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,

v.

JIANG ZEMIN AND
FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 6/10)

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 AND REQUIRED SHORT APPENDIX OF APPELLANTS, PLAINTIFFS A, B, C, D, E, F, AND OTHERS SIMILARLY SITUATED, WEI YE, AND HAO WANG

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January 20, 2004

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 03-3989

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

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Attorney's Printed Name: Terri E. Marsh
Please indicate if you are counsel of record for the above listed parties pursuant to Circuit Rule 3(d). **Yes.**
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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants request oral argument. This is a case concerning the non-immunity status of a former head of state who allegedly committed violations of established norms of the international law of human rights, and hence the 'law of nations.' As the Second Circuit noted in *Filartiga v. Pena-Irala*, 630 F. 2d 876, the Supreme Court has enumerated the appropriate sources of international law. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61. They include areas of law not typically before U.S. federal courts, including the works of jurists, writing professedly on public international law and the general usage and practice of nations. Appellants seek an opportunity to address and explain the legal issues raised by this case from within the framework of these sources.

JURISDICTIONAL STATEMENT

Petitioners are appealing the September 12, 2003 decision of the U.S. District Court for the Northern District of Illinois, Eastern Division (Case No. 02C 7530), docketed on September 15, 2003, as well as of the October 6, 2003 decision, of the same court on a motion for reconsideration of the same case, docketed on October 15, 2003. Appellants seek to appeal all issues in the case, including all issues in connection with or presented in both the September 15 decision and the October 15 decision. The Court of Appeals has jurisdiction over the claims brought by Appellants also by virtue of 28 U.S.C. § 1291: *see* Rule 28(a) (c) & (d).

The District Court had jurisdiction over the claims brought by Appellants by virtue of 28 U.S.C. § 1350, incorporating provisions of the Alien Tort Claim Act and the Torture Victims Protection Act, which provide for federal jurisdiction and a cause of action "for 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," as well as for acts of torture committed abroad against either U.S. citizens or citizens of other nations. The Complaint alleges as grounds for jurisdiction violations of *jus cogens* and other universally recognized norms of international law enshrined in customary international law, international treaty law, and U.S. law. A separate and additional basis for jurisdiction by the District Court is 28 U.S. C. § 1343(4), which provides for federal court jurisdiction in situations where damages or equitable or other relief is sought under acts of Congress providing for the protection of civil rights, as well as under 28 U.S.C. § 1331, since this case arises "under the Constitution, laws or treaties of the United States," and raises significant federal questions under Constitutional provisions, statutes and international treaties ratified by the United States including 42 U.S.C. § 1985.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding that Jiang Zemin was immune from suit as a former head of state for alleged acts of torture, genocide, and other violations of *jus cogens* norms committed during the term of office as head of state under U.S. Common Law.
2. Whether the District Court erred in finding that Jiang Zemin was immune from suit as a former head of state for alleged acts of torture, genocide, other violations of *jus cogens* norms committed during the term of office as head of state under International Law.
3. Whether the District Court erred in finding that Jiang Zemin was immune from suit as a former head of state for alleged acts of torture, genocide, and other violations of *jus cogens* norms committed after his term of office.
4. Whether the District Court erred in finding that the court should defer automatically to suggestions of immunity for former heads of state?
5. Whether the District Court erred in finding that court did not have personal jurisdiction over Office 6/10?
6. Whether the District Court erred in finding that Jiang Zemin may not be served on behalf of Office 6/10?

STATEMENT OF THE CASE

On October 18, 2002, the individual plaintiffs in this case filed a class action lawsuit in the United States District Court for the Northern District of Illinois, Eastern Division, against Jiang Zemin and the Falun Gong Control Office (a.k.a. Office 6/10). Defendant Jiang Zemin is the former President of the People's Republic of China, and he established the Falun Gong Control Office for the purpose of suppressing Falun Gong, a spiritual movement of Chinese origin. Plaintiffs are all practitioners of Falun Gong and are either current or former residents of China.

Among other things, the plaintiffs alleged that defendants have mandated and applied a brutal and unlawful campaign of persecution against Falun Gong, and have ordered and authorized the extrajudicial arrest, detention, torture and arbitrary execution of Falun Gong practitioners. Plaintiffs themselves have suffered horrific human rights abuses at the hands of officials carrying out the dictates of the Falun Gong Control Office.

The Falun Gong Control Office, a non-governmental agency, has been operating under defendant Jiang's illegal mandate to organize and direct the campaign of persecution against Falun Gong, with the support of, on behalf of, and in furtherance of the goals of defendant Jiang and other high ranking officials of the government of China.

Defendants never responded to the complaint and plaintiffs moved for entry of an order of default.

On September 12, 2003, Judge Matthew F. Kennelly of the District Court issued a memorandum opinion and order (docketed September 15, 2003) holding that defendant Jiang

Zemin was immune from suit, and dismissed the claims against him. The Court also dismissed the claims against defendant Falun Gong Control Office, citing lack of personal jurisdiction.

On September 29, 2003, plaintiffs filed a motion to reconsider and a motion for leave to reopen judgment and amend complaint. On October 6, 2003, Judge Kennelly of the District Court issued a memorandum opinion and order denying these two motions. The order was docketed on October 15, 2003.

On November 15, 2003, plaintiffs filed a timely notice of appeal with the United States Court of Appeals for the Seventh Circuit from both decisions of the District Court. Plaintiffs seek to appeal all issues in the case, including all issues in connection with or presented in both opinions of the District Court.

STATEMENT OF THE FACTS

Defendant Jiang is no longer head of state of the People's Republic of China: he left the posts of Chair of the Communist Party and of President of China in November of 2002 and in March of 2003 respectively. During his tenure as head of state, defendant Jiang utilized illegally the head-of-state office to initiate a campaign of genocide and torture against Falun Gong practitioners, in spite of opposition from many of his colleagues and high ranking officials in the Communist Party and Government of China. Complaint § 3, 7, 24, 25. Indeed, defendant Jiang carried out the entire persecution of practitioners of Falun Gong beyond officially authorized channels and normal and legally established government procedures, and in violation of the Convention Against Torture, and the corresponding measures of Chinese legislative, administrative and judicial organs, as well as the Convention on the Prevention and Punishment of the Crime of Genocide, ratified by China, respectively on October 4, 1988 and April 18, 1983. Complaint § 7, 28. Pl's Mem. on Preliminary and Jurisdictional Issues at § V A (4).

In June of 1999, defendant Jiang established the clandestine Falun Gong Control Office (a.k.a. Office 6/10) as an elite branch of the Communist Party to carry out the campaign of murder, torture, terrorism, rape, assaults and property violations against cultivators of Falun Gong and their families. Complaint § 3, 7, 24. Under Defendant Jiang's unlawful mandate, Defendant Office 6/10's authority encompasses not only the power, and indeed duty, to override the Constitution and laws in pursuit of the campaign of repression against Falun gong parishioners, but the power to criminally indict any and all government and party officials, whatever their capacity, who fail to comply with the illegal directives of their office. Complaint § 24 – 26, 28-31, 36. An even harsher campaign of persecution was initiated in 2001. Complaint

at Para. 35-37. Office 6/10's efforts to persecute Falun Gong practitioners have extended to Illinois, Opinion at 21; Pl's Mem. on Preliminary and Jurisdictional Issues at 44, Complaint § 8, and to other states, Complaint § 21-22.

