should set aside its judgment pursuant to Rule 60(b)(6) in light of the "extraordinary circumstances of this case" and

---

U.S.C.] section 1331." *Kadic*, 70 F.3d at 246. Thus, so long as plaintiffs' well-plead allegations support a cause of action under the TVPA, the action "arises under" a federal statute and this court has subject matter jurisdiction. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)(cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law).

the "substantial interests of justice." Although Defendant is correct that Rule 60(b)(6) is reserved for the extraordinary, he is mistaken in assuming that there is anything even remotely extraordinary about this case.

Defendant brazenly argues that "justice" requires this Court to reward Defendant's deliberate and calculated refusal to mount a defense, by setting aside a judgment that is grounded upon credible, detailed and overwhelming evidence that Defendant violated Plaintiffs' human rights. Notwithstanding the fact that Defendant's argument under Rule 60(b)(6) is procedurally barred because Defendant asks this Court to set aside its judgment pursuant to 60(b)(4), Defendant attempts to bring his motion within the narrow confines of Rule 60(b)(6) by arguing facts that he believes establish his innocence. Put simply, the time for making such claims has long passed. Not only was Defendant aware of the filing of this action—he was, after all, personally served with the Complaint and Summons over two years ago—this Court has concluded that Defendant had "unquestionably 'evil motive' in authorizing and implementing the crimes against humanity and terror that encompassed the torture, summary execution and injuries suffered by plaintiffs and their families." (FOF/COL p. 38.)

A. DEFENDANT IS BARRED FROM SEEKING RELIEF UNDER RULE 60(B)(6) BECAUSE HE HAS ALSO SOUGHT RELIEF UNDER RULE 60(B)(4).

Defendant seeks relief from the judgment of this Court pursuant to Rule 60(b)(6) as well as Rule 60 (b)(4). Defendant's reliance upon Rule 60(b)(6) is misplaced. As explained by the court in *Carr v. District of Columbia*:

> As has been held in many cases, however, clause (6) and the first five clauses of Rule 60(b) are mutually exclusive, with the result that clause (6) affords no basis for relief at any time available under either of the earlier clauses . . . . That appears to have been the view already taken in this circuit . . . and in any event we adopt it here.

543 F.2d 917, 926 n. 72 (D.C. Cir. 1976)(citations omitted). *See Klapprott v. United States*, 335 U.S. 601, 613 (1949); *Goland v. Central Intelligence Agency*, 607 F.2d 339, 372-73 (D.C. Cir. 1978); *In re Korean Airlines Disaster of September 1, 1983*, 156 F.R.D. 18, 21 (D.D.C. 1994). Having sought a remedy under Rule (60)(b)(4), Defendant may not avail himself of remedies under Rule (60(b)(6), *see In re Korean Airlines*, 156 F.R.D. at 21, and Defendant's motion for relief under Rule 60(b)(6) should be denied.

B. EVEN IF DEFENDANT'S RULE 60(B)(6) MOTION IS NOT BARRED, DEFENDANT HAS NOT SATISFIED THE STRICT CRITERIA REQUIRED FOR OBTAINING RELIEF UNDER RULE 60(B)(6).

Defendant argues that the judgment of this Court must be set aside because he is innocent—and attempts to argue facts that allegedly establish his lack of culpability for the gross human rights abuses suffered by the Plaintiffs. Notwithstanding the fact that Defendant may not, as a matter of law, seek relief under Rule 60(b)(6), an evaluation of the merits of Defendant's arguments reveals that Defendant has not met the heavy burden of proof that predicates relief under Rule 60(b)(6).

1. RULE 60(B)(6) IS NOT AVAILABLE TO RESCUE DEFENDANT FROM HIS DECISION NOT TO DEFEND. IN DEFENDANT'S OWN WORDS, "I AM AN INDONESIAN CITIZEN, I ONLY BOW TO INDONESIAN LAW."

