No. 03-3989

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PLAINTIFFS A, B, C, D, E, F, and OTHERS SIMILARLY SITUATED, WEI YE, and HAO WANG,

Plaintiffs-Appellants,

-against-

JIANG ZEMIN and
FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 610),

Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Illinois Eastern Division
(D.C. Case No. 02 C 7530)
The Honorable Matthew F. Kennelly, United States District Judge

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BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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INTEREST OF *AMICI CURIAE*

The District Court's opinion in this case contains errors and uses improper legal standards with respect to the issue of former head of state immunity. Both treaty-based and customary international law provide relevant legal standards, and international law is part of supreme federal law under the United States Constitution. Federal statutes incorporating international law also provide relevant legal standards that the District Court did not address. Errors and improper standards, if not corrected, can have serious and unwanted consequences beyond those for the Plaintiffs in this case. *Amici Curiae*, the international law professors named below, have lectured and/or published widely on these and related matters. This *amicus* brief sets forth their considered views. *Amici* sign this brief on their own behalf and not as representatives of their respective schools. The names and affiliations of *amici* briefly are as follows:

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Appellate Court No: 03-3989

Short Caption: Does (A-F) et al v. Jiang Zemin, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-Governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of the motion, response, petition, or answer in this court; whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information.

The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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International Law Professors In Support of Plaintiffs-Appellants

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Attorney's Signature: _____ Date: January 24, 2004
Attorney's Printed Name: Jordan J. Paust
Please indicate if you are counsel of record for the above listed parties pursuant to Circuit Rule 3(d). No**.**
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SUMMARY OF FACTS

Amici accept the statement of facts set forth in Plaintiffs' initial complaint and in their brief before this Circuit.

SUMMARY OF ARGUMENT

Defendant Jiang Zemin is only a former head of state. Even if he had remained a head of state, he would not have been entitled to immunity for violations of international law. As several international legal instruments (including treaties of the United States) and international and U.S. cases have recognized, acts in violation of international law are beyond the authority of any state, are therefore *ultra vires*, and are not "public," "official," or "sovereign" acts entitled to any form of immunity. Many U.S. cases have applied the *ultra vires* precept to deny immunity. The district court below was apparently unaware of most of these cases and the customary and treaty-based *ultra vires* precept.

Most importantly, Defendant Jiang is merely a former head of state and under international law, which is law of the United States, no immunity exists for acts of former heads of state, especially acts taken in violation of international law. Many U.S. cases recognize that former heads of state are not entitled to immunity. The district court below was apparently unaware of this distinction and the many cases denying immunity to a former head of state or official.

Treaties of the United States, such as the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, and the Convention on the Prevention and Punishment of the Crime of Genocide, also preclude immunity with respect to any person, including any official, who has violated the rights covered under the treaties. These treaty-based denials of immunity are especially important supreme federal law binding on the federal courts and are especially within judicial power and responsibilities under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1331, and as incorporated through other statutes such as the Alien Tort Claims Act and the Torture Victim Protection Act.

Federal statutes also preclude immunity. The language of the Torture Victim Protection Act expressly precludes immunity by creating liability with respect to torture or extrajudicial killing engaged in by any individual acting "under actual or apparent authority, or color of law, of any foreign nation." The Alien Tort Claims Act expressly provides alien plaintiffs the right to sue for any tort or wrong in violation of the law of nations or any treaty of the United States and there is absolutely no immunity for any individual official, especially any former official. Such federal statutes, like the abovementioned treaties, must trump any inconsistent common law, such as so-called head of state immunity, which is inapplicable to a former head of state.

Finally, these matters, issues and concerns are legal in nature and are within the power and prerogative of the judiciary. For more than 200 years, issues concerning nonimmunity under U.S. treaty law, customary international law as law of the United States, and U.S. statutes have been issues of law for the courts to decide and they are textually and unavoidably committed to the judiciary under Article III of the Constitution. The Constitution confirms judicial power and responsibility to entertain suits "against ambassadors," "public ministers," and "foreign States," and certainly, by necessary implication, mere former heads of state.