The extent and severity of the religious persecution of Falun Gong throughout China have been confirmed and extensively documented by the U.S. Government in its Country Reports on Human Rights Practices, and most especially in its Annual Reports on International Religious Freedom, as well as in reports issued by non-governmental human rights monitoring groups such as Amnesty International and Human Rights Watch. Complaint at Para. 38-39.

For example, the Annual Report on International Religious Freedom for 2001, issued in December 2001 by the U.S. Department of State, includes numerous specific references to the major human rights abuses and violations being committed against Falun Gong practitioners – all geared to both suppress and totally eradicate the presence of Falun Gong in China.

Noting that the Government of China is trying "to control and regulate religious groups to prevent the rise of groups or sources of authority outside the control of the Government and the Chinese Communist Party" (p. 122), the report enumerates just what this has meant for practitioners of Falun Gong: 100 or more deaths of practitioners in detention since 1999 (p.122), thousands placed in reeducation-through-labor camps, hundreds placed in mental hospitals and others in psychiatric institutions, many subjected to excessive force by police and to torture including electric shock and having hands and feet shackled and linked with crossed steel chains (p. 131). No one is exempt from the excessive use of torture, brainwashing, the use of psychotropic drugs, forced feeding – not even pregnant women, young children or infants. Complaint at Para... 38-39.

SUMMARY OF ARGUMENT

The United States has a strong interest in vindicating the violations of *jus cogens* norms alleged in this case. *Jus cogens* norms are qualitatively different from other violations of international law because of their special status: they are peremptory norms from which no derogation is permitted. They include prohibitions against genocide, slavery, murder or disappearance, and torture. The United States has ratified several treaties in which it has agreed to ensure that these norms are not violated. There is broad agreement in customary international law and U.S. law about the core protections that rise to the level of *jus cogens*, as preemptive rights that no government can deny. Indeed they have been held to be *per se* "unofficial," "non-governmental," and "private," and are for that reason subject to the scrutiny of the court.

While jurisdictional immunity bars prosecution of a head of state during tenure in office for his official, public acts, it does not exonerate a head of state from civil and criminal responsibility for the non-governmental, private acts he committed during the term of his office. Indeed, immunity is not equivalent to impunity. Prosecution for acts committed prior to or subsequent to tenure in office, as well as, for the private acts committed during tenure in office do not interfere with traditional functions of a head of state. Therefore a former head of state may be sued for his acts committed subsequent to tenure in office as well as for acts of torture, genocide and other "private" acts he commits during his term of office. The District Court below decided the case erroneously because it completely ignored these principles of non-immunity in U.S. and international law for violations of jus cogens and other human rights norms of international law; and most importantly, because it failed to note that serious human rights abuses are characterized as private acts in both U.S. and international law. Moreover, the court

failed to apply the rule of law it itself established in *Abiola v. Abubakar*, 267 F.Supp. 2d 907 (N.D.Ill. 2003), that heads of state are not immune for acts committed after they leave office. The Court's outright dismissal of the lawsuit in its entirety, without taking account of defendant Jiang's loss of head of state immunity as of March 15, 2003, therefore constitutes reversible error.

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 officials of a state, who have engaged in violations of human rights covered under the International Covenant, torture or cruel, inhuman treatment covered under the Convention Against Torture, and genocide covered under the Genocide Convention. These treaty-based denials of immunity are especially important because they constitute supreme federal law binding on the federal courts, and they are specifically 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.

U.S. treaty law takes precedence over inconsistent pre-existing common law. The District Court did not address, much less acknowledge, the immunity provisions in these treaties which prevail over the common law suggestion of immunity procedure utilized in this and other cases.

Finally, cases which implicate foreign policy considerations are not necessarily within the absolute discretion of the Executive branch. Indeed, one function of the judicial branch is to decide cases and controversies arising under treaty law and customary international law as part of U.S. law. 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. Even if the court finds that some public officials merit immunity, competing considerations must be weighed prior to a determination of immunity. As in other contexts, courts might embrace a sliding scale affirming non-immunity when the acts of a former heads of state rise to the level of jus cogens, when they are private and not official.

Service upon Jiang Zemin, the founder of and person exercising complete authority over Office 6/10, was sufficient to effect service upon Office 6/10.

Personal Jurisdiction exists over Office 6/10 because of its continuous and systematic contacts with Illinois, or, alternatively, because of its contacts with the United States as a whole.

ARGUMENT

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Opinion and Judgment*, I.M.T. (1946) 41.

I. THE UNITED STATES HAS A STRONG INTEREST IN VINDICATING THE INTERNATIONAL HUMAN RIGHTS VIOLATIONS ALLEGED IN THIS MATTER.

The United States has a strong interest in vindicating the violations of *jus cogens* norms alleged in this case. See *Presbyterian Church of Sudan et al. v. Talisman Energy, Inc. and the Republic of Sudan* [hereinafter *Presbyterian Church*], 244 F. Supp. 2d 289 at 339 (S.D.N.Y. 2003) *Jus cogens* norms are qualitatively different from other violations of international law because of their special status: they are peremptory norms from which no derogation is permitted. They include prohibitions against genocide, slavery, murder and disappearances, and torture. The United States has ratified several treaties in which it has agreed to ensure that these norms are not violated. Violations of these norms can never be characterized as "official acts," inasmuch as no state may authorize acts which violate its own laws any more than a state may authorize acts violative of the peremptory norms of international law**.**

A. *Jus Cogens* Norms are "Obligations *Erga Omnes*"

Plaintiffs' complaint is replete with accusations that, if proven true, would constitute behavior manifestly in violation of the most basic rules of international law, and indeed of civilized conduct. Plaintiffs seek redress not merely for acts which are *ultra vires* because they violate international law, but more particularly, for violations of *jus cogens* norms, including the crimes of genocide and torture. See RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE

UNITED STATES [hereinafter RESTATEMENT THIRD] § 702 cmt. n (1987) (stating that acts of genocide, slavery and extrajudicial killing violate *jus cogens* norms); *Siderman de Blake v. Republic of Argentina* [hereinafter Siderman], 965 F. 2d 699, 717 (9th Cir. 1992); *Tachonia v. Mugabe*, 234 F. Supp. 2d 401, 415-416 (S.D.N.Y. 2002).

Such acts are qualitatively different from other violations of international law. As defined in the Vienna Convention on the Law of Treaties [hereinafter Vienna Convention] May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679, a *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, art. 53, (cited in Siderman, id., at 714-719). The RESTATEMENT THIRD, *supra*, § 102 cmt. d, adopts the Vienna Convention's definition of jus cogens norms as binding on all nations and "derived from values taken to be fundamental by the international community rather than from the …choices of nations." As the International Court of Justice notes, violations of these norms constitute violations of obligations owed to all ("obligations *erga omnes*"). *The Barcelona Traction, Light & Power Co*. (Belgium v. Spain) 1970 I.C. J. 3, 32; also see, RESTATEMENT THIRD, *supra*, § 702 cmt. o. See also id at § 404.