Defendant argues that his case presents the "extraordinary circumstances" and "demand for justice that qualifies for relief under Rule 60(b)(6)" in part because a "$66 million dollar judgment has been issued against a foreign citizen . . . who never appeared in Court to defend himself." Defendant's reliance on Rule 60(b)(6) as authority for this argument is without precedent, and it flies in the face of the well-established finality doctrine. As set forth in detail above, Defendant was personally served with the Summons and Complaint in this action. He made a deliberate choice not to appear, contest the entry of default or challenge this Court's

judgment on its merits. Defendant has provided no explanation for his failure to timely challenge this Court's jurisdiction. As stated by the Court, "free, calculated and deliberate choices are not to be relieved from through the use of Rule 60(b)(6). *Ackermann v. United States,* 340 U.S. 193,198 (1950). In other words, Rule 60(b) cannot . . . be employed simply to rescue a litigant from strategic choices that later turn out to be improvident. *Good Luck Nursing Home, Inc. v. Harris,* 636 F.2d 572, 577 (D.C. Cir. 1980). *See also Federated Department Stores v. Moitie,* 452 U.S. 394, 401 (1981).

Of the authority cited by Defendant, only two cases involved the granting of a Rule 60(b)(6) motion. Neither supports Defendant's argument that relief from this Court's judgment would serve the interests of justice. In *Klapprott v. United States,* a prisoner sought to re-open a default judgment revoking his citizenship and canceling his naturalization certificate. *See* 335 U.S. at 604-07. The default was entered while he was wrongfully imprisoned on a selective service conspiracy charge, ill and without funds to obtain counsel. *See id*. Here, by contrast, Defendant has advanced no evidence that he was prevented or unable to present a defense, contest the entry of the default judgment or appear at trial. Moreover, as the Court noted in *Klapprott,* its holding was quite fact specific. *Id.* at 603.

Likewise, in *Computer Professionals for Social Responsibility v. Unites St*ates, the court noted that "a party that . . . has not presented known facts helpful to its cause when it had the chance cannot ordinarily avail itself [of] rule 60(b) after an adverse judgment has been handed down." 72 F.3d 897, 903 (D.C. Cir. 1996)(citation omitted). The court permitted a re-opening because the interests of third parties were at issue and because the motion was filed only eighteen days after the court's adverse decision. *Id.* at 904. Here, Defendant seeks to set aside this

Court's judgment because he is unhappy with his strategic decision not to defend and there are no interested third parties that need protection.

Instead, Defendant's position here is more akin to that of the defendant in *Anderson v. Chevron*, where the court refused to set aside a default order and held that the movant should be bound by his strategic choice:

> The burden of undermining a default judgment that is two years old rests heavily upon Moving Plaintiffs. Moving Plaintiffs have not demonstrated extraordinary circumstances that rise to the level required for this court to have the ability to exercise its discretion in to set aside the judgment of April 16, 1997.

190 F.R.D. 5, 12 (D.D.C. 1999),

No extraordinary circumstances prevented Defendant from bringing a timely challenge to Plaintiffs' allegations and, at trial, proof. Defendant was fully aware of this proceeding and made a strategic decision not to defend. As a result there is no basis to grant Defendant's Rule 60(b)(6) motion.

2. RULE 60(B)(6) AFFORDS DEFENDANT NO RELIEF BECAUSE DEFENDANT'S PARTICIPATION IN HUMAN RIGHTS VIOLATIONS HAS BEEN ESTABLISHED BY COMPETENT EVIDENCE AND THERE IS NO NEW "EVIDENCE" THAT SUPPORTS DEFENDANT'S PROTESTATIONS OF INNOCENCE.

Defendant also argues that Rule 60(b)(6) should provide him relief because he did not commit any of the torts alleged in Plaintiffs' Complaint. Defendant conveniently omits that his liability was established by Plaintiffs at trial by overwhelming and convincing evidence. He never mentions this Court's conclusion that "Defendant Lumintang is both directly and indirectly responsible for the human rights violations committed against the Plaintiffs." (FOF/COL at 32.) Nonetheless, Defendant essentially argues that Plaintiffs have the wrong person because: (1) Defendant was interviewed by the Attorney General of the Republic of Indonesia who then decided that Defendant was not suspected of the human rights abuses in East Timor, and (2)

Defendant's duties with the Indonesian army at the relevant time were administrative, and as a result he had no authority over operations in the field.

