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' RESPONSE TO DEFENDANT'S OBJECTIONS TO THE REPORT AND RECOMMENDATION ISSUED BY MAGISTRATE JUDGE ALAN KAY

Plaintiffs in this case are the victims, and the survivors of other victims, of human rights abuses committed at Defendant's direction in East Timor in 1999. The action was brought under the Alien Tort Claims Act, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350 note. Process was served on Defendant Major General Johny Lumintang at Washington Dulles Airport, just after he had left the District of Columbia, on March 30, 2000. Defendant decided to ignore that process, and to thumb his nose at this Court. It is beyond dispute that he was personally aware of the case, but he neither appeared nor had counsel enter an appearance on his behalf. On November 8, 2000, Judge Kessler granted Plaintiffs' motion for default judgment, and some months later she referred the determination of damages to Magistrate Judge Kay. Still no word was heard from Defendant.

In late March, 2001, Magistrate Judge Kay conducted a three-day evidentiary proceeding, including the testimony of eight witnesses. Defendant did not appear at trial, and he sent no one

to represent him. In September of that year, Judge Kay entered Findings of Fact and Conclusions of Law, awarding Plaintiffs damages aggregating $66 million.

Defendant's voice was heard for the first time in late March 2002. Very nearly two years after he was served, 15 months after entry of the default judgment, and six months after the award of damages, Defendant filed a motion under Rule 60 to set aside both the default and the award. That motion was briefed and argued before Magistrate Judge Kay, who filed his Report recommending that it be denied in all respects on March 3, 2004.

Defendant has now filed Objections to Magistrate Judge Kay's Report and Recommendation, and it is to those Objections that Plaintiffs now briefly respond. Their response is brief because Defendant's memorandum in support of his Objections is, with a very few additions, a recycled version of the papers he filed with Magistrate Judge Kay, setting forth the arguments that the Judge went on to consider, discuss, and reject. The flaws, fallacies, and weaknesses in Defendant's position are revealed in Plaintiffs' opposition to the Rule 60 motion, to which they respectfully refer the Court.

In short, Magistrate Judge Kay did not err in concluding that Defendant was not entitled to relief under Rule 60 of the Federal Rules of Civil Procedure. He recognized the established fact, hardly contested by Defendant, that Major General Lumintang made a calculated decision from the outset to ignore this lawsuit, openly announcing to the press that he knew that he had been sued but that he is "an Indonesian citizen, I only bow to Indonesian law." *See* Exhibit 6 to Plaintiffs' Opposition to the Motion to Set Aside. Yet, apparently, something has happened to make the General more flexible: he is now willing to come before this Court, presenting half-baked and inconsistent arguments that he violated no law, that he was not properly served, that

his ignoring the case for so long was not his doing, and even that the statutes under which the trial was conducted are unconstitutional.

It should be noted that what is now before the Court is **not** the merits of the underlying case. Nor is it the decision of the Court to grant the default judgment or even the award of damages. All of those were definitively resolved by Judge Kessler and Magistrate Judge Kay, pursuant to an express delegation of authority. All that this Court is now being asked to review is the decision to deny the motion to set aside the default judgment and damages. If the Report and Recommendations of Magistrate Judge Kay denying that motion are consistent with existing law, they should be affirmed and adopted by the Court.

To succeed in his motion now, Defendant must demonstrate that the Magistrate Judge was wrong: the judgment against him was not voidable, but void. He has utterly failed to do that, and he offers no remediation now for the weaknesses in the arguments deployed before and correctly rejected by Judge Kay.

Defendant offers the Court nothing to justify a grant of extraordinary relief from the consequences of his deliberate contumacy. Magistrate Judge Kay weighed the evidence and found that Plaintiffs personally served Defendant with a summons and complaint. He further held that service was proper, and determined that this Court has jurisdiction over both the person of Defendant and the subject matter of this case. These conclusions are well supported by the facts and the law, and Plaintiffs respectfully urge this Court to adopt and approve Magistrate Judge Kay's Recommendations.

Defendant was personally served, and he knew about the lawsuit against him. Judge Kay found unpersuasive and ultimately untrue the protestations that, when Defendant was handed the summons and complaint at Dulles Airport, he thought that the papers (served on him

after he passed through security) contained an explosive and therefore did not touch them. There was simply no evidence submitted in support of the motion to set aside that came close to overcoming the presumptive weight of the process server's affidavit of service. The motion to set aside, therefore, was rejected for quite correct reasons: the law properly imposes a very heavy burden on the party that would set aside a completed judicial procedure on the grounds that he had no formal notice of it.

As noted above, Defendant's Objections do contain exactly two new and quite novel arguments or, at least, new twists on old arguments. Neither of these arguments has any merit. In fact, neither makes much sense at all. Nevertheless, Plaintiffs respond to each below.

I. SERVICE OF A SUMMONS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ON A DEFENDANT IN VIRGINIA DOES NOT CONFER JURISDICTION OVER THAT DEFENDANT UPON A VIRGINIA COURT.

