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.	)	

FILED

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NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

This matter was referred to the undersigned pursuant to Rule 72.3(a)(6) of the Local Rules of the United States District Court for the District of Columbia for a Report and Recommendation on the Defendant's Motion to Set Aside Default Judgment and Order and Judgment on Damages ("Motion") [42], the Plaintiffs' Opposition to Defendant's Motion to Set Aside Default Judgment and Order and Judgment on Damages ("Opposition") [45] and the Defendant's Reply Memorandum of Law in Support of the Motion to Set Aside Default Judgment and Order and Judgment on Damages ("Reply") [49]. Upon consideration of the memoranda and exhibits submitted in connection with this Motion, the opposition thereto and oral argument, for the reasons set forth below, the undersigned recommends that Defendant's Motion be **DENIED**.

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I. BACKGROUND

This was an action for, *inter alia*, torture, wrongful death, summary execution, assault, battery and intentional infliction of emotional distress brought by citizens of East Timor Jane Doe and John Does I-V ("Plaintiffs"), on their own behalf and on behalf of their deceased relatives. Plaintiffs sued General Johny Lumintang ("Defendant"), an Indonesian military officer, in his position as Vice Chief of Staff of the Indonesian military, for designing, ordering, and directing a campaign of violence and intimidation against the people of East Timor which resulted in the wrongs suffered by Plaintiffs.

On November 8, 2000, United States District Judge Gladys Kessler granted Plantiffs' Motion for Default Judgment against Defendant [16], who failed to file an Answer to Plaintiffs' Complaint or otherwise appear. On March 21, 2001, Judge Kessler referred the case to the undersigned for a trial on damages. The undersigned held a non-jury trial on the issue of damages March 27-29, 2001. At trial, Plaintiffs presented the testimony of eight witnesses: Richard Tanter, Professor of International Relations and Comparative Politics at Japan's Kyoto Seika University; John Doe III; Jane Doe; Theodore Folke, documentary filmmaker for the United Nations; John Doe II; Arnold Kohen, author on East Timor and consultant for the human rights organization, The Humanitarian Project; Ian Thomas, cartographer and remote sensing specialist; and Estella Abosch, social worker and member of Advocates for Survival of Torture and Trauma. In addition, Plaintiffs presented approximately forty exhibits in support of their claims, including videotaped depositions of Sertorio Junior, a friend of John Doe I who worked

with him for East Timor's independence, and John Doe IV. Because the Defendant presented no defense, the undersigned accepted Plaintiffs' incontrovertible evidence as true. *See, e.g., Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99 (D.D.C. 2000).

Upon careful consideration of the evidence presented at trial and the entire record in this case, the undersigned found that a judgment for damages should be rendered in favor of Plaintiffs in the total amount of $66,000,000.00 and entered such Order and Judgment, along with Findings of Fact and Conclusions of Law ("Findings of Fact") on September 13, 2001 [41]. On March 25, 2002, more than six months after the entry of judgment for damages and approximately fifteen months after the entry of the default judgment, Defendant filed this Motion [42]. Plaintiffs filed their Opposition on May 7, 2002 [45]. Defendant filed his Reply on May 20, 2002 [49]. Defendant asserts in his Motion that Plaintiffs failed to effect valid service of process on him at Dulles International Airport immediately prior to his departure following a visit to the District of Columbia.

II. ANALYSIS

Defendant argues that either Rule 60(b)(4) or Rule 60(b)(6) of the Federal Rules of Civil Procedure demand that the Court set aside its default judgment against Defendant. The Rule states in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . . (4) the judgment is void . . . or (6) any other reason justifying relief from the operation of judgment. The motion shall be made within a reasonable time . . . ." Fed. R. Civ. P. 60(b). Under Rule 60(b)(4),

Defendant argues the judgment is void for lack of personal jurisdiction and lack of subject matter jurisdiction. (Motion at 2.) If the judgment is void under Rule 60(b)(4), relief is mandatory. *See Combs v. Nick Garin Trucking*, 825 F. 2d 437, 441 (D.C. Cir. 1987). Under Rule 60(b)(6), Defendant argues for the judgment to be set aside because of the "extraordinary circumstances of the case and the demands of justice." (Motion at 2.)

A. PERSONAL JURISDICTION

Defendant asserts four reasons the default judgment is void under Rule 60(b)(4) for lack of personal jurisdiction. (Motion at 11-17.) First, Defendant claims he was not personally served in accordance with Federal Rule of Civil Procedure 4(e).[1] (Motion at 17-19.) Plaintiffs and Defendant filed conflicting declarations on the events that occurred at Dulles International Airport on March 30, 2000. Because of the disputed testimony, Defendant urges the Court to conduct an evidentiary hearing and assess the credibility of the affiants. (Reply at 15-16.)