The non-contingent nature of *jus cogens* norms is especially well exemplified by the principles underpinning the judgments of the Nuremberg tribunals following World War II. As Steven Fogelson observes in The Nuremberg Legacy: An Unfulfilled Promise, 63 S. CAL. L. Rev. 833, (cited in *Siderman, id*., at 715): "[t]he legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal." The doctrine of *jus*

cogens is not predicated on the domestic or foreign policies of nations. Comprising internationally recognized norms of conduct as peremptory to any treaty or agreement in contravention to them, these preemptory rights are the foundation of our legal and public order.

B. The United States Has Agreed to Vindicate Violations of the Prohibition Against Torture and other *Jus Cogens* Norms by signing the Torture Convention, the Genocide Convention and the Treaty on Civil and Political Rights.

1. Convention Against Torture

The obligation to vindicate torture is one of the "obligations *erga omnes*." Little if any doubt exists that the charge of torture brought in this and other cases is of the utmost gravity. In November of 1994, the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter The Torture Convention]. In so doing, the United States agreed to ensure that no one shall be subjected to torture and "to ensure… that the victim[s] of ….torture obtain redress and ….an enforceable right to fair compensation." (*Id*, Article 14(1)). The references in the Torture Convention to such notions as "equal and inalienable rights of all members of the human family," to the "inherent dignity of the human person," to the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, art. 2(3)(a), 999 U.N.T.S. 171 (Dec. 9 1996), all attest to the fact that the document signed into law by the United States is itself premised on a public order based on the primacy of certain values and common, shared interests, which include the prohibition against torture.[1]

2. Genocide Convention and Other Conventions and International Instruments

In the aftermath of the atrocities committed during the Second World War, the

[1] These values are enshrined as inalienable rights in the Declaration of Independence, the Bill of Rights,

condemnation of genocide as a crime "condemned by the civilized world," gained broad acceptance by the community of nations. The prohibition against genocide, like prohibitions of other *jus cogens* norms alleged in plaintiffs' complaint, is an offense of universal concern by virtue of the "depths of depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce." *Tachonia v. Mugabe*, 234 F. Supp. 2d 401, 415-416 (S.D.N.Y. 2002). See also, RESTATEMENT THIRD, *supra*, § 702, cmt. n (citing genocide along with slavery and extrajudicial killing as a jus cogens norm). This is especially and profoundly true in China today, according to the allegations in Plaintiffs' complaint.

The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948) [hereinafter The Genocide Convention], which provides a more specific articulation of the prohibition against genocide in international law, has itself gained universal support, ratified by more than 120 nations, and by the U.S. in 1988. By becoming a signatory, the United States has agreed to "undertake to prevent and to punish" the crime of genocide, irrespective of the rank or status of those responsible.[2]

C. Acts of Torture and Other Violations of *Jus Cogens* Norms Are Widely Recognized in International Law and U.S. Law as Beyond the Official Authority of the State and Are Consequently Private in Nature and, as Elaborated Below, Subject to Judicial Scrutiny.

In *The Prosecutor v. Erdemovic*, Sentencing Judgment, Case No. IT-96-22-T Trial

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and the Emancipation Proclamation.

[2] There is also a human right of access to courts and to an effective remedy under many other treaties to which the United States is a signatory. See, *e.g.*, the following: Universal Declaration of Human Rights, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.") The International Covenant on Civil and Political Rights, art. 2(3)(a), 999 U.N.T.S. 171 (Dec. 9 1996), ratified by the U.S. Sept. 8,

Chamber 1, 29 Nov. 1996 (108 ILR 180), the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia [hereinafter ICTY] characterized crimes against humanity as crimes which "transcend the individual, because when the individual is assaulted, humanity comes under attack and is negated." As Lord Browne-Wilkinson maintained, in House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, Judgment of 24 March 1999* [hereinafter *Ex Parte Pinochet*], "torture as a crime against humanity has the status, as noted above, of a *jus cogens*, and (like genocide and other violations of *jus cogens*) is so serious and on such a scale as to be regarded as an attack on the [entire] legal order." Indeed, these and other international and U.S. court decisions underscore the distinction between official acts and acts which by definition exceed the lawful boundaries of official authority. As noted in *Presbyterian Church, supra* at 345, a state cannot authorize acts that violate its laws. And as noted in the Nuremberg trials, a state may not authorize acts that violate international law.

Both the Foreign Sovereign Immunities Act of 1976 [hereinafter FSIA], 28 U.S.C. § 1602 *et seq.*, and the act of state doctrine have been used by U.S. federal courts to draw distinctions between official public acts and acts which, as violations abhorred by all civilized peoples, exceed the lawful boundaries of official authority, and are therefore considered private acts. For example, in *In Re Estate of Marcos Human Rights Litigation. Maximo Hilao et al v. Estate of Ferdinand Marcos* [hereinafter *Hilao v. Marcos]*, 25 F. 3d 1467 (9th Cir. 1994), a case which charged the former President of the Philippines with acts of torture and summary executions, in addition to disappearances, the court held that the "illegal acts of a dictator are not

1992, similarly requires that the United States "ensure that any person whose rights are violated shall have a remedy. U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948).

'official acts' unreviewable by federal courts, that actions which exceed statutory limitations are considered individual and not sovereign [because] the officer is not doing the business which the sovereign has empowered him to do." *Id* at 1470. Therefore, the court concludes, "Marcos' acts of torture, execution, and disappearance were clearly acts outside of his authority as President." *Id.*

What the *Hilao* court terms "unofficial" and "individual acts," many other U.S. courts term "not public" and/or "private acts." For example, in the act of state context, in The Republic of Philippines v. Marcos, 806 F.2d 344 (2nd Cir. 1986), the Second Circuit limits the applicability of this doctrine to the "public" acts of the sovereign, *id* at 358, citing for the same proposition, *inter alia, Jimenez v. Aristeguieta*, 311 F. 2d 547, 557-58 (5th Cir. 1962), c*ert. denied*, 373 U.S. 914, 83 S. Ct 1302, 10 L.Ed. 2d 415 (1963) ("dictator is not the sovereign and his …crimes committed in violation of his position and not in pursuance of it are not acts of a sovereign, but rather as far from being an act of state as rape.")