ARGUMENT

I. Immunity Is Precluded Under International Law.

A. Customary International Law Precludes Immunity.

1. No Immunity Exists for Former Heads of State.

Importantly, Defendant Jiang Zemin is not a head of state and, as a former head of state, is entitled to no immunity. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 464, RN 14 (3 ed. 1987) (former heads of state "would have no immunity from [a U.S. court's] jurisdiction to adjudicate" claims arising out of their acts while in office); see also Part I.A.2, below. Former heads of state, like the Defendant Jiang Zemin, are like any other aliens who are subject to our jurisdiction. S*ee, e.g.*, Domingo v. Republic of Philippines, 808 F.2d 1349, 1351 (9th Cir. 1987). They do not enjoy immunity for a broad range of acts that violate international, U.S., or foreign law. *See, e.g.*, Hilao v. Marcos (*In re* Estate of Ferdinand E. Marcos Human Rights Litigation), 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *In re* Doe v. United States of America, 860 F.2d 40, 45 (2d Cir. 1988), *citing*, among other cases, *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 135, 144 (1812); El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp.2d 69, 82 n.10 (D.D.C. 1999) (common law head of state doctrine "is limited only to the sitting official head-of-state," *citing* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 24 (D.D.C. 1998)); First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1121 (S.D. Tex. 1994) ("even were Dubai entitled to recognition as an independent state, the Dubai Defendants would not be entitled to head of state immunity, because none is a sitting head of state," *citing* Lafontant v. Aristide, 844 F. Supp.

128, 132 (E.D.N.Y. 1994); Republic of the Philippines v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987)); Roxas v. Marcos, 969 P.2d 1209, 1252 (Haw. 1998). *See also* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 350-55 (1822) (quoted in Part I.A.2 re: international law violations); Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); United States v. Noriega, 746 F. Supp. 1506, 1519, n.11 (S.D. Fla. 1990) (observing that "there is ample doubt whether head of state immunity extends to private or criminal acts in violation of U.S. law."); *id*. 117 F.3d at 1212 (11th Cir. 1997) ("the FSIA [28 U.S.C. §§ 1602, 1603, *et seq*.] addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context...."); Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962) (foreign law); SOMPONG SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 27-28 (1959); Note, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 658-59 (2002) ("Recent state practice has drawn a sharp distinction between former heads of state and current heads of state, as courts across the world have been much more willing to subject former leaders to their jurisdiction" and there exists "abrogation of immunity for the private acts of former heads of state, including international crimes in any context"). The policy justification for immunity for sitting heads of state with respect to lawful "public" acts so as to avoid interference with the conduct of lawful sovereign functions does not apply (1) when the person leaves office, or (2) with respect to unlawful acts – the latter exception following the traditional recognition that unlawful acts are *ultra vires* and are not "public" or "official" acts in any event.

In particular, former heads of state have generally not been granted immunity for human rights violations, including systematic torture, disappearance, summary execution or prolonged arbitrary detention. For example, United States courts have upheld jurisdiction in a

variety of suits against former Philippine President Ferdinand Marcos and his wife, Imelda. *See* Hilao v. Marcos (*In re* Estate of Ferdinand E. Marcos Human Rights Litigation), 25 F.3d 1467 (9th Cir.1994), *cert. denied*, 513 U.S. 1126 (1995); Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986). In *Hilao*, the Ninth Circuit held that Marcos was not immune from suit under the FSIA, because acts such as torture and illegal execution cannot be deemed an exercise of sovereign authority. Instead, those actions "should be treated as taken without official mandate pursuant to [Marcos's] own authority." 25 F.3d at 1470-71, *aff'd*, 103 F.3d 767, 771-72 (9th Cir. 1996).

2. Nonimmunity Exists for Violations of International Law.

Importantly, Defendant Jiang Zemin is not a head of state, but even if he still was a head of state he would not be entitled to immunity for serious violations of international law alleged in Plaintiffs' Complaint. The District Court was correct that immunity of a head of state is not provided by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602, *et seq*., because persons are not covered under Section 1603(a) and (b). Unlike protection of current diplomats (see Vienna Convention on Diplomatic Relations, art. 29, 500 U.N.T.S. 95, 23 U.S.T. 3227), no treaty provides immunity for a head of state. In fact, every relevant international criminal law and human rights treaty can reach relevant international crimes and violations committed by a head of state. Thus, inquiry shifts to nonimmunity under customary international law.

Prior to and ever since the Charters of the International Military Tribunal at Nuremberg (1945) and the International Military Tribunal for the Far East (1946), which reflect customary international legal norms concerning nonimmunity, there has been

recognition of nonimmunity for heads of state, diplomats, or other government officials who engage in violations of customary or treaty-based international criminal law, such as war crimes, torture, disappearance of persons, genocide, and other crimes against humanity (such as religious or political persecution). *See, e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL*., INTERNATIONAL CRIMINAL LAW 27-34, 38, 46-53, 55-70, 73-74, 88-99, 132, 134, 136, 171-73, 621-22 (Conradin von Hohenstafen (1268)), Peter von Hagenbach (1474)), 717 (Napoleon (1818)), 660, 677 (Karadzic), 699-708 (Rutaganda & Akayesu), 741-46 (Report of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, concerning the German Emperor William II), 747 (Article 227 of the Treaty of Peace with Germany (Versailles, June 28, 1919) (which did "publicly arraign" the German Emperor)), 821 (2 ed. 2000); Leslie Green, *International Crimes and the Legal Process*, 29 INT'L & COMP. L.Q. 567, 570 (1980).