Second, Defendant contends the Court did not have jurisdiction over him under the provisions of the District of Columbia Long-Arm Statute. *See* D.C. Code Ann. § 13-423 (2003). Defendant argues that he did not have "minimum contacts" constituting purposeful activity with either the District of Columbia or the United States as required by *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and therefore he could not have anticipated being

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[1]Federal Rule of Civil Procedure 4(e) states in pertinent part: ". . . service upon an individual . . . may be effected in any judicial district of the United States: (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or (2) by delivering a copy of the summons and of the complaint to the individual

brought into court here. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). (Motion at 14-15.)

Third, Defendant further claims there were no "continuous and systematic" contacts between himself and the District that would give rise to general jurisdiction over him as he had traveled to the United States only six times in twenty-four years for primarily official visits. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984). (Motion at 15-17.)

Fourth, Defendant contends maintenance of the suit would "offend traditional notions of fair play and substantial justice" even if the undersigned were to find minimum contacts between Defendant and the District of Columbia. (Reply at 5.) Defendant states his burden to litigate in the United States would be great; the United States has little interest in resolving this case; and, resolving the case in Indonesia would be more efficient. (Reply at 13-14.)

Responding first to Defendant's challenge to the validity of the service of process, Plaintiffs argue Defendant's affidavits do not rebut Plaintiffs' prima facie showing of valid service of process by the process server's signed return of service, his additional affidavit and the supporting affidavit of a witness to the service. (Opposition at 5, 7.) [2]

Second, with respect to Defendant's claim that service cannot be made pursuant to the D.C. long-arm statute, Plaintiffs contend Federal Rule of Civil Procedure 4(k)(2) acts as a federal long-arm statute to exercise personal jurisdiction over Defendant since such an exercise of

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personally . . . or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

[2] Defendant filed three declarations describing attempted service of process of Defendant: first, Defendant filed his own account of the service on March 30, 2000; second, he filed the declaration of Brigadier General Dadi Susanto who witnessed the service; third, he filed the declaration of Mr. Wakidi Wadji who also witnessed the service from a distance.

jurisdiction will comport with constitutional due process. (Opposition at 11.) Plaintiffs then argue all of Defendant's contacts with the United States may be aggregated to find the requisite minimum contacts. (Opposition at 12.)

1. SERVICE OF PROCESS

Plaintiffs rely on a signed return of service and the Declarations of both the process server who served Defendant on March 30, 2000, John Bartelloni, and a witness to the service, Lynn Fredriksson. Ms. Fredriksson, a human rights worker for the East Timorese Action Network, accompanied the process server to Dulles Airport to ensure identification of Defendant. (Opposition at 1; Bartelloni Decl. Ex. 1; Fredriksson Decl. Ex. 2.) She was the first to notice Defendant standing in the area of Gate 41.[3] (Opposition at 2; Fredriksson Decl. Ex. 2.) According to Plaintiffs, the process server approached 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." (Opposition at 2; Bartelloni Decl. Ex. 1.) The process server then handed the summons, complaint and attachments to Defendant and said, "You have been served." *Id.* Defendant took the papers and threw them onto the floor. (Opposition at 2; Bartelloni Decl. Ex. 1; Fredriksson Decl. Ex. 2.) A man who was with Defendant [General Susanto] picked up the papers and took them with him when they left. *Id.* The process server filed a signed return of service on March 31, 2000. (Bartelloni Decl. Ex. 1.)

In turn, Defendant provides the Declarations of himself and General Susanto, the man

[3] Ms. Fredriksson was not close enough to Defendant to hear the conversation between him and the process server.

who accompanied him to the airport that day.[4] Defendant states he was in the concourse near the boarding area when they were approached by a man. (Motion at 7; Lumintang Decl. Ex. 1; Susanto Decl. Ex. 4.) Although the man tried to identify Defendant, he never identified himself. *Id.* Defendant did confirm his name when asked, and the man attempted to hand him a stack of papers. *Id.* General Susanto told Defendant not to accept the papers and knocked them out of the man's hands. *Id.* Defendant did not touch or read the papers that day. *Id.* The man left. *Id.* General Susanto had his driver collect the papers. (Motion at 8; Susanto Decl. Ex. 4.)

The undersigned is confronted with conflicting affidavits describing the events involving the meeting of the process server and Defendant in the area of Gate 41 of Dulles International Airport. Several circuits have held a properly executed return of service to be prima facie evidence of valid service that "can be overcome only by strong and convincing evidence." *See O'Brien v. R.J. O'Brien Associates*, 998 F.2d 1394, 1398 (7th Cir. 1993) (quoting *Hicklin v. Edwards*, 226 F.2d 410, 414 (8th Cir. 1955)).

Accepting *arguendo* Defendant's version of the events in the area of Gate 41 on March 30, 2000, an individual approached Defendant and a colleague, General Susanto, who ostensibly accompanied him to the airport. Mr. Wadji, the embassy driver, testified he also witnessed the events from a distance but did not hear the verbal exchange between the process server, Defendant and General Susanto. The three declarations relied on by Defendant do not dispute that the process server did in fact approach Defendant and attempt to hand him some papers.