The "facts" Defendant relies on to support his argument that he was merely an administrative officer are directly contradicted by the record. Specifically, this Court has found that Defendant issued a telegram on May 5, 1999, instructing the responsible local commander in East Timor to anticipate situations which may arise from the vote and to "prepare a security plan with the aim of preventing the outbreak of civil war" and directing the military to prepare for "evacuation." (FOF/COL ¶16.) Moreover, on June 30, 1999, a manual authored by Defendant was distributed to and used by soldiers in East Timor which directed training in, *inter alia*, abduction, killing, kidnapping, terror, and agitation. (FOF/COL ¶17.) Defendant's claim that he was not responsible for military operations are simply insufficient to negate findings of this Court that are based upon credible evidence.

Nor does Defendant's argument regarding the investigation of the Indonesian Attorney General justify relief under Rule 60(b)(6).[7] First, Defendant reveals very little about the substance and quality of the investigation. Although according to the Defendant, "written minutes were taken during the interrogations and kept," transcripts were not provided to this Court. Given the vague description of the investigation and the serious issue of the Indonesian Attorney General's independence and ability to conduct an impartial investigation of such a high-ranking military officer, it is not possible to determine whether the investigation of the Indonesian Attorney General even addressed the specific human rights violations at issue here.

[7] It is patently clear that Defendant cannot meet the standard under Rule 60(b)(2) for newly discovered evidence because the evidence must have been in existence at the time of the trial. *See In Re Korean Airlines Disaster of September 1, 1983*, 156 F.R.D. 18, 22 (D.D.C. 1994). The Indonesian Attorney General's investigation took place well after. Moreover, while the "evidence" offered by Defendant regarding the structure of the Indonesian military and his ostensible responsibilities within that structure was in existence at the time of trial, it cannot be said that it is "newly discovered."

Again, however, Defendant's assertions regarding the investigation of the Indonesian Attorney General, are directly contradicted by the findings entered by this Court:

> Defendant Lumintang is both directly and indirectly responsible for the human rights violations committed against the Plaintiffs. Lumintang had "direct" responsibility for these acts: as the third-ranking member of the Indonesian military, he - along with other high-ranking members of the Indonesian military - planned, ordered, and instigated acts carried out by subordinates to terrorize and displace the East Timor population, to repress East Timorese who supported independence from Indonesia, and to destroy East Timor's infrastructure following the vote for independence. Lumintang's signature on the May 5, 1999 telegram was sent to subordinates in the Indonesian army that furthered the events in East Timor in 1999. The June 30, 1999 manual that was issued over his signature advocated training tactics for use by Indonesian soldiers that violate international law and were the same tactics that were actually used by these soldiers both before and after the Popular Consultation. These official acts support a finding that Lumintang was directly involved in ordering, instigating or planning acts which led to the plaintiffs' injuries in this case. The defendant also had indirect command responsibility for the plaintiffs' injuries. In his position as Vice Chief of Staff of the TNI, and as a member of the TNI High Command, Lumintang (1) served as commander of subordinate members of the TNI in East Timor who perpetrated the acts of violence which injured the plaintiffs; (2) knew or should have known that subordinates in East Timor were committing, were about to commit or had committed widespread and systematic human rights violations, and (3) failed to act to prevent or punish the violations. Based on the principles of command responsibility, the Court finds that defendant may be held liable for the actions of his subordinates, including the abuses suffered by plaintiffs in this action.

(FOF/COL at 32-33.)

Defendant's liability has been established by this Court. Nothing has been offered to justify relieving Defendant of this Court's judgment. Defendant's prayer for relief under Rule 60(b)(6) should therefore be denied.