In The Prosecutor v. Tadic, ICTY-94-1-AR72 (2 Oct. 1995), the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) recognized: "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity." *Id*. para. 58. In The Prosecutor v. Milosevic, ICTY-99-37-PT (Nov. 8, 2001), the Trial Chamber of the ICTY ruled that President Milosevic of Yugoslavia had no immunity from alleged international crimes as a head of state and that Article 7 of the Statute of the ICTY, rejecting head of state immunity, "reflects a rule of customary international law." *Id*. at paras. 26-34. See also The Prosecutor v. Furundzija,

ICTY-95-17/1, para. 140 (10 Dec. 1998). More generally, there is no head or state, former head of state, or public official immunity with respect to conduct that constitutes an international crime recognized in *any* treaty or international criminal law instrument and several treaties expressly deny any such immunity. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 422, 435-39 (2 ed. 2003) [hereinafter PAUST, INTERNATIONAL LAW]; Part I.B., below. Certainly the United States, as an occupying power in Iraq, is unwilling to recognize head of state immunity for Saddam Hussein.

Summarizing customary international law, the I.M.T. at Nuremberg recognized a necessary exception to any form of immunity when international law has been violated: "The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position," and one "cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law." Opinion and Judgment, I.M.T. at Nuremberg (1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947). As the Nuremberg Opinion affirms, acts taken in violation of international law are beyond the lawful authority of any state, are *ultra vires*, and cannot be covered by immunity. See also Principles of the Nuremberg Charter and Judgment, Principles I & III, adopted by U.N. G.A. Res. 177(II)(a), 5 U.N. GAOR, Supp. No. 12, U.N. Doc. A/1316 (1950) ("I. Any person who commits and act which constitutes a crime under international law is responsible therefore.... III. The fact that a person who committed an act which constitutes a crime under

international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."); United States v. von Leeb (The High Command Case) (1948), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 462, 489 (1950) ("International law operates as a restriction and limitation on the sovereignty of nations."); United States v. Weizsaeker, *et al*. (The Ministries Case), 16 INT'L L.R. 344, 361 (1949), 12, 13 & 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1950-51) (diplomatic immunity applies only to legitimate acts of state and not to violations of international law); Prefecture of Voiotia v. Federal Republic of Germany (Greece 1997), extract addressed in 92 AM. J. INT'L L. 765, 766 (1999) (in 2002, the Hellenic Supreme Court upheld the decision of nonimmunity, noting that the murders in question were crimes against humanity and an abuse of sovereign power that were not protectable acts under customary international law and that, as acts "in breach of rules of peremptory international law..., they were not acts *jure imperii*" (*i.e.*, they were not lawful "public" acts and *ratione ultra vires* they are unprotectable). See 95 AM. J. INT'L L. 198 (2001)); E. DE VATTEL, THE LAW OF NATIONS bk. I, chpt. IV, § 54 (1758) ("The Prince...who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer to be considered in any other light than that of an unjust and outrageous enemy"); Andrea Bianchi, *Denying State Immunity to Violations of Human Rights*, 46 AUSTRIAN J. PUB. & INT'L L. 229 (1994). Indeed, "sovereignty" is conditioned on obedience to international law, the law upon which sovereignty rests.

Jus cogens rights or prohibitions are peremptory norms that preempt other law. *See, e.g.*, RESTATEMENT, *supra*, § 702(a), (c), (d), (e), (g), and cmts. a, c, g, h, m, n, RN 11; Human Rights

Committee, General Comment No. 24, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), *reprinted in* PAUST, INTERNATIONAL LAW, *supra*, at 376-77; Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp.2d 289, 345 (S.D.N.Y. 2003). The district court below seemed unaware of these cases, rules, and rationales of international law and seemed unaware of the fact that acts taken in violation of international law are *ultra vires* and cannot be lawful "public" or "sovereign" acts, but are treated like private acts that are nonimmune. *See* Dist. Ct. Op. at 12. Since customary international law is law of the United States and issues concerning international law implicate judicial power and responsibility (see Part III.B., below), the district court should have identified and applied the *ultra vires* precept to find Defendant's acts committed in violation of international law to be nonimmune.