As noted, not only in international law but in many federal circuits, it has been held that violations of *jus cogens* norms cannot be defended by the state as official since *jus cogens* violations are violations of peremptory norms, from which no derogation is permitted. *Presbyterian Church, supra,* at 345, *citing* RESTATEMENT THIRD, *supra*, § 702 cmt. n; see also *Siderman,* at 714-15 (finding that torture constitutes a violation of *jus cogens.*) Since a sovereign state cannot endorse an official's actions that violate *jus cogens* norms of international law as official, the actions must be considered private acts, and as elaborated below are for that reason, subject to judicial scrutiny. [3]

[3] The RESTATEMENT THIRD, *supra*, § 702 cmt. n, specifies that genocide, slave trade and slavery, murder,

II. FORMER HEADS OF STATE ARE NOT IMMUNE IN U.S. LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS COMMITTED IN A PRIVATE CAPACITY DURING THEIR TERM OF OFFICE AND FOR VIOLATIONS OF OTHER INTERNATIONAL NORMS COMMITTED AFTER THEIR TERM OF OFFICE.

Serious human rights abuses committed by a former head-of-state are considered private acts in U.S. law, and are therefore not entitled to immunity. While jurisdictional immunity bars prosecution of a head of state during tenure in office, it does not exonerate a head of state from all civil and criminal responsibility. Therefore a head of state may be sued after he leaves office for acts committed subsequent to tenure in office as well as for private acts committed while in office. The District Court below decided the case erroneously because it ignored the principle of non-immunity in U.S. common law for violations of *jus cogens* and other human rights norms of international law; and most importantly, because it failed to note that serious human rights abuses are characterized as private acts in U.S. law. Finally, the District Court failed to apply the rule of law established in *Abiola v. Abubakar*, 267 F.Supp. 2d 907 (N.D.Ill. 2003), that heads of state are not immune for acts committed after they leave office. This decision is reviewable *de novo*. *See Gomez-Diaz v. Ashcroft,* 324 F. 3d 913 (7th Cir. 2003)*; United States v. Smith*, 332 F. 3d 455 (7th Cir. 2003).

A. Former Heads of State are Not Immune for Private Acts Committed During Their Term of Office.

Under U.S. common law, a former head of state does not enjoy complete immunity from civil process. Many recent cases in fact have specifically limited head of state immunity to sitting

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torture, and systematic racial discrimination are violations of *jus cogens* norms. Section 102, reporter's note 6, includes causing the disappearance of individuals, prolonged arbitrary detention, and other gross violations of human rights.

heads of state and foreign ministers. In *The Republic of the Philippines v. Marcos*, 665 F. Supp. 793, 797, (N.D. Cal. 1987) for example, the court quite explicitly rejected a suggestion of immunity filed by the Executive branch of government for a solicitor general because "he is neither a sovereign nor a foreign minister, the two traditional bases for a recognition or grant of head-of-state immunity" (citing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, (1812)) See also *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782 (W.D.Wash. 1988) (heads of state do not enjoy immunity for a broad range of acts that violate international, U.S. or foreign law); *El Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 82 (D.D.C. 1999) (common law head of state immunity is "limited to the sitting official head of state," citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1996)); 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).

More particularly, heads of state have been found to be not immune for private acts committed during their tenure in office, after they leave office, as well as in situations in which immunity is waived by the foreign state.[4] As Michael A. Tunks observes in Diplomats or Defendants? Defining the Future of Head-of-State Immunity, 52 DUKE L.J. 651, 658-59 (2002), recent state practice in the United States 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 for their unofficial and private acts committed during

[4] Equally important and discussed in the next section of this brief, former heads of state are not immune for acts committed after their term of office.

their tenure in office. He notes that "consistent with the treatment required by international law, American courts have not presumed to take jurisdiction over current or former heads of states based on their public and official acts." But while jurisdictional immunity bars prosecution of a head of state during his tenure in office, it does not exonerate him from civil or criminal responsibility and shield him from future adjudication. As Mr. Tunks goes on to explain, "accountability for private offenses [for a former head of state] does not unduly infringe upon state sovereign interests" (*id*. at 670), and thus U.S. courts have declined to extend immunity to former heads of state for such acts.

For example, the Ninth Circuit decided in 1994 that former heads of state no longer merit protection from lawsuits based on their private acts committed while in office. In *Hilao v. Marcos*, *supra at* 1471, the court decided that the plaintiffs' allegations of torture, executions and disappearances by Philippine military intelligence personnel under the authority of former Philippine head of state Ferdinand Marcos, could be adjudicated, because these *jus cogens* crimes do not qualify as legitimate official acts. "[Marcos] was not the state, but the head of state, bound by the laws that applied to him," the court declared. *Id.* at 1471 (quoting *The Republic of the Philippines v. Marcos*, 862 F. 2d 1355, 1361 (9th Cir. 1988).[5] *Also see*, *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (case against former President Marcos could go forward because his acts were not public acts of the sovereign); *In re Estate of Ferdinand Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) (defendant's acts were not performed within the official mandate of his office and were therefore not the acts of … a foreign state). *See* Jordan Paust, *Amicus Brief for Appellants* [hereinafter *Paust Amicus Brief*] and cases cited therein, § I.A.

[5] The Ninth Circuit also noted that it was unnecessary to reach the issue of whether the Philippine government had waived Marcos' immunity because the case could be decided on other grounds. *Id.* at

A similar decision was reached by the Fifth Circuit in a case involving another former head of state, *Jimenez v. Aristeguieta*, 311 F. 2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, 83 S. Ct. 1302, 10 L. Ed. 2d 415 (1963) in which allegations of murder and financial crimes were made against the former ruler of Venezuela. The Fifth Circuit rejected the defendant's argument that his acts were those of a sovereign because he was dictator, and therefore immunized under the law. As noted above in § I C of this brief, the court based its holding on the unofficial and private nature of the defendant's acts, stating that they are "as far from being an act of state as rape," clearly an unofficial act.

B. Torture and Violations of Jus Cogens Norms Are Characterized as Unofficial, Private Acts in U.S. Law.

The district court below itself cited a few pertinent cases, Opinion, at 12 (Second Circuit has stated in dictum that "there is respectable authority for denying head-of-state immunity for former heads-of-state."), but failed to note that the "private acts" exception is part of the traditional common law doctrine of immunity (Opinion, at 5, 13), that violations of *jus cogens* norms which prohibit torture, genocide and crimes against humanity are characterized as private acts in U.S. case law, and that the policy favoring immunity for heads of state does not carry the same weight in cases of individuals who are no longer in office.

As noted in considerable detail and depth by Jordan Paust (*see Paust Amicus Brief* § III A and cases cited therein), the "private act" exception to immunity is hardly a new development, but figures in a line of cases beginning with The Schooner Exchange, supra, and *The Santissima Trinidad*, 20 U.S. 283, 5 L.Ed. 454 (1822), two early Supreme Court cases which limited immunity to the public governmental acts of the sovereign. However, while some 19th and 20th

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1472.

century cases denied immunity not only for purely commercial acts, but also comprised murder and other criminal acts,[6] it has been primarily since the mid-20th century that courts around the world have emphasized the individual and private nature of acts like torture, genocide and other crimes against humanity. That such shifts in approach parallel the growing recognition of the fundamental dignity of the person acknowledged in international and U.S. law is not particularly surprising.