[4] The third declaration relied on by Defendant was that of Mr. Wadji, the driver of General Susanto's car on that day. He describes entering the boarding area, seeing a man try to hand papers to Defendant, seeing General Susanto knock the papers onto the floor, and being told to pick up the papers after the man left. (Reply at Wadji Decl. Ex. 4.) Mr. Wadji was too far away to hear the words exchanged among the two generals and the process server.

Nor do they dispute that the papers ultimately landed on the ground in Defendant's immediate vicinity and that General Susanto eventually took control of the papers.[5] However, there are two significant differences between Defendant and Plaintiffs' testimony. First, the process server asserts he told Defendant his name, identified himself as a process server and stated he was serving papers on Defendant. Both Defendant and General Susanto deny the process server made any statements. Second, the process server asserts that Defendant accepted the papers and then Defendant threw them to the ground. However, Defendant, General Susanto and the embassy driver all state that General Susanto knocked the papers out of the process server's hand onto the floor.

When faced with a battle of affidavits, the undersigned is able to examine all of them and decide whether Defendant has provided the strong and convincing evidence needed to rebut the presumption of valid service. *O'Brien* at 1398. In *Reifsteck v. Kelly-Springfield Tire Corp.*, the plaintiff submitted an affidavit from his secretary who swore she had sent a copy of the summons and complaint to the sheriff for service. 2002 WL 206488 (N.D. Ill. 2002). The defendant submitted an affidavit from the employee who accepted service on the defendant's behalf who swore she received the summons but not the complaint. *Id.* The court found there was no strong and convincing evidence to rebut the signed return of service. *Id.* They noted that courts often decide service of process issues based only on affidavits and other documents submitted to the court. *Id., quoted in Margaretten & Co. v. Porterfield*, 1991 WL 159827 (N.D. Ill. 1991). Here,

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[5] Interestingly, General Susanto's declaration conflicts with the embassy driver's on this point. General Susanto states he received the papers from the embassy driver on March 31, 2000, one day after the service of process. (Motion at Susanto Decl. Ex. 4.) However, the embassy driver states he gave the papers to General Susanto on March 30, 2000, in the car outside of Dulles International Airport. (Reply at Wadji Decl. Ex. 4.)

Defendant has submitted three affidavits describing a partially different account of service than the two affidavits Plaintiffs submitted. Plaintiffs also submitted a signed return of service. Upon examination of all affidavits, the undersigned finds that no strong and convincing evidence exists to invalidate the return of service and the more credible affidavits from Plaintiffs.[6]

Cases in this District have differed on the quantum of evidence necessary to overcome the process server's affidavit and return of service. *See Mobern Electric Corp. v. Walsh*, 197 F.R.D. 196, 198 (D.D.C. 2000). In *Mobern*, the process server's affidavit stated he went to the defendant's last known address at a marina and confirmed from employees that the defendant resided there. *Id.* at 196. When he saw the defendant begin to board his boat, the process server approached and attempted to give him documents. *Id.* The documents fell to the pier, and the process server left. *Id.* When he returned to the boat a few moments later, the documents were gone. *Id.* The defendant, after a default judgment had been entered against him, sent a letter to the court asserting he was never served and stating he had been out of state at the time the process server allegedly visited him. *Id.* at 197-98. The court decided that "something more than nothing is clearly necessary" for a defendant to be able to rebut the process server's affidavit. *Id.* at 198. The defendant had submitted no evidence save his letter to the court. *Id.* In addition, the court found that service was sufficient under Rule 4 of the Federal Rules of Civil Procedure. *Id.*

The undisputed facts in this case are stronger than the facts in *Mobern*. The summons and complaint here were served by a person who was over eighteen years of age and a non-party. The process server, Mr. Bartelloni, confirmed Defendant's identity in several ways: through a

[6] It is worth noting that both General Susanto and Mr. Wadji are subordinates of Defendant and

photograph he had, through Ms. Fredriksson's identification and by Defendant's admission that he was General Lumintang. The process server arguably informed Defendant of the nature of the papers. Service was made personally on Defendant, or, accepting Defendant's version of the facts, the papers were left in Defendant's immediate vicinity, despite their being knocked to the ground by either Defendant or General Susanto. General Susanto retrieved the papers and Defendant admits he did eventually receive the complaint. (Motion at Lumintang Decl. Ex. 1.)The undersigned finds that while Defendant's affidavits can be viewed as "something more than nothing," they fall far short of providing strong and convincing evidence to rebut the testimony of the process server and Ms. Fredriksson. Defendant's attempt to invalidate personal service because General Susanto knocked the Summons and Complaint out of the process server's hand is unavailing. To accept Defendant's argument would effectively permit any defendant to avoid being served by merely refusing to accept service when tendered or knocking the papers from a process server's hand and walking away, thereby frustrating compliance with Federal Rule of Civil Procedure 4(e)(2).