Many U.S. cases have applied the *ultra vires* rationale with respect to violations of international law as well as violations of relevant foreign domestic law to find acts by heads of state, former heads of state, or other public officials to be *ultra vires* and unprotectable or nonimmune, like private acts. *See, e.g.*, *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1470-71 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); Doe v. Unocal Corp., 963 F. Supp. 880, 892-95, 898-99 (C.D. Cal. 1997); Xuncax v. Gramajo, 886 F. Supp. 162, 175-76 (D. Mass. 1995); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980); JORDAN J. PAUST, JOAN M. FITZPATRICK, JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 25, 303-04, 313-14, 323-25, 592-93, 651-53, 676-77, 709-11 (2000); PAUST, INTERNATIONAL LAW, *supra*, at 306-07, 312-14, 421-22, 438-39 n.72; also see Berg v. British and African Steam Navigation Co., 243 U.S. 124, 153-56 (1917), *quoting* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 352-53 (1822) (If a sovereign "comes personally within our

limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nations," which were subject to jurisdiction in our courts with respect to violations of the law of nations (the law of neutrality)); Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808) (foreign public acts violative of the law of nations are beyond foreign "jurisdiction" and are not entitled to recognition as lawful public acts); Rose v. Himely, 8 U.S. (4 Cranch) 241, 276-77 (1808) (same); Kadic v. Karadzic, 70 F.3d 232, 239-42, 250 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); Liu v. Republic of China, 892 F.2d 1419, 1432-33 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990); *In Re* Doe v. United States of America, 860 F.2d 40, 45 (2d Cir. 1988) ("there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law," *citing*, among others, The Schooner Exchange, 11 U.S. (7 Cranch) at 135, 144; Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987) ("sovereigns are not immune from suit for their violations of international law"), *rev'd on other gds.*, 488 U.S. 428 (1989); *In re* Grand Jury Proceedings, Doe No. 700, 817 F.2d 1108, 1111 (4th Cir.), *cert. denied*, 484 U.S. 890 (1987); West v. Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987) ("violations of international law are not 'sovereign' acts"), *cert. denied*, 507 U.S. 1017 (1993); Republic of the Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986) (adding that head of state immunity is animated merely by "comity"); Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962), *cert. denied sub nom.*, Jimenez v. Hixon, 373 U.S. 914, *reh'g denied*, 374 U.S. 858 (1963) (domestic crimes "were not acts of...sovereignty" or acts "in an official capacity"); La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1821) (No. 15,551) ("no nation can rightfully permit its subjects to

carry...on [a violation of international law], or exempt them... [and] no nation can privilege itself to commit a crime against the law of nations"); Daliberti v. Republic of Iraq, 97 F. Supp.2d 38, 52-54 (D.D.C. 2000), *quoting* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23, 52-54 (D.D.C. 1998) ("'nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit'"); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1197-98 (S.D.N.Y. 1996) (acts of torture are "acts which exceed the lawful boundaries of a defendant's authority" and are therefore nonimmune); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (acts alleged in violation of international law "hardly qualify as official public acts"); United States v. Noriega, 746 F. Supp. 1506, 1519 n.11 (S.D. Fla. 1990); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987); Kalmich v. Bruno, 450 F. Supp. 227, 229 n.2 (N.D. Ill. 1978) (act of state doctrine does not apply to acts in violation of international law); 9 Op. Att'y Gen. 356, 362-63 (1859) ("A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision of his own municipal code"); 2 Op. Att'y Gen. 725, 726 (1835) (Vattel recognizes that a foreign consul should be given immunity "'unless he violates the law of nations by some enormous crime'"), *quoting* 2 J. KENT, COMMENTARIES ON AMERICAN LAW, Lect. 2, at 44 (1826), *quoting* E. DE VATTEL, THE LAW OF NATIONS ch. 2, § 34 (1758); *see also* Ervin v. Quintanilla, 99 F.2d 935, 939 (5th Cir. 1938) ("immunity from jurisdiction will be denied a foreign sovereign where...breach of our laws occurred"); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 296 (E.D. Pa. 1963), *quoting* 1 BURLAMAQUI, NATURAL & POLITICAL LAW 164 (5th ed. 1791); and cases recognizing nonimmunity for violations of international law despite commissions from any foreign prince or state, United States v. Furlong, 18 U.S. (5 Wheat.) 184, 201-02 (1820); The Estrella, 17 U.S. (4

Wheat.) 298, 299-301, 304, 307-09 (1819); L'Invincible, 14 U.S. (1 Wheat.) 238, 257-58 (1816); *but see* Abiola v. Abubakar, 267 F. Supp.2d 907 (N.D. Ill. 2003); Tachiona v. Mugabe, 169 F. Supp.2d 259 (S.D.N.Y. 2001); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (so-called common law head of state immunity, apparently unaware of international laws and other cases addressed herein). Other cases cited by the district court are inapt because they do not address violations of international law: Leutwyler v. Office of her Majesty Queen Rania Al-Abdullah, 184 F. Supp.2d 277, 280 (S.D.N.Y. 2001) (mere copyright and breach of contract claims); First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1109 (S.D. Tex. 1994) (ordinary negligence claims); Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (ordinary torts claims).