There are a growing number of court decisions indicating that U.S. courts are not extending "Foreign Sovereign Immunity Act" [hereinafter FSIA] immunity to officials responsible for torture, genocide, crimes against humanity and other jus cogens norms of international law because they are deemed, by definition, unlawful and unauthorized in nature, and outside the scope of an official's authority. In addition to the cases cited above, *s*ee, *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 (S.D.N.Y.1996) (agreeing that FSIA is inapplicable to the "commission of acts which exceed the lawful boundaries of a defendant's authority"); *Xuncax v. Gramajo*, 886 F.Supp. 162, 175 (D.Mass.1995) (refusing to apply immunity because the alleged violations of human rights "exceed[ed] anything that might be considered to have been lawfully within the scope of Gramajo's official authority"); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir.1990) (FSIA immunity is lost if an official acts "completely outside his governmental authority"); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) ("There is no discretion to commit, or to have one's officers or agents commit, an illegal act...no 'discretion' to perpetuate conduct designed to result in...assassination..., action that is clearly contrary to the precepts of humanity, as recognized in both national and international law").

[6] *Paust Amicus Brief* § I A (1).

Similarly, courts have generally rejected claims by former officials that the act of state doctrine bars adjudication of human rights violations. *See*, for example, *Jimenez v. Aristeguieta, 311 F. 2d 547, 557* (and cases cited therein*); Paust Amicus Brief*, *supra*, § I.A; argument in this brief § I C. In fact, according to the Senate Report on the Torture Victim Protection Act, the act of state doctrine does not apply to torture and similar violations of international law: "[S]ince this doctrine applies only to public acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation." S. Rep. No. 249, 102nd Cong., 1st Ses. (1992).

In the District Court decision below, Judge Kennelly recognized that *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, (1812), a case that he relies upon heavily to conclude that foreign heads of state are absolutely immune from suit, "leaves open the possibility that a 'prince' may not be immune for his purely private ventures." But although he recognized this exception, he failed to apply it to acts of torture and other human rights violations that are widely recognized as being private in nature because they are unauthorized and not public, official acts. *Plaintiffs A, et al. v. Jiang***,** 2003 WL 22118924, pp. 5-6 n. 4 (N.D.Ill. 2003) [hereinafter Opinion].

Indeed, 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 *jus cogens* norms and international criminal law are "*ultra vires"* and cannot be lawful "public" or "sovereign" acts, but are treated like private acts that are non-immune. *See* Opinion at 12. Since these matters implicate judicial power and responsibility (see *infra* , part IV of this brief), the district court should have identified and applied the immunity exception to find defendant's private acts to be not protectable and nonimmune.

C. Former Heads of State Are Not Immune For Acts Committed After Their Term of Office

Former heads of state have been found to be not immune for acts committed prior to or subsequent to their term in office and thus defendant Jiang is clearly not immune for his continued role in the persecution of Falun Gong after he left the office of the head of state in March of 2003. In *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D.Ill. 2003), Judge Kennelly held that the defendant was entitled to head of state immunity only with respect to the human rights abuses occurring during the very limited time that he held office as Nigeria's head of state. *Id* at 919. In essence, by refusing to extend head of state immunity to the human rights abuses carried out by the defendant prior to his term as head of state, Judge Kennelly recognized that only during the period that an individual is a sitting head of state is a claim of head of state immunity viable and appropriate.

The same reasoning applied by Judge Kennelly in the *Abiola* decision should also be applied to defendant Jiang's continued role in the persecution of Falun Gong practitioners after his departure from the office of head of state. At a minimum, this very same principle, limiting immunity to acts taking place during the term of the defendant's office, should be applied here. Judge Kennelly's outright dismissal of the lawsuit in its entirety, without taking account of defendant Jiang's loss of head of state immunity as of March 15, 2003, therefore constitutes reversible error. See Morton Sklar, *Amicus Brief for Appellants* [hereinafter *Sklar Amicus Brief*] and cases cited therein.

III. FORMER HEADS OF STATE ARE NOT IMMUNE FOR TORTURE, GENOCIDE AND CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW.

While international law provides immunity to heads-of-state for public acts committed during their tenure in office, it does not provide immunity to former heads of state for private acts committed during their tenure in office. Under international law, a head-of-state no longer enjoys complete immunity from civil or criminal process. Immunity from suit does not equal impunity: they are distinct concepts. Not only did the District Court below decide erroneously because it ignored the principle of non-immunity in U.S. common law for the "private" acts of former heads of state, but also because it ignored the principles of non-immunity for former heads of state in international law. Both customary international law and treaty law preclude immunity for acts of torture and other prohibited violations of *jus cogens* norms, for sitting heads of state, once they leave office.

A. Customary International Law Precludes Immunity for Former Heads of State for Acts of Torture, Crimes Against Humanity and Other Serious Human Rights Crimes. [7]

Those responsible for torture, genocide and other crimes against humanity cannot invoke immunity or special privileges as a means of avoiding criminal or civil liability. The fundamental rule exempting officials from immunity for such international crimes has included former heads of state. Both the opinions of jurists and state practice indicate that former heads of state may not appeal to their official position within the state when their acts constitute grave breaches of the norms of international law. In fact, while former heads of state do still retain immunity for the official acts they committed while in power, they enjoy no protection for their

[7] The Supreme Court has enumerated the appropriate sources of international law. Customary international law may be "ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage or practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1829) (cited in *Filartiga v.*

violations of *jus cogens* and universally recognized norms of international law because such serious abuses cannot and do not fall within the scope of a head of state's legitimate functions.

Prior to and particularly ever since the Charters of the International Military Tribunal at Nuremberg (1945) and the International Military Tribunal for the Far East (1946), there has been a recognition of non-immunity under customary international law for former heads of state for violations of *jus cogens* and other human rights norms. *See, e.g.*, *Paust Amicus Brief* at I.A, and cites enumerated.

The principle of non-immunity under customary international law for former heads of state had long been established by state practice even before the Second World War. Before the allies planned to bring Adolf Hitler, the head of state of Germany, to justice for crimes like those alleged in plaintiffs' complaint, the Allies and Associated Powers, under Article 227 of the Treaty of Versailles of 28 June of 1919, publicly arraigned "William II of Hohenzollern, former German Emperor, for a supreme offense against international morality and the sanctity of treaties," and provided a special tribunal to try the former head of state, with judges appointed by Great Britain and other countries. *Amnesty Amicus Brief for Appellants, Ex Parte Pinochet at 9 (http://www.derechos.org/nizkor/chile/juicio/amicus.html)* [hereinafter *Amnesty Amicus Brief*].

The decision to bring Adolf Hitler, the former ruler of Nazi Germany, to justice for his international crimes under Article 7 of the Nuremberg Charter was aborted by his death. Drafted in 1945 by the United States, Great Britain, France and the Soviet Union, Article 7 of the Charter expressly provided: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." As Justice Robert Jackson, the renowned United States

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Pena-Irala, 630 F. 2d 876, 887 (2d Cir. 1980).

Prosecutor at Nuremberg and one of the authors of the Charter, explained in his 1945 report to President Truman regarding the legal basis for trials of such high ranking persons:

> Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine right of kings. We do not accept the legal paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Jackson Coke, who proclaimed that even a King is still under God and the law.'"