Some courts have held a defendant's affidavit countering service, standing alone, is insufficient to rebut the prima facie presumption of valid service. *See Greater St. Louis Construction Laborers Welfare Fund v. Little*, 182 F.R.D. 592, 596 (E.D. Mo. 1998). In *Greater St. Louis*, the defendants filed affidavits stating they had not been served with a complaint and did not hear of a judgment against them until they received the plaintiffs' motion for default judgment in the mail. *Id.* at 594. Plaintiffs filed the process server's affidavit in response. *Id.* at 595. The court reasoned that the defendants' affidavits constituted insufficient evidence when

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their credibility must be weighed against that circumstance.

held against the process server's affidavit and return of service. *Id.* at 596. The court also noted the defendants had received copies of several court orders and other motions from plaintiffs, thereby putting them on notice that some type of legal action was proceeding against them. *Id.* The court refused to set aside an entry of default. *Id.*

The court in *Greater St. Louis* stated the defendants should have had notice of the action regardless of service, given the other mail they received. *Id.* Unlike *Greater St. Louis*, Defendant here does not deny he was confronted with a person who, at a minimum, attempted to give him some papers. Pretermitting the sworn testimony of the process server that he told Defendant he was being served with papers, Defendant acknowledges he had notice of the lawsuit after General Susanto sent him the summons and complaint in 2000. Notwithstanding his knowledge of the lawsuit, he chose to ignore it, claiming government bureaucracy stopped him from responding. Having made that conscious election for approximately two years before challenging the service of process, he now cannot credibly argue he acted in good faith.

Defendant, in the alternative, argues for an evidentiary hearing to be conducted by this Court to determine the credibility of the affiants. He cites *Weiss v. Glemp* as having a virtually identical set of circumstances to the instant case, and notes the *Weiss* court held an evidentiary hearing. 792 F. Supp 215 (S.D.N.Y 1992). *See* Reply at 16. The defendant, a Polish cardinal, moved to dismiss a lawsuit against him for, *inter alia*, insufficiency of service of process. *Id.* at 218. At the evidentiary hearing, the process server and several witnesses to the attempted service testified, as well as a videographer who filmed the event and a linguistics expert. A videotape and audiotape of the encounter also were admitted into evidence. *Id.* at 218-223. The court determined the process server attempted to hand the defendant cardinal a summons and

complaint during a procession, but the papers fell to the ground as someone said "No, no." *Id.* The court in *Weiss* discredited the process server's testimony, found there was insufficient evidence to determine the defendant was resisting service and granted the defendant's motion to dismiss. *Id.* at 223.

New York law, however, allows some flexibility in service of process when a defendant resists the service. *See Weiss* at 224-225. For example, if the person to be served slams a door and refuses to open it to accept service, the process server may leave a summons outside that door. *Id.* In *Weiss*, the court did not find that the defendant resisted service; instead, the process server attempted to hand papers to him without saying anything and then, the papers fell on the ground. *Id.* at 225. However, here, accepting Defendant's version of the facts, General Susanto effectively acted as a door slamming in front of the process server by knocking the summons and complaint to the ground. The undersigned finds that this essential difference in how the papers found their way to the ground is enough to remove the necessity of holding an evidentiary hearing to determine witnesses' credibility. In addition, unlike the *Weiss* court, at that hearing, the undersigned would not have the benefit of either an audio or videotape of the events.

In a case essentially analogous to this case, a New York District Court held that process is sufficiently served even if a person other than the defendant swats the papers from the process server's hand, if the process server identifies himself to the person to be served. *Doe v. Karadzic*, 1996 U.S. Dist. LEXIS 5291, 5295-6 (S.D.N.Y. 1996). In *Karadzic*, a process server attempted to serve a foreign military leader in the lobby of his hotel while he was visiting New York. When the process server approached the foreign defendant, his body guard swatted the papers to the ground and removed the defendant from the area. The process server then shouted

something to the effect of: "You've been served." *Id* at 5296. The Court found the New York law only requires the process server to "tender the summons to the defendant." If the defendant resists service, "the process server need only leave the summons on a table or other item nearby, or on the floor in front of the defendant (or behind him as he walks away)." *Id.* (citations omitted).

The undersigned finds Defendant's affidavits have not overcome the return of service and the more credible affidavits filed by Plaintiffs. The undersigned further finds that it is within the Court's discretion to evaluate and weigh the affidavits filed in this action and determine their credibility.[7]

For the foregoing reasons, the undersigned concludes and so recommends to the trial court that the judgment is not void under Rule 60(b)(4). Having found valid personal service, the Court had personal jurisdiction over Defendant; therefore, the issue of constitutional due process, *vel non*, is not implicated. Defendant's remaining arguments, including the inapplicability of the D.C. long-arm statute, for voiding the default judgment will not be discussed.