Some claim that there should be a so-called "procedural" or "functional" immunity for a sitting head of state that exists only for public acts while the person is in office. A majority of the International Court of Justice adopted such an approach in Arrest Warrant of 11 April, 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 Feb. 2002, 2002 I.C.J. __ , reprinted in 41 I.L.M. 536 (2002), also available at http://www.icj.org. According to the majority, such immunity is only procedural or functional and attaches only to the person while he or she is in office and does not apply to "private" acts. The majority held that Congo's Minister of Foreign Affairs could not be served with a criminal arrest warrant while in exercise of his functions. Nonetheless, the ICJ made clear that the immunity afforded was not a substantive immunity, and did not imply impunity for acts that are criminal under international law. Specifically, the majority stated that "[w]hile jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may

well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all [criminal] responsibility." *Id*. para 60. Further, the ICJ majority recognized that immunity would not apply to a foreign minister "in respect of acts committed prior or subsequent to his or her period office, as well as in respect of acts committed during that period of office in a private capacity." *Id*. para. 61. This follows from the procedural nature of the immunity granted, which cannot apply once the person involved ceases to carry out the functions that require immunity. Immunity will only continue to protect official acts carried out during the person's term in office. The majority opinion has also been highly criticized by the dissenting opinions in that case and by commentators as not reflecting the current state of international law. *See, e.g.*, Dissenting opinion of Judge Al-Khasawneh, reprinted in 41 I.L.M. 595 (2002); Dissenting opinion of Judge Van den Wyngaert, reprinted in 41 I.L.M. 622 (2002); Alberto Luis Zuppi, *Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice*, 63 LA. L. REV. 309 (2003). The majority opinion also contained very few citations and seemed to be unaware of numerous trends in decision identified in this section.

It should also be noted that Defendant's conduct complained of in this case involves not merely *ultra vires* and nonprotectable, nonimmune acts under international law, but also acts *ultra vires* and acts that were not public acts under the domestic laws of China, as alleged in Plaintiffs' Complaint, at paras. 25, 28-31, alleging that Jiang's actions were beyond and in excess of any authority under Chinese law, inconsistent with his duties as head of state under Chinese law, and absolutely contrary to constitutional and legal standards under Chinese law, especially since Defendant Jiang ordered government and other officials to override the

Constitution and laws in their implementation of the repression and persecution of Plaintiffs.

B. Treaty Law of the United States Precludes Immunity.

1. The International Covenant on Civil and Political Rights Precludes Immunity.

Nonimmunity is mandated under treaty law of the United States that requires the United States "[t]o ensure that any person whose rights...are violated shall have an effective remedy, *notwithstanding that the violation has been committed by persons acting in an official capacity*." International Covenant on Civil and Political Rights, art. 2(3)(a), 999 U.N.T.S. 171 (Dec. 9, 1966) (emphasis added), ratified by the U.S. Sept. 8, 1992. See also *id*. art. 50 (all of "*[t]he provisions* of the present Covenant *shall extend* to all parts of federal States *without any limitations or exceptions*.") (emphasis added); Human Rights Committee, General Comment No. 20, paras. 2 ("whether inflicted by people acting in their official capacity, outside their capacity or..."), 13 ("whether committed by public officials or other persons acting on behalf of the State, ...those who violate...must be held responsible") (forty-fourth session, 1992), available at http://www1.umn.edu/humanrts/gencomm/hrcomms.htm. Article 26 of the International Covenant also requires that all persons be "equal before the law," which also precludes a special status or immunity.

Such treaty-based rights and requirements are supreme federal law binding on the judiciary. *See, e.g.*, RESTATEMENT, *supra*, §§ 111, and cmts. a, c, d, e, 113, and cmt. b; PAUST, INTERNATIONAL LAW, *supra*, at 67-71, 78-79, 361-62, 370-71, 373-74, 382 n.14, *passim*. As supreme federal law, the treaty requirements must necessarily trump mere "common law" such as so-called head of state immunity. As held by the Supreme Court several times, treaties even

trump inconsistent previously enacted federal statutes and rights under treaties will also prevail over subsequent federal statutes. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra*, at 100-02, 104-05, 120, and Supreme Court cases cited.