Rule 4(k)(2) of the Federal Rules of Civil Procedure effectively functions as a federal long-arm statute, permitting a federal court to aggregate a defendant's contacts with the entire United States for the purpose of determining whether the court can take jurisdiction over that defendant. *See* FED. R. CIV. P. 4(k)(2); *Vitamins Antitrust Litigation*, 94 F.Supp.2d 26, 31 (D.D.C. 2000). For Rule 4(k)(2) to apply, however, the defendant in question must not be subject to suit in the courts of general jurisdiction of any particular State. *Id.*

Here, Defendant argues that, if Plaintiffs personally served him with the summons and complaint at Dulles International Airport, he "would clearly be subject to the jurisdiction of the courts of general jurisdiction of the Commonwealth of Virginia." Objections, at 11. Thus, according to Defendant, "Rule 4(k)(2) cannot be applied to give this Court jurisdiction over" Defendant, since he was subject to suit in Virginia. *Id.*

The fault in this reasoning is as simple as it is obvious. If Defendant were right, then no service outside the territorial boundaries of a State could ever be effective, since the recipient of that service would always be amenable at the same time to service of process issued by a local court. But this is not what the Rule says. In fact, the Rule by its very terms supports Plaintiffs' position and the Recommendations of the Magistrate Judge.

There is no reason whatever in this case to believe that Defendant, at the time he was served at Dulles Airport, was subject to "the jurisdiction of the courts of general jurisdiction" of Virginia. He was in Virginia in transit, having done business in the District of Columbia, and present in the Commonwealth for a matter of hours only because the international airport nearest to Washington happens to be located there. Defendant Johny Lumintang, therefore, is precisely someone who, when and where he was served with process from this Court, was "not subject to the jurisdiction of the courts of general jurisdiction of any State." Therefore, Rule 4(k)(2) supports the conclusions set forth in the Recommendations. This new argument put forward by Defendant should be summarily rejected.

II. THE COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS PURSUANT TO THE TORTURE VICTIMS PROTECTION ACT.

Finally, in addition to the reheated arguments already amply addressed in Plaintiffs' earlier pleadings and in the Report and Recommendations, Defendant urges that the Torture Victims Protection Act of 1991 ("TVPA") "is unconstitutional because it is so unconstitutionally vague [*sic*] that it violates the Due Process Clause of the Fifth Amendment." Objections, at 24. Defendant therefore tells the Court that it lacks subject matter jurisdiction based on the TVPA, which, he says, "fails to define what is necessary to 'subject' an individual to torture or extra-judicial killing" and which, therefore, somehow does not give appropriately clear guidance to those who are governed by its strictures. *Id.*

It is difficult to make any sense of this argument. Defendant makes no effective showing that the TVPA is imprecise or vague, or that, even if it were somehow unconstitutional, that there would not be concurrent jurisdiction over this case pursuant to the Alien Tort Claims Act ("ATCA") which would cure the problem. Plaintiffs brought suit under the ATCA and the TVPA: their claims clearly arise under both of these federal laws, and there is no argument that the former, at least, passes constitutional muster. This is, after all, a case "in tort only," Plaintiffs are aliens, and they allege violations of the law of nations.

In no case brought since the enactment of the TVPA has its constitutionality been successfully challenged. No Administration since 1992 has objected to the TVPA on the grounds that the requirement that the judiciary must define its key terms represents any kind of incursion into the separation of powers. The courts have encountered no difficulty in determining what it means to "subject" someone to torture. When a defendant like Johny Lumintang gives an order that directly results in the burning of villages, the cold-blooded murder of innocent civilians, the deliberate maiming of unarmed men, and the other depredations of which this Defendant has now been found liable, it is not a stretch of logic or language to conclude that he "subjected" his victims to torture.

Defendant never before claimed that the TVPA presents constitutional infirmities. Now, he somewhat incoherently appears to contend not only that the statute is unconstitutional, but that it is beyond the power of this Court even to assess the validity of that claim, which apparently should be accepted without analysis or scrutiny. What an interesting theory of democratic governance, in which a statute becomes unconstitutional because a litigant, having been found liable, simply says without authority that it is, and the courts *ipso facto* lose their

power not only to award relief under the statute, but to determine the claim of its unconstitutionality.

This last-ditch argument should be recognized for what it is, and summarily rejected. This Court has subject matter jurisdiction over Plaintiffs' claims, both under ATCA and under TVPA. All of the jurisdictional prerequisites of both statutes are met, as Judge Kay held in his Findings of Fact and Conclusions of Law. And the failure of the Magistrate Judge to conclude that the statute is unconstitutional – a question not even presented to him in the motion to set aside the default judgment and damages – does not properly give rise to Rule 60 remedies. Defendant has not demonstrated that any of the Rule 60 criteria have been satisfied. The refusal to vacate the judgment and damages that the Magistrate Judge has recommended to this Court should therefore be endorsed.

CONCLUSION

As has been noted above, rather than reiterating here all 33 pages of their earlier submission, Plaintiffs respectfully direct the Court's attention to their memorandum in opposition to the motion to set aside, for the responses to the warmed-over fare currently being served by Defendant. For all of the reasons set forth in that document and in the foregoing pages, Plaintiffs respectfully urge this Court to adopt and approve the Report and Recommendations filed by Magistrate Judge Kay on March 3, 2004. The motion to set aside should be rejected, and the original default judgment and award of damages should stand. And this case should be added to the list of those successfully prosecuted under the ATCA and TVPA, which stand for the proposition that abusers of internationally-protected human rights who come to these shores have no immunity from suit here, when their victims pursue them to

the United States and properly invoke the personal and subject matter jurisdiction of our Courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PLAINTIFFS' RESPONSE TO DEFENDANT'S OBJECTIONS TO THE REPORT AND RECOMMENDATION ISSUED BY MAGISTRATE JUDGE ALAN KAY were served on the following at the addresses and in the manner set forth below on this 26th day of April, 2004.

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