B. SUBJECT MATTER JURISDICTION

[7] It is interesting to note that General Susanto states in his Declaration he was afraid the papers contained a weapon or explosive device. (Motion at 7; Susanto Decl. Ex. 4.) However, earlier in the same paragraph in which he frets over the possibility of a concealed weapon, General Susanto states "I went with him [Defendant] *through security* to his gate boarding area. [emphasis added]" (Susanto Decl. Ex. 4.) General Susanto had just gone through the security check. Since Mr. Bartelloni approached Defendant inside the gate boarding area, General Susanto must have realized it would have been difficult for the process server to have concealed a weapon or explosive just steps away from the security checkpoint through which they all had

1. ALIEN TORT CLAIMS ACT

Defendant argues the injuries claimed by Plaintiffs, such as torture and summary execution, would violate international law under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, only if committed by state officials or under color of law. (Motion at 21-22.) Defendant contends Plaintiffs have not explained how General Lumintang acted with Indonesian officials or under Indonesian law; therefore, the undersigned should not have found subject matter jurisdiction. (Motion at 22.)

Plaintiffs argue the undersigned's previous determination of jurisdiction was binding "as long as the assertion of jurisdiction [was] not frivolous." (Opposition at 18-19.) They contend, under the ATCA, they specifically have asserted that Defendant committed harmful acts against them under color of law. (Opposition at 20.) Plaintiffs state Defendant wrote an operations manual for the Kopassus, or Army Special Forces, that required training in terror and kidnapping, among other crimes. (Opposition at 20.) Plaintiffs assert Defendant sent a telegram to the Army authorizing repressive measures against the East Timorese if they voted for independence in 1999. (Opposition at 20.) Finally, Plaintiffs note the systematic and extensive nature of human rights violations committed by the Army and militias around the time of the independence vote. (Opposition at 20-21.)

The ATCA provides "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Case law on the ATCA is sparse. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 793 (D.C. Cir. 1984) (Edwards, J. concurring.) While the meaning of

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just passed. General Susanto's alleged fear of a weapon or explosive device being concealed in

the ATCA still remains somewhat of an open question in this Circuit, the statute has been interpreted to confer jurisdiction over lawsuits by alien plaintiffs for damages under United States law for violations of treaties and the law of nations. *See Al-Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (Randolph, concurring). Two conditions must exist for this Court to have subject matter jurisdiction under the ATCA. First, Plaintiffs must be aliens. Second, the tortious conduct Plaintiffs allege must have been committed in violation of the law of nations or a treaty to which the United States is a signatory. *Id.* In fact, nothing more than a violation of the law of nations is required to invoke jurisdiction under the ATCA. *See Tel-Oren* at 774, 779 (D.C. Cir. 1984) (Edwards, J. concurring.)

Plaintiffs are all citizens of East Timor, so they are aliens. (Findings of Fact at 22.) In addition, the actions Plaintiffs allege are violations of the law of nations. (Findings of Fact at 23.) Courts have held that torture, summary execution, crimes against humanity and cruel, inhuman and degrading treatment are acts that violate international law; therefore, they meet the ATCA's criterion that Plaintiffs' claims violate the law of nations. *See FIS*, 993 F. Supp. at 4, 8; *Xuncax*, 886 F. Supp. 162. In *Tel-Oren v. Libyan Arab Republic*, victims of a Palestine Liberation Organization (PLO) attack on Israeli buses, a taxi and a car, brought suit in United States courts asserting jurisdiction under, *inter alia*, the ATCA. 726 F. 2d 774, 776 (D.C. Cir. 1984) (Edwards, J. concurring). Passengers in the various vehicles were tortured, shot, wounded and killed. *Id.*

A crucial difference between the present case and *Tel-Oren* is the nature of the actors. Defendant Lumintang was a state official. PLO members were "non-state actors"; therefore, the

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the Summons and Complaint does not add to his credibility.

court in *Tel-Oren* was not willing to find jurisdiction over these individuals, even though they were alleged torturers and murderers. *Id.* at 791-93.

Judge Edwards' concurring opinion in *Tel-Oren* chose to follow *Filártiga v. Peña-Irala* as it applied to state actors such as Defendant here. *Id.* at 776-77. In *Filártiga*, Paraguayan citizens brought suit in the United States against a Paraguayan government official for the torture and murder of their son/brother in Paraguay. The Second Circuit decided official torture did constitute a violation of the law of nations under the ATCA. 630 F. 2d 876 (2nd Cir. 1980). Judge Edwards argues no specific right to sue need be found in the "law of nations" for federal courts to have jurisdiction. *Tel-Oren* at 777. If the acts alleged violate the "law of nations," jurisdiction will lie *Id.* In contrast to those cases brought under the ATCA where no jurisdiction was found, no violation of international law was alleged. *Id.* at 793.