Nonimmunity also exists in other basic human rights treaties, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), 1465 U.N.T.S. 85 (Dec. 10, 1984), addressed in Part I.B.2; the Inter-American Convention on the Forced Disappearance of Persons, arts. II (reaches conduct "perpetrated by agents of the state or...."), IX ("Privileges, immunities...shall not be admitted...."), done in Belen, Brazil, June 9, 1994, *reprinted in* 33 I.L.M. 1529 (1994). The latter treaty reflects the customary and *jus cogens* international legal proscription of "disappearance." S*ee, e.g.*, RESTATEMENT, *supra*, § 702 (c), and cmts. a, n, RN 11; United Nations General Assembly Declaration on the Protection of All Persons from Enforced Disappearance, U.N. G.A. Res. 47/133 (18 Dec. 1992), U.N. Doc. A/RES/47/133, 92nd plenary mtg. (also recognizing nonimmunity it is preamble and art. 6(1)); Human Rights Committee, General Comment No. 29, States of Emergency (article 4), para. 13 (b), U.N. Doc. CCPR/C21/Rev.1/Add.11 (2001); *In re* Estate of Ferdinand Marcos, Human Rights Litigation Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 184-85 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. at 710-12; *see also* Abebe-Jira v. Negewo, 72 F.3d 844, 845-46 (11th Cir. 1996); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other gds*., 654 F.2d 1382 (10th Cir. 1981).

The International Covenant on Civil and Political Rights also assures aliens equal access to courts and rights to a remedy through Article 14, as supplemented by General Comments of

the Human Rights Committee created by the treaty. *See, e.g.*, Dubai Petroleum Co., *et al.* v. Kazi, 12 S.W.3d 71 (Tex. 2000), recognizing: "Article 14(1) requires all signatory countries to confer the right of equality before the courts to citizens of the other signatories.... The Covenant not only guarantees foreign citizens equal treatment in the signatories' courts, but also guarantees them equal access to these courts" (*id*. at 82) and that "the language of the Covenant provides for equal access to courts and equal treatment in civil proceedings...." (*id*. at 83); PAUST, INTERNATIONAL LAW, *supra*, at 224-29. The Texas Supreme Court also quoted paragraphs 1 and 2 of the Human Rights Committee's General Comment No. 13 (1984) in support of its ruling. *Id*. at 82, *quoting* General Comment No. 13, 39 U.N. GAOR, Supp. No. 40, at 143, U.N. Doc. A/39/40 (twenty-first session, 1984); see also Human Rights Committee, General Comment No. 15, paras. 1-2, 7, 41 U.N. GAOR, Supp. No. 40, Annex VI, at 117, U.N. Doc. A/41/40 (twenty-third session, 1986).

As recognized also by the Texas Supreme Court: "As treaties are to be construed broadly, the treaty need not provide explicitly for equal court access; it need only imply it. *See Asakura v. City of Seattle*, 265 U.S. 332, 342 ... (1924). Therefore, treaty language providing for general due process protections or otherwise suggesting that the country's courts will be open to United States citizens will suffice." Dubai Petroleum Co., *et al.* v. Kazi, 12 S.W.3d 71, 80 (Tex. 2000). This is correct. Treaties are to be construed in a broad manner to protect both express and implied rights. S*ee, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924); United States v. Payne, 264 U.S. 446, 448 (1924); Geofroy v. Riggs, 133 U.S. 258, 271 (1890); Hauenstein v. Lynham, 100 U.S. 483, 487

(1879), *citing* Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809).

2. The Convention Against Torture Precludes Immunity.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984), ratified by the U.S. on Nov. 20, 1994, also reaches all public officials and precludes immunity. Article 1(1) reaches torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Article 14(1) also requires that the U.S. "shall ensure...that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." Addressing torture committed by former Chilean head of state Pinochet while in office, the U.K. House of Lords ruled 6-1 that immunity could not attach in part because "the commission of a crime which is an international crime against humanity and *jus cogens*...cannot be a state function" and, thus, cannot be official acts. See Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, *Ex Parte* Pinochet, Judgment of 24 March 1999 (opinion of Lord Browne-Wilkinson); see also *id*. (Hutton, L.J., sep. opinion).

3. The Genocide Convention Precludes Immunity.

Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), ratified by the U.S. in 1988, recognizes nonimmunity for crimes of genocide whether the perpetrators are "constitutionally responsible rulers, public officials or private individuals." See also Kadic v. Karadzic, 70 F.3d 232, 236, 239-42 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

II. Federal Statutes Preclude Immunity.

A. Language in the Torture Victim Protection Act (TVPA) Precludes Immunity.

On its face, the Torture Victim Protection Act (TVPA), Pub. Law 102-256, 105 Stat. 73 (1992), precludes immunity by expressly creating liability with respect to torture or extrajudicial killing engaged in by any individual acting "under actual or apparent authority, or color of law, of any foreign nation." *Id*. § 2(a). The very purpose of the TVPA is to provide a civil remedy against state actors.