IV. SHOULD THIS COURT SET ASIDE ITS JUDGMENT, THE PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES AND COSTS AND DEFENDANT MUST POST BOND TO SECURE PAYMENT OF JUDGMENT.

This Court may impose reasonable conditions on any decision to vacate a default judgment. *See* FED.R.CIV.P. 60(b)(default judgment may be vacated "upon such terms as are just"); *Thorpe v. Thorpe*, 364 F.2d 692, 694 (D.C.Cir. 1966). In the event that the Court determines that its judgment should be set aside, pursuant to FED.R.CIV.P. 60(b)(4) or 60(b)(6), Plaintiffs respectfully request the Court to order the Defendant to pay the Plaintiffs' attorneys' fees and costs incurred in pressing for a default judgment. Plaintiffs also ask the Court to require Defendant to post a bond in the amount of the default judgment if it determines that it must set aside its judgment pursuant to FED.R.CIV.P. 60(b)(6).

A. DEFENDANT SHOULD PAY THE ATTORNEYS' FEES AND COSTS PLAINTIFFS HAVE INCURRED TO DATE.

If the Court determines that its judgment against Defendant should be set aside, Defendant should be ordered to pay Plaintiffs' attorney fees and costs directly attributable to his refusal to enter an appearance in these proceedings and mount a defense, despite having personally accepted service in this matter. As this court has noted, reimbursement of costs and attorney fees incurred because of the default is the condition "most commonly" imposed on a defendant in granting a motion to vacate a default judgment. *Thorpe*, 364 F.2d at 694.

For example, in *Harris v. District of Columbia*, 159 F.R.D. 315, 317 and n.3 (D.D.C. 1995), this Court ordered defendants to pay "reasonable attorneys' fees and expenses" for any time spent by plaintiff's counsel resulting from defendant's failure to respond to plaintiff's complaint, including "time spent on the motions for entry of default, entry of default judgment, . . . and in opposition to defendants' motion to vacate the default." Similarly, in *Interpol*, 103

F.R.D. at 398, this Court denied defendant's motion to reconsider an award to plaintiffs of attorneys' fees and expenses "attributable to defendants lack of responsiveness" in defending the case.[8]

Defendant's failure to respond to the Complaint need not have been willful to justify an award of fees and costs incurred by Plaintiffs in responding to the default. *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812-13 (4th Cir. 1988)(holding trial court could award costs and attorneys fees though neither defendant's nor attorney's conduct was deliberate); *Corso v. First Frontier Holdings, Inc.*, 205 F.R.D. 420, 421 (S.D.N.Y. 2001)(awarding attorney fees to plaintiff though default was not willful).
Here, however, the Defendant's failure to respond was, in fact, willful. Plaintiffs incurred substantial costs and attorneys' fees as a result of Defendant's willful failure to respond. Plaintiffs therefore respectfully request that this Court order the Defendant to reimburse the Plaintiffs for those costs and attorneys' fees.

B. DEFENDANT SHOULD BE REQUIRED TO POST BOND TO SECURE PAYMENT OF THE JUDGMENT.

In the event that this Court sets aside its judgment pursuant to FED.R.CIV.P. 60(b)(6), the Plaintiffs respectfully request this court to secure the amount of default judgment by requiring the Defendant to post a bond in that amount. Given the Defendant's earlier refusal to mount a defense, Plaintiffs are not at all confident that the Defendant will answer their Complaint if he persuades this Court to set aside its judgment. Defendant should therefore be ordered to post a bond pending the outcome of a trial on the merits of Plaintiffs' claims.