(Justice Robert Jackson, Report to President Truman on the Legal Basis for Trial of War Criminals. TEMP. L.Q. (1946), 19, p. 148. [hereinafter Jackson Report]

In its judgment, the International Military Tribunal at Nuremberg similarly concluded that state immunities cannot immunize individual officials for serious crimes under international law. No state may enact legislation authorizing crimes against humanity and *ipso facto*, immunize the participants by reference to these laws.[8] The Nuremberg Tribunal held high-ranking officials, including former head of state Karl Doenitz, guilty for their different levels and degrees of complicity with and participation in the holocaust of the Second World War, notwithstanding the German government's endorsement of their crimes.

The principles articulated in the Nuremberg Charter and Judgment has long been recognized as part of international law. The UN General Assembly endorsed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" in GA Res. 95 (I) of December 11, 1946. Indeed, the fundamental rule of customary international law that former heads of state do not enjoy immunity for acts such as torture,

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[8] "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*

genocide and crimes against humanity has been consistently reaffirmed by the international community. *See*, for example, Article 6 of the Charter of the International Military Tribunal for the Far East (1946); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950); Article 3 of the UN Draft Code of Offenses against the Peace and Security of Mankind (1954); Article 7(2) of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia [hereinafter ICTY Statute]; Article 6(2) of the 1994 Statute of the International Criminal Tribunal for Rwanda [hereinafter ICTR Statute]; and Article 7 of the UN Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996.

Other leading international authorities have concluded that the principles of the Nuremberg Charter and Judgment, which include the principle that individuals notwithstanding their official position, even as head of state, are not immune for torture and other *jus cogens* crimes against humanity, are part of international law. *Amnesty Amicus Brief* at 11.

The rule that immunity under international law for former heads of state is limited, particularly when they have been accused of the violation of *jus cogens* and universally recognized norms of international law, has been recognized by U.S. and other national courts (*Amnesty Amicus Brief* at 13), and by international *ad hoc* tribunals. For example, The International Criminal Tribunal for the former Yugoslavia [hereinafter ICTY] in Jurundzija held that the principle that individuals are personally responsible for acts of torture, whatever their official position, even if they are heads of state or government ministers, is "indisputably declaratory of customary international law." *The Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-T, Trial Chamber of the ICTY, Judgment of 10 Dec. 1998. *See also*, *The Prosecutor*

41 AM. J. INT'L L. 172, 221 (1947).

v. Tadic, ICTY-94-1-AR72 (2 Oct. 1995), where the Appeals Chamber of the 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 [violations of all] 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. Similarly, in *The Prosecutor v. Milosevic*, ICTY-99-37-PT (8 Nov. 2001), the Trial Chamber of the ICTY ruled that President Milosevic of Yugoslavia had no immunity from alleged international (*jus cogens*) crimes against humanity and violations of the customs of war as a head of state. In rejecting the assertion of immunity raised in the *amici curiae*, the Court held that Article 7, paragraph 2 of the ICTY Statute "reflects a rule of customary international law." *Id*. at paras. 26-34.

The broad agreement in customary international law about the core protections that rise to the level of *jus cogens*, is further reiterated in several cases in which former head of state or foreign ministers were denied immunity for their *ultra vires* violations of *jus cogens* norms. For example, in the cases against former head-of-state Pinochet and former foreign minister Yerodia,[9] the courts reaffirm this precept in their findings. Even though Pinochet was charged with crimes committed while he served as head of state, because international law deems torture so far outside the bounds of legitimate state action, he was considered a private actor and his acts were held to be non-immune.[10]

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[9] See, e.g., *Regina v. Bow St. Metro. Stipendary Magistrate*, (2000), 1 A.C. 147, 205-06 (H.L. 1999) (denying immunity to Pinochet and allowing the extradition procedure to proceed on charges of torture in pursuance of a conspiracy to commit torture); *Arrest Warrant of 11 April 2000 (Congo v. Belgium.)*, 41 I.L.M. 536, 541 (2002).

[10] See Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State is Not Immune for Torture*, 14 TEMP. INT'L & COMP. L.J. 263, 326 (2000), (reporting

On April 11, 2000, a Belgian investigating judge for the International Court of Justice (ICJ) issued an international arrest warrant in absentia against a former foreign minister official, Abdulaye Yerodia Ndombasi, accused of violations of *jus cogens,* crimes against humanity.[11] In its decision, the Court emphasized, "immunity from criminal jurisdiction and individual responsibility are quite separate concepts." A ruling of immunity for a sitting official is not a grant of impunity from future adjudication. While the court here addresses the immunity status of a foreign minister, the same logic applies to heads of state. As M. Tunks notes, *id.* at 551-52, the court indicates by its analysis that a former head of state is not immune for private acts committed during his term of office because they are not official acts.

Judge Higgins observes in her Joint Separate Opinion in *Arrest Warrant of 11 April 2000 (Congo v. Belgium.)*, 41 I.L.M. 536, 541 (2002) [hereinafter *Arrest Warrant, Yerodia*], at paras. 84-5, regarding the non-immunity status of the former foreign minister, Yerodia: "The very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minster of Foreign Affairs of the Congo. Nevertheless, once Mr. Yerodia leaves the office, he is no longer immune for the private acts he committed during his term of office. *See also*, Andrea Bianchi, *Denying State Immunity to Violations of Human Rights*, 46 AUSTRIAN J. OF PUB. & INT'L LAW 299 (1994), (stating that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone [in contrast to an individual] can perform); Goff, J and Lord Wilberforce who articulated this test in the case of *I Congresso del Partido* (1989)

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that a majority of the Law Lords in the Pinochet case found that acts performed by state officials under color of law are not necessarily state acts when the conduct violates international law).

[11] The two traditional bases for a recognition or grant of head-of-state immunity are the sovereign or the foreign minister. *See, supra* II A.

QB 500 at 528 and (1983) AC 244 at 268, respectively); *Attorney General of Israel v. Eichmann*, 36 International Law Reports 277, 290-93 (Isr. S. Ct. 1962).

B. Treaty Law of the United States Precludes Immunity for Former Heads of State

Immunity for former and sitting state actors for grave violations of international law has effectively been reversed by international treaty law. Treaty law removing such immunity dates back to the Versailles Treaty[12] and includes the Nuremberg Principles[13] as well as the Torture Convention, the Genocide Convention and the International Covenant on Civil and Political Rights. The treaty-based denials of immunity contained therein constitute a supreme federal law binding on the federal courts, and within judicial power and responsibilities under Article III, § 2 of the United States Constitution, (U.S. Const., art. III, §. 2) and 28 USC § 1331, and as incorporated through other statutes such as the Alien Tort Claims Act and the Torture Victim Protection Act. 28 U.S.C.§ 1350[14] **(***See, e.g.*, RESTATEMENT THIRD, *supra*, § 111, and cmts. a, c, d, e, there under and § 113, and cmt. b, there under; *Paust Amicus Brief* § I B). [15] Moreover, like all international instruments to which the United States is a signatory, they are controlling over

[12] The Treaty of Versailles, June 28, 1919, Article 227.