The Senate Report on the TVPA contains inconsistencies. It states: "The purpose of this legislation is to provide a federal cause of action against *any individual* who... [engages in torture or extrajudicial killing]. This legislation will carry out the intent of the Convention Against Torture.... The Convention obligates state parties to adopt measures to ensure that torturers within their territories are held *legally accountable* for their acts. This legislation will do precisely that – by making sure that torturers and death squads will no longer have a safe haven in the United States.... A state that practices torture and summary executions *is not one that adheres to the rule of law*. *Consequently*, the... [TVPA] is designed to respond to this situation by providing a cause of action in U.S. courts...," adding: "[s]ince... [the act of state] doctrine applies only to public acts..., this doctrine *cannot shield former officials from liability* under this legislation," thus adhering to the *ultra vires* precept. S. Rep. No. 249, 102nd Cong., 1st Sess. 8 (1992) (emphasis added); *but see id*. at 7-8 ("Nor should visiting heads of state be subject to suits under the TVPA," but not recognizing immunity for former heads of state). The language of the statute should control and it is unavoidably opposed to immunity from a cause of action against individuals acting "under actual or apparent authority" of any foreign state. Moreover, federal statutes are to be interpreted consistently with international law.

See, e.g., Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Cook v. United States, 288 U.S. 102, 118-22 (1933); The Charming Betsy, 6 U.S. (6 Cranch) 64, 117-18 (1804); PAUST, INTERNATIONAL LAW, *supra*, at 43-44, 70, 84 n.39, 99, 124-25 ns.2-3, 120, *passim*. Additionally, ratifications of the International Covenant on Civil and Political Rights and the Convention Against Torture occurred "last-in-time" vis-a-vis enactment of the TVPA and prevail in case of a clash and, in any event, "rights under" the treaties would prevail in case of any inconsistency with the statute. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra*, at 101, 104-05, 120, and Supreme Court cases cited.

B. The Alien Tort Claims Act (ATCA) Does Not Recognize Immunity.

The Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, provides a cause of action or right to a remedy for alien plaintiffs concerning violations of international law. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra*, at 14-15, 63-65, 95-97, 229, 232-34, 311-12, 314, 373-74. The ATCA applies to "any" violation of international law and contains no exemption for public officials. 28 U.S.C. § 1350. Further, statutes must be interpreted consistently with international law (*see, e.g.*, RESTATEMENT, *supra*, § 114; PAUST, INTERNATIONAL LAW, *supra*, at 43-44, 59, 70, 99, 101, 124-25, 127, 134, 217; PAUST, FITZPATRICK, VAN DYKE, *supra*, at 131, 141-42, and cases cited), and customary and treaty-based international law noted above precludes immunity. See Part I.A. & B. Additionally, federal statutes like the TVPA and ATCA must trump mere common law, such as so-called "common law" head of state immunity. *See also* Lafontant v. Aristide, 844 F. Supp. at 131-21 (statute trumps "common law" head of state immunity); RESTATEMENT, *supra*, § 443(2), and cmts. d, g, j; PAUST, INTERNATIONAL LAW, *supra*, at 66 n.140; Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d

876 (2d Cir. 1980) (judicial enforcement of international law incorporated by reference in the ATCA against a foreign official is not only "entirely appropriate," but a refusal to do so "might seriously damage the credibility of our nation's commitment" to implement human rights), *reprinted in* 19 I.L.M. 585, 604 (1980). Moreover, rights under treaties must prevail even over a federal statute in case of a clash. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra*, at 104-05, 120, and Supreme Court cases cited.

III. District Court Errors Concerning Immunity.

A. Errors Concerning the Reach of Any Immunity.

The district court opinion missed most of the cases cited above as well as relevant treaty-based and customary international law and the *ultra vires* precept addressed in Part I.A. & B. See also Dist. Ct. Op. at 5, assuming in error that common law head of state immunity was absolute and not mentioning the many cases cited above, much less The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 350-55 (1822) (adding: if a "foreign sovereign...comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process" for violations of the law of nations). This rule has never been deviated from by the Supreme Court (*see also* Berg v. British and African Steam Navigation Co., 243 U.S. 124, 153-56 (1917), *quoting The Santissima Trinidad*) and has been recognized subsequently in many international, U.S., and foreign cases recognizing that acts taken in violation of international law are not lawful public or official acts, but are *ultra vires* and are entitled to no immunity, whether committed by a sitting or former head of state. See Part I.A., above. The district court also misses the point that when a public official violates international law his acts are *ultra vires* and are treated like private acts. The Prince who violates international divests himself of his status as

a public actor. *See, e.g.*, E. DE VATTEL, quoted above in Part I.A.2; see also The Schooner Exchange, 11 U.S. (7 Cranch) at 145 (re: private acts, the Prince "may be considered as so far laying down [his character as] the prince, and assuming the character of a private individual.").