Torture is universally recognized as a heinous act. *See Tel-Oren* at 781. Further, Judge Edwards notes that in *The Paquete Habana*, the United States Supreme Court construed the law of nations as requiring courts to resort to "the customs and usages of civilized nations . . . ." *See Tel-Oren* at 789 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Additionally, only Congress can modify or repeal a statute. Courts are empowered to construe an otherwise constitutionally valid statute out of existence. *Id.* at 790.

The undersigned finds Judge Edwards' concurring opinion correctly states the law in so far as it follows the conclusion in *Filártiga* that torture by state actors provides the basis for a cause of action under the ATCA.[8]

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[8] Judge Bork, a member of the *Tel-Oren* panel, also wrote a concurring opinion suggesting a court should not infer a cause of action that is not explicitly given in the statute. *Tel-Oren* at 799. He concluded there is no cause of action described in the ATCA. *Id.* Judge Bork then

For the foregoing reasons, the undersigned finds the judgment is not void under Rule 60(b)(4), and the Court has subject matter jurisdiction over Plaintiffs' claims under the ATCA.[9]

2. TORTURE VICTIM PROTECTION ACT

Defendant also argues the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 78 (1992) (codified as 28 U.S.C. § 1350 note), does not provide subject matter jurisdiction because Plaintiffs did not exhaust local Indonesian legal remedies before seeking relief in a United States court. (Motion at 22.) Defendant argues Plaintiffs could have brought their complaint in the District Court in Dili, East Timor, to the East Timorese General Prosecutor for investigation through the human rights tribunal established by UNTAET[10], in an Indonesian civil court or in a special Human Rights Court in Jakarta, Indonesia. (Motion at 22-23.)

Plaintiffs also address subject matter jurisdiction under the TVPA. They argue that utilizing all available legal avenues for relief in the country where the torture and executions occurred before bringing suit in the United States is not a prerequisite for a federal court to take

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argued the ATCA was meant to apply only to torts that existed in 1789, as opposed to now incorporating all of modern international law, including the concept of international human rights. *Id.* at 812-815. The undersigned declines to follow Judge Bork's narrower interpretation of the ATCA's jurisdictional provisions. Significantly, despite these points, Judge Bork also stated that plaintiffs [in *Tel-Oren*], in order to state a cause of action, "would have to argue . . . for an exception to the general rule that international law imposes duties only on states and on their agents or officials." *Id.* at 805-806. One may at least infer from this statement that Judge Bork believes a general rule of international law does exist to impose a duty on state officials like Defendant.

[9] The court in *Tel-Oren* also notes in the case of aliens, jurisdiction under 28 U.S.C. § 1331 is available as long as 28 U.S.C. § 1350, the ATCA, applies. *See Tel-Oren* at 779, note 4 (Edwards, J., concurring). The undersigned has found that § 1350 does apply. Since Plaintiffs' action "arises under" § 1350, their action "arises under" a law of the United States and meets § 1331's requirement. *Id.*

[10] UNTAET is the United Nations Transitional Administration in East Timor.

jurisdiction. (Opposition at 21.) They contend the failure to exhaust remedies at the situs of the torts is an affirmative defense available to a defendant; however, exhausting these remedies is not a required element of Plaintiffs' cause of action. (Opposition at 22.)

The TVPA "provides for a federal cause of action for torture and execution committed anywhere in the world." *FIS*, 993 F. Supp. at 9. In § 2(b), the TVPA states "a court shall decline to hear a claim . . . if the claimant has not exhausted *adequate and available remedies* in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350, note 2 (emphasis added). Plaintiffs here argue they cannot find relief in East Timor "due to the legacy of the illegal military occupation of Indonesia. The Indonesian judiciary does not resolve cases of abuse filed by civilians against military officials, and any suit against the defendant in East Timor or Indonesia would be futile and result in serious reprisals against those raising the allegations." (Complaint [5] at Paragraph 32.) Defendant, on the other hand, lists four different avenues Plaintiffs could have explored in Indonesia before coming to United States courts. *See supra* page 17.

The undersigned need not reach the adequacy or availability of any of the remedies Defendant avers are available in Indonesia. Because the TVPA is not a jurisdictional statute, a failure to comply with its requirements will not preclude a U.S. court from hearing a claim under it. *See Al-Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (Randolph concurring). (*See also Abiola v. Abubakar*, 267 F. Supp. 2d 907, 910 (N.D. Ill 2003.)) The statute provides a cause of action for damages to "anyone who suffered torture anywhere in the world at the hands of any individual acting under the law of any foreign nation." *Id.* Further, any case brought under the TVPA will also arise under federal law and jurisdiction can then be based on 28 U.S.C.

§ 1331, which expressly grants general federal question jurisdiction. *Id.*

For the foregoing reasons, the judgment is not void under Rule 60(b)(4), and the Court has subject matter jurisdiction over Plaintiffs' claims under the TVPA.