[8] Though the Court in *Interpol* denied plaintiffs' motion for default judgment, the court noted that the decisions on the default and plaintiffs motion for sanctions were "closely related." As the Court stated, it "could have granted the default and thereafter, upon defendants' application for relief from that default, conditioned such grant upon the payment of attorney's fees and costs which were occasioned by defendants' manipulations." *Interpol*, 103 F.R.D. at 397. However, as the Court noted, it decided to "compress the two proceedings into one" by denying the motion for default, but still imposing sanctions. *Id.*

This Court has itself seen fit to require defaulting defendants to post bond as a condition of setting aside the default. In *Thorpe*, the Court stated "[i]t may also be appropriate, in some cases, for the defendant to be required to post bond to secure the amount of the default judgment pending trial on the merits." *Thorpe*, 364 F.2d at 694. Though it is uncommon, the practice has been employed by other jurisdictions. For example, in *Sales v. Republic of Uganda*, a construction worker was injured while working on the premises of the permanent mission of the Republic of Uganda to the United Nations in New York. *See* 828 F. Supp. 1032 (S.D.N.Y. 1993). A default judgment was entered against Uganda, and Uganda subsequently moved to vacate the judgment. *Id.* The court conditioned its decision to vacate the default judgment upon defendant's posting of security in the full amount of plaintiffs' damages as set out in the default judgment (and modified in part by the court). *Id.* at 1035-37. In determining that this condition was "just and fair," the court noted that the government of Uganda had on at least one prior occasion disregarded process issued by a United States court and failed to pay a judgment, and that the factual and medical evidence before the magistrate judge made it "crystal clear that plaintiffs suffered severe damages." *Id.*

This Court's detailed findings and conclusions amply demonstrate that the Plaintiffs here have, as in *Sales*, "suffered severe damages." Moreover, it is well-established that defendants in cases brought under the ATCA and TVPA uniformly have disregarded judgments issued by United States federal courts against them, though Plaintiffs are unaware of any outstanding judgments against Defendant. For example, a judgment issued by the United States District Court for the District of Massachusetts in 1994 against another Indonesian military leader, former Indonesian General Sintong Panjaitan, for his role in an infamous massacre at the Dili cemetery in East Timor. *See, e.g.*, B. Stephens and M. Ratner, *International Human Rights*

Litigation in U.S. Courts 218 (1996)(noting that judgments in ATCA cases have gone uncollected). Thus, it is appropriate for this Court to condition a decision to vacate its judgment in this case upon the posting of security by Defendant for the amount of the default judgment or such other amount as this Court deems appropriate.

CONCLUSION

If this Court did not have jurisdiction over the Defendant and over the Plaintiffs' claims and if the Defendant had not personally accepted service two years ago, this Court might now be faced with the unenviable task of rewarding the Defendant for his conscious decision to ignore these proceedings. However, this Court has determined, after considering the credible and detailed evidence presented by Plaintiffs at trial, that it does, in fact have, jurisdiction over the Defendant and the Plaintiffs' claims. The evidence now before the Court simply supports this Court's initial determination regarding its jurisdiction. As for service, the only reliable evidence presented to the Court shows that service was proper and personally accepted by Defendant. Finally, it is apparent that the justice ensured by FED.R.CIV.P. 60(b) does not require this Court to set aside its judgment in favor of the Defendant's hollow and essentially unsubstantiated claims of innocence. Even if those claims had merit, the Defendant himself allowed the time for

making them pass. For these reasons, the Plaintiffs respectfully request that the Court deny the Defendant's motion to set aside the judgment.

Respectfully submitted,

_____

Steven M. Schneebaum
D.C. Bar No. 956250
R. Brian Hendrix
D.C. Bar No. 469475
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300

Jennifer Green
Judith Chomsky
Anthony DiCaprio
Shawn Roberts
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Joshua Sondheimer
CENTER FOR JUSTICE & ACCOUNTABILITY
588 Sutter Street, Suite 433
San Francisco, CA 94102

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT AND ORDER AND JUDGMENT ON DAMAGES were served on the following at the addresses and in the manner set forth below on this 5th day of April, 2002.

BY HAND DELIVERY

Martin R. Ganzglass, Esq.
O'Donnell, Schwartz & Anderson, P.C.
1900 L Street, N.W., Suite 707
Washington, D.C. 20036

_____