B. Issues Being Addressed Are Legal Issues for the Judiciary to Decide.

For more than 200 years, issues concerning the interpretation of and nonimmunity under U.S. treaty law, customary international law as law of the United States, and U.S. statutes have been issues of law for the courts to decide and they are textually and unavoidably committed to the judiciary under the Constitution. *See generally* U.S. Const., arts. III, § 2, IV, cl. 2; RESTATEMENT, *supra*, §§ 111 (1)-(3), cmts. c, d, e, RN 4, 113; PAUST, INTERNATIONAL LAW, *supra*, at 7-11, 38-59, 68-71, 489-90, 493-94, 499-502, 507-10, and numerous cases cited; PAUST, FITZPATRICK, VAN DYKE, *supra*, at 111-17, 119, 122-35, 141-42, 146, 179-80, 248-51, *passim*, and cases cited, including: The Paquete Habana, 175 U.S. 677, 700, 708, 714 (1900); Hilton v. Guyot, 159 U.S. 113, 116 (1895); The Nereide, 13 U.S. (9 Cranch) 388, 422-23 (1815); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272 (1796) (Iredell, J.); The Resolution, 2 U.S. (2 Dall.) 1, 13 (Fed. Ct. App. 1781); Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980); Taylor v. Morton, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J., on circuit), *aff'd*, 67 U.S. (2 Black) 481 (1862); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798-99 (D. Kan. 1980). The district court below was correct that individuals have no immunity under the Foreign Sovereign Immunities Act (FSIA), because individuals are not covered under 28 U.S.C. § 1603; but the district court was in error (D. Ct. Op. at 8-9) in assuming that the Executive should determine legal issues under the many relevant laws at stake (*e.g.*, treaties, customary international law, and federal statutes). *See also* Republic of Philippines v. Marcos, 665 F. Supp.

793, 797-98 (N.D. Cal. 1987) (rejecting a suggestion of immunity from a Solicitor General).

For Executive views of the contents of these laws and its "suggestions" of immunity in contrast to these laws to be determinative, courts would have to abdicate their judicial power and responsibility to determine the content of law and to decide questions of law, and this would create a violation of the separation of powers. Even during the height of Executive power in time of actual war, Executive views concerning the content of international law were found to be incorrect and the Supreme Court reaffirmed its power to decide issues of international law. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700, 708, 714 (1900); see also *Ex parte* Quirin, 317 U.S. 1, 25, 27 (1942) (emphatically rejecting a presidential claim of unreviewability of presidential decisions); PAUST, INTERNATIONAL LAW, *supra*, at 169-73, 175, 189, 489-90, 493-94, 499-502, 507-10. *See also* The Peterhoff, 72 U.S. (5 Wall.) 28, 57 (1866) ("we administer the public law of nations, and are not at liberty to inquire what is for the particular...disadvantage of our own or another country."). Violations of international law are a legal concern of the entire community, with universal jurisdiction attaching for both civil and criminal sanctions even though there are no contacts with the forum. *See, e.g.*, Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159-61 (1795); United States v. Yousef, 327 F.3d 56, 79 (2d Cir. 2003); *In re* Estate of Marcos Litigation, 978 F.2d 493, 499-500 (9th Cir. 1992); Daliberti v. Republic of Iraq, 97 F. Supp.2d 38, 52-54 (D.D.C. 2000) United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Filartiga v. Pena-Irala, 630 F.2d at 878, 885; RESTATEMENT, *supra*, § 404, and cmts. a, b; PAUST, INTERNATIONAL LAW, *supra*, at 420-23. The district court seemed to miss the point that when universal jurisdiction exists under international law, which is part of the law of the United States, no contacts are required. See Dist. Ct. Op. at 20 (re: Defendant Control Office).

Even the text and structure of the U.S. Constitution confirms judicial power and jurisdictional competence with respect to certain suits "against ambassadors," "public ministers," and "foreign States," thereby also implicitly recognizing that certain forms of nonimmunity necessarily exist. See U.S. Const., art. III, § 2; see also Judiciary Act of 1789, chpt. 20, § 13, 1 Stat. 73 (1789).

IV. Conclusion.

For the foregoing reasons, *Amici* support the request of Plaintiffs for reversal of the district court's opinion below and recognition that Defendant Jiang Zemin is not entitled to immunity with respect to acts in violation of international law, as set forth in Plaintiffs' Complaint.

Dated January 23, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 29(d)

I hereby certify that this *amici* brief complies with the type volume limitation of Circuit Rule 29(c). The brief contains 6,992 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 23rd day of January, 2004, two (2) true and correct copies of the above and foregoing Brief of *Amici Curiae* International Law Professors in Support of Plaintiffs-Appellants, with their approval, and Urging Reversal were served upon:

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