C. RULE 60(b)(6)

Defendant's final argument centers on the provisions of Federal Rule of Civil Procedure 60(b)(6). As stated *supra*, this catch-all basket provision of the rule provides relief from a final judgment for "any other reason justifying relief from the operation of judgment." Defendant argues if the Court finds Rule 60(b)(4) does not void the judgment, relief is warranted under Rule 60(b)(6) because it will "further the interests of justice without affecting the substantial rights of the parties" here. (Motion at 25.) He states that because of the extraordinary circumstances of the case, *inter alia*, the size of the judgment, Defendant's foreign citizenship and his lost opportunity to defend himself in court, justice demands that the judgment be set aside. (Motion at 26.) Defendant contends he meant no disrespect through his failure to appear in court because he did not learn of the suit until General Susanto sent him a copy of the complaint and summons some time after March 2000. (Reply at 19.) Upon receipt, he referred the lawsuit to the Ministry of Defense and was not given permission to travel to the United States to appear in court. (Reply at 19.) Defendant notes the Indonesian Attorney General investigated human rights violations in East Timor and found Defendant was not responsible for committing any atrocities. (Motion at 27.) In addition, Defendant argues that as the second highest ranking officer in the Army, he had no command or control of or responsibility over soldiers in the Armed Forces. (Motion at 29; Reply at 20.) He argues the "Army" and the "Armed Forces" are

separate and distinct. He was a member of the "Army" which only had responsibility for administrative matters, such as "training and education, payment and housing of personnel, procurement in general and provision of equipment." (Motion at 29-30.) The "Armed Forces," on the other hand, were responsible for military operations, such as "planning, commanding, supervising, controlling and execution" of military plans. (Motion at 29-30.) Therefore, Defendant argues any atrocities committed against Plaintiffs would have happened at the hands of troops under the control of the Armed Forces' command, not the Army's. (Motion at 31-33.) Since he did not control the Armed Forces, he could not have taken any steps to prevent any of the harms from occurring. (Reply at 21.)

Plaintiffs, in response, argue Defendant made a conscious and deliberate choice not to defend himself in this action. (Opposition at 23.) They first argue that having made a claim for relief under Rule 60(b)(4), Defendant may not ask for relief under Rule 60(b)(6) in the alternative. (Opposition at 24.) Plaintiffs claim that Rule 60(b)(6) "affords no basis for relief at any time available under . . . the earlier clauses." *See Carr v. District of Columbia*, 543 F.2d 917, 926 (D.C. Cir. 1976) (citations omitted). (Opposition at 24.) Plaintiffs further argue Defendant did not meet his heavy burden of proof that would allow relief under the rule. (Opposition at 24.) There was no extraordinary circumstance that prevented him from defending this suit. (Opposition at 26.) Plaintiffs state Defendant's liability already was established by the undersigned at trial, and none of the *new* facts Defendant alleges should cause the judgment to be overturned. (Opposition at 26.) Plaintiffs contend too many details are lacking from Defendant's description of the Attorney General's investigation and exoneration of him. (Opposition at 27.) In addition, Plaintiffs claim Defendant's discussion of the differences

between the Army and Armed Forces does not outweigh Plaintiffs' evidence of the telegram Defendant sent or the manual he authored. *See infra* pages 22-23. (Opposition at 27.)

The Court finds Defendant is not barred from seeking relief first under Rule 60(b)(4) and then, in the alternative, under Rule 60(b)(6). *Carr v. District of Columbia* states Rule 60(b) "empowers district courts to entertain motions seeking to relieve a party from a final judgment for *either* of six specified reasons." 543 F.2d 917, 925 (D.C. Cir. 1976) (emphasis added). Further, this Circuit, in *Goland v. CIA*, recognizes Rule 60(b)(6) as a "catch-all" clause which serves as a default basis if relief is not available under clauses one through five of Rule 60(b). 607 F.2d 339, 372-73 (D.C. Cir. 1979). *See also Klapprott v. United States*, 335 U.S. 601, 613 (1949). Defendant may seek relief under Rule 60(b)(4) *and* under Rule 60(b)(6). The conclusion by the undersigned that Defendant is not entitled to relief under Rule 60(b)(4) does not preclude Defendant from asserting his claim for relief under Rule 60(b)(6). Accordingly, the undersigned will now consider Defendant's request that the judgment be set aside under Rule 60(b)(6).

It is well settled that relief from a final judgment under Rule 60(b)(6) "'should be only sparingly used.'" *See Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897, 903 (D.C. Cir. 1996) (quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980)). It only applies to "extraordinary" situations. *See Ackermann v. United States*, 340 U.S. 193, 202 (1950). 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. No single reason or combination of reasons persuade the undersigned he is entitled to relief from the judgment under Rule 60(b)(6).