[13] *See*, Principles of the Nuremberg Charter and Judgment, adopted by U.N.G.A. Res. 177(II)(a), 5 UN GAOR, Supp. No 12, U.N. doc. a/1316 (1950), principle III ("The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or a responsible government official does not relieve him from responsibility under international law.")

[14] The framers regarded treaty law so highly that they incorporated it directly into the text of the U.S. Constitution, Article VI, cl. 2 states: "[A]ll Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

[15] The federal courts of course have been specifically empowered to hear cases involving treaties. U.S. Constitution, Article III, section 2, clause 1 specifies that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority…" U.S. Const., art. III, § 2, cl 1. As noted in more detail *infra,* IV B, the judiciary has the exclusive right to interpret international agreements. Federal courts are the proper forum for determining the rights granted under a treaty and the federal courts also have the

common law and all prior inconsistent statutes**.** The non-immunity provisions of U.S. treaty law necessarily prevail over the U.S. cases cited by the District Court in support of the common law suggestion of immunity procedure. *See also, infra* § IV B.

The Torture Convention, ratified by the U.S. on Nov. 20, 1994, precludes immunity for violations of the *jus cogens* norm of torture, and insofar as it reaches all public officials, it most certainly includes a former head of state. For example, in Article 1(1) of the Torture Convention, torture is defined as including "such pain or suffering...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 United States, as a signatory, "shall ensure...that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation" and if "death of the victim [occurs] as a result of an act of torture, his dependents shall be entitled to compensation."

Notwithstanding pre-1992 court decisions regarding the immunity status of former (or sitting) heads of state, once the United States ratified the Torture Convention in 1994, there was no longer any immunity for former heads-of-state for acts of torture. Regarding cases decided since the ratification of the Torture Convention, none of those cases address or even acknowledge the issue, thereby failing to take into account the fact that no person, regardless of his title or rank, is immune for acts of torture under U.S. law.

The significance of the immunity provisions have been well noted by the United Kingdom House of Lords, who relied primarily on this international instrument to deny immunity to the former head of state of Chile, Pinochet, ruling that state immunity may not attach to a former head of state for acts of torture in part because "the commission of a crime

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responsibility to apply treaties as domestic law.

which is an international crime against humanity and *jus cogens*...cannot be a state function." *See Ex Parte Pinochet,* (opinion of Lord Browne-Wilkinson); *see also, id*. (Hutton, L.J., sep. opinion) ("torture...cannot be regarded as functions of a head of state under international law...not entitled to claim immunity").[16]

Immunity is similarly precluded for state actors, including former heads of state, for the international crime of genocide, also alleged by plaintiffs in this case. Under Article 1V of the Genocide Convention, ratified by the U.S. in 1988, non-immunity is recognized 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).

The principle of non-immunity is also upheld for former and current state actors, including former heads of states under the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 9, 1966), ratified by the U.S. Sept. 8, 1992 for violations of *jus cogens* norms such as the prohibitions against torture, slavery, and genocide, in addition to violations of universally recognized norms of international law including arbitrary arrest and detention. As a signatory, the United States has formally and officially agreed "[t]o ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the

[16] In the same opinion, the rationale for the non-immunity principle enunciated above by, *inter alia*, the I.M.T. at Nuremberg, is reaffirmed by Lord Browne-Wilkinson as the reason for holding that acts of torture may not be qualified as a function of a head of state: that international law cannot regard as official conduct something which international law itself prohibits and criminalizes. Lord Wilkinson supplemented this traditional rationale with yet another – "that a constituent element of the international crime of torture is that it must be committed 'by or with the acquiescence of a public official or other person acting in an 'official capacity.' Thus it would be unacceptable if the head of state escaped liability on grounds of immunity while his inferiors who have carried out his orders were to be held liable." (*Ex Parte Pinochet* at 114-115 a-e).

violation has been committed by persons acting in an official capacity," art. 2(3)(a), 9.[17] *See also id*. art. 50 (all of "[t]he provisions of the present exceptions."); U.N. Human Rights Committee, General Comment No. 20, (forty-fourth session, 1992), 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").[18]

The International Covenant on Civil and Political Rights 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: that "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); See, *Paust Amicus Brief, supra*, § I. B. I.[19]

The District Court below did not address, much less acknowledge, the above-referenced treaties, notwithstanding their relevance to the case on appeal. Once the United States ratified

[17] Plaintiffs do not use the International Covenant on Civil and Political Rights directly to create a private cause of action, since their causes of action are based in implementing or executing legislation such as the Alien Tort Claims Act and the Torture Victim Protection Act, as supplemented by 28 U.S.C. § 1331. They use Articles 2, 14, and 50 of this treaty, through such federal statutes, to assure nonimmunity for a former head of state with respect to violations of international law.

[18] The treaty-based requirement of nonimmunity also exists in other basic human rights treaties. *See Paust Amicus Brief*, sec. I B.

[19] *See also* U.N. 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. For an analysis of the

these treaties, there was no longer any immunity for former heads of state for acts of torture, genocide, and other *jus cogens*. These treaty-based requirements prevail over the common law suggestion of immunity procedure utilized in this and other cases, no less than the common law doctrine of immunity for heads of state.

IV. ABSOLUTE DEFERENCE TO THE EXECUTIVE BRANCH'S SUGGESTION OF IMMUNITY FOR FORMER HEAD OF STATE'S ACTS OF TORTURE, GENOCIDE AND *JUS COGENS* VIOLATIONS IS INCONSISTENT WITH IMPORTANT POLICY CONSIDERATIONS AND OFFENDS THE DOCTRINE OF SEPARATION OF POWERS

Cases which implicate foreign policy considerations are not necessarily within the absolute discretion of the Executive branch. Indeed, one function of the judicial branch is to decide cases and controversies arising under treaty law and customary international law as part of U.S. law. 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 decide questions of law, and this would create a violation of the doctrine of separation of powers.

Even if the court finds that some public officials should have immunity, competing considerations should be weighed prior to a determination of immunity. Of relevance are whether or not the alleged violation is an official or private act (taking into consideration the seriousness of the abuse, *jus cogens* being the most serious) the rank of the official (head of state, foreign minister or lower official), whether the defendant is a current or former official, whether

liberal interpretation of this and other treaties *see*, *Paust Amicus Brief, supra*, § I B (1).

the acts were committed during the tenure of his office or in the alternative before or after his term of office.

A. Policy Reasons Support Non-Immunity for Former Heads of State for the Violations of the Prohibitions Against Torture, Genocide and Other *Jus Cogens* Norms While in Office

There is broad agreement about the core protections that rise to the level of *jus cogens*, preemptive rights that no government can deny. This is reflected in customary international law, international treaty law, and U.S. common law. Distinguishing serious human rights violations from other "governmental" acts clearly is consistent with important 20th century trends in customary international law, multilateral conventions and treaties, and American jurisprudence, all of which argue for universal condemnation of these practices and reject policies which lend comfort to perpetrators of these acts. Peter Evans Bass, Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy, 97 YALE L.J. 299, 306, and especially, notes 88-92.