Defendant here made a calculated, strategic election in choosing not to respond to Plaintiffs' lawsuit. In *Good Luck Nursing Home v. Harris*, which involved a claim by the nursing home for reimbursement of expenses incurred under Medicare, the district court initially granted the Home's summary judgment motion. 636 F.2d 572, 574 (D.C. Cir. 1980). However, it was later revealed to the court through a Rule 60(b) motion that the expenses were incurred during the Home's defense of a lawsuit involving allegations of Medicare fraud. *Id* at 574, 576. The district court vacated its initial decision pursuant to Rule 60(b)(6), concluding it had been based on a "'fundamental misconception of the facts'" and remanded the case back to the appropriate agency. *Id* at 574, 576 (citation omitted). The Circuit court concluded the application of Rule 60(b)(6) was proper, but could not be used to save a party from a calculated choice that might later turn out to have been a reckless one. *Id* at 577. If a litigant presents a previously unknown fact in its motion that is so critical to the litigation it causes the initial decision to have been unfair, the trial court can reconsider its initial decision, under Rule 60(b)(6). *Id.*

Here, Defendant argues that all of the facts he presented in his pleadings are central to this litigation and support his request to void the judgment under Rule 60(b)(6). Defendant first says he was unable to defend the lawsuit because he received the complaint some time in 2000 after General Susanto sent it to him. (Reply at 19.) He then gave the papers to the Ministry of Defense which gave them to the Ministry of Foreign Affairs. *Id.* Neither organization permitted him to travel to the United States. *Id.*

Next, Defendant insists he lacked "effective control" over the troops that committed human rights violations. (Reply at 20.) He claims as Army Deputy Chief of Staff, he had no

operational authority. (Reply at 21.) He did not design or plan any military operations and could not punish any soldiers for any alleged atrocities. *Id. See also* Motion at Sihombing Decl. Ex. 3, Motion at Improvements to the Basics of Organisation and Procedure of the Indonesian Army Ex. E.

However, the undersigned already found that the May 5, 1999 telegram bearing Defendant's signature that was sent to the local commander in East Timor instructing him to "prepare a *security* plan with the aim of preventing the outbreak of civil war . . . [emphasis added]" showed a measure of Defendant's authority to issue orders. (Findings of Fact at 7-8.) The language in this telegram does not support Defendant's claim that he bore responsibility for purely administrative duties. *See* Motion at 29-30. Defendant provides a Declaration of Colonel Anshari, a Legal Officer in the Indonesian Defense Department, which claims Plaintiffs have misinterpreted the word "security" in the telegram. *See* Reply at Anshari Decl. Ex. 3. Colonel Anshari contends the word "security" should have been translated as "campaign," thus making the telegram administrative in nature. *Id.* The undersigned does not find that a disagreement over the proper translation of a word creates an "extraordinary" circumstance worthy of overturning the judgment.

The June 30, 1999 manual issued with Defendant's signature advocated that certain training tactics involving army secret warfare should be used by Indonesian soldiers. (Findings of Fact at 8, 32-33.) These tactics were used by the soldiers before and after East Timor's vote for independence, and their actions violated international law. (Findings of Fact at 33.) Page 35 of the manual described training in abduction, killing, kidnapping, terror and agitation. (Findings of Fact at 8 (quoting March 27, 2001 Trial Transcript at 93-95.).) Colonel Anshari

calls the manual "administrative" and says it was not intended to be used for any operations nor was it distributed to field soldiers. *See* Reply at Anshari Decl. Ex. 3. What Colonel Anshari does not mention, or attempt to dispute, is the nature of the manual's descriptions of terror and killing tactics. The undersigned is not persuaded that one officer's description of this manual's intended use generates an "extraordinary" circumstance capable of voiding the judgment.

Finally, Defendant admits he was the second highest ranking officer in the Army at the time the atrocities were committed against Plaintiffs. (Motion at 29.) Despite whatever institutional distinctions exist between the "Army" and the "Armed Forces," the undersigned finds it difficult to accept the assertion that the second highest ranking officer of one branch would have no influence or control over members of the other related organization. In fact, Defendant reported directly to the Army Chief of Staff, whose superior in turn was the Commander of the *Armed Forces* [emphasis added]. (Findings of Fact at 4.) On one hand, Defendant maintains the "Armed Forces" are a wholly separate organization from his "Army," yet his own commanding officer in the "Army" reported to the commander of that separate organization, the "Armed Forces."

For the foregoing reasons, the undersigned's judgment is not void under Rule 60(b)(6) because no extraordinary circumstance exists which would require the judgment to be overturned.

III. RECOMMENDATION

Plaintiffs' requested relief under Rule 60(b)(4) based on a lack of personal jurisdiction should be denied. Defendant's conflicting affidavits did not supply the strong and convincing

objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985). If this Report and Recommendation is served on the parties by mail, calculation of the time period for filing written objections is as follows: ten business days (excluding weekends and holidays) plus three calendar days (including weekends and holidays). *See CNPq-Conselho Nacional de Desenvolvimento Científico e Technológico v. Inter-Trade, Inc.*, 50 F.3d 56, 58 (D.C. Cir. 1995) (per curiam).

DATED: March 3, 2004

ALAN KAY
UNITED STATES MAGISTRATE JUDGE