Furthermore, and, as the Second Circuit noted in *The Republic of Philippines v. Marcos*, 806 F.2d 344, 358 (2nd Cir. 1986), the rationale underlying sovereign immunity – avoiding embarrassment to our government and showing respect for the foreign state - may well be absent when the individual is no longer the head of state. Moreover, even if our government were to experience a degree of embarrassment[20] (and perhaps inconvenience) by the adjudication of this matter, and even if the court were to believe that the doctrine of comity should prevail in some former head-of-state contexts, to allow such a result in the context of alleged torture and genocide violates the strong United States interest in addressing *jus cogens* violations through the

[20] The limit placed by *Environmental Tectonics v.W.S. Kirkpatrick,* 847 F. 2d 1052, 1061 (3rd Cir. 1988), on the possibility of embarrassment is also of relevance (merely because adjudication raises the

Alien Tort Claims Act, *Presbyterian Church, supra* at 343, citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-04 (2nd Cir. 2001)

Finally, heads of state need not be protected from civil or criminal process after they cease their tenure in office because there is no longer any concern that such process will affect their ability to carry out their duties efficiently and effectively; and accountability for private acts will not interfere with their nations' ability to effectively engage in diplomatic relations.

As noted above, in section III A, immunity from suit is not the equivalent of exoneration from criminal responsibility irrespective of the gravity of the crime and its impact on the community on man.

B. The Court's Automatic and Absolute Deference to the Suggestion of Immunity in All Cases Offends the Doctrine of Separation of Powers

Cases which implicate foreign policy issues are not necessarily within the absolute discretion of the Executive branch. One function of the judicial branch is to decide cases and controversies arising under treaty law and customary international law as part of U.S. law. See generally, U.S. Const., art. III, §. 2; U.S. Const., art. VI, cl. 2; RESTATEMENT THIRD, *supra*, §§, 111 (1) "International law and international agreements of the United States are law of the United States…"), (2) ("Cases arising under the international law or international agreements of the United States are within the judicial power of the United States are…within the jurisdiction of the federal courts."), (3) ("Courts in the United States are bound to give effect to international law and international agreements…"), and cmts. c,d,e, RN 4, 113; *Paust Amicus Brief supra*, § III.B, and numerous cases cited therein, including: *The Paquette Habana*, 175 U.S. 677, 700,

possibility of embarrassment is not sufficient ground for dismissal under the act of state doctrine).

708, 714 (1900); *Hilton v. Guyot*, 159 U.S. 113, 116 (1895); *Filartiga v. Pena-Irala*, 630 F. 2d 876, 887 (2d Cir. 1980).

Moreover, as the Second Circuit more particularly observes in Filartiga, id at 885, as "an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, s 9(b), 1 Stat. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are at issue. The constitutional basis for the Alien Tort Claims Act is the law of nations, which has always been part of federal common law." More generally, as Jordan Paust observes, for more than 200 years, issues concerning the non-immunity of public officials under U.S. treaty law, customary international law, and U.S. statutes have been issues of law for the courts to decide. *See*, *Paust Amicus Brief* , supra, § III.B.

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 decide questions of law, and this would create a violation of the doctrine of separation of powers. *See*, *Paust Amicus Brief*, III B and citations contained therein.

Even if the court finds that some public officials should have immunity, competing considerations should be weighed prior to a determination of immunity.[21] Surely of relevance are

[21] The district court below failed to take into account any of these distinctions. Most of the cases cited to support an unlimited and absolute deference to the Executive branch's "suggestion of immunity," are current head-of-state cases. *See for example*, *Tachonia v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001); *LaFontant* ("The United States Government has consistently recognized Jean-Bertrand Aristide as the current lawful head-of-state of the Republic of Haiti."). *Id.* at 130. With a few exceptions, moreover, most of the head-of-state cases cited by the court do not address *jus cogens* violation, but rather allege mere copyright and breach of contract violations (*Leutwyler v. Office of her Majesty Queen Rania Alabdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001); ordinary negligence claims *(First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 119 (D.D.C. 1996); or ordinary tort claims (*Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 370, 382 (S.D. Tex. 1994). Moreover, the cases cited by the Court below, which are analogous to the case on appeal, (*Abiola v. Abubakar*, 267 F. Supp, 2d 907 (N.D. Ill. 2003); *Boshnjaku v. Federal Republic of Yugoslavia*, 2002 WL 1575067 (N.D. Ill.)) were decided by the same judge, apparently unaware of the law and rules addressed herein.

whether or not the alleged violation is an official or private act (taking into consideration the seriousness of the abuse, *jus cogens* being the most serious) the rank of the official (head of state, foreign minister or lower official), whether the defendant is a current or former official, whether the acts were committed during the tenure of his office or in the alternative before or after his term of office.

The doctrine that heads of state have unlimited power to violate the preemptive *jus cogens* norms even after they leave office, is out of step with modern developments in international and domestic law. This is especially true when the principle of sovereignty with its many corollaries including immunity is at odds with the notion that fundamental rights should be respected and that certain particularly heinous violations, should be prevented and punished irrespective of the status or title of the agent. As Justice Jackson, the United States prosecutor at Nuremberg, stated, "if certain acts in violation of [the law] are crimes, they are crimes," no matter who commits them.[22]

V. THE DISTRICT COURT ERRED IN FINDING THAT JIANG ZEMIN MAY NOT BE SERVED ON BEHALF OF OFFICE 6/10

Appellants argued below that service upon defendant Jiang Zemin was sufficient to effect service upon defendant Office 6/10. The United States Government moved to dismiss, and the District Court granted the motion, in part on the ground that Office 6/10 had not been served. Opinion at 16-17. Specifically, the District Court found the Complaint had insufficiently alleged the type of agency relationship between Jiang and Office 6/10 required under the relevant service rules, here, Fed R. Civ. P. 4(h), 735 ILCS 5/2-204, and 735 ILCS 5/2-209.1. Opinion at 17.

[22] Report of Robert Jackson, Dept. of State Pub. No 3080, at 330 (London 1945).

This decision is reviewable *de novo*. *See Claus v. Mize*, 317 F.3d 725, 727 (7th Cir. 2003). As discussed below, Rule 4(h) clearly permits Jiang Zemin to receive service of process on behalf of Office 6/10.

Under Fed. R. Civ. P. 4(h), service on either a foreign corporation or an unincorporated association can be effected "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or law to receive service of process." Fed. R. Civ. P. 4(h).

While there is little relevant Seventh Circuit authority, a number of other courts and commentators have interpreted this rule. Whether an individual is "a managing or general agent" depends on a factual analysis of that person's authority within and connection to the organization. *Gottlieb v. Sandia Am. Corp*, 452 F.2d 510, 513 (3d Cir. 1971); 2 *Moore's Federal Practice* § 4.22[2] (2d ed.1970). A few principles should guide this factual analysis. First, a managing or general agent must be invested with powers of discretion and must exercise judgment in his or her duties, rather than being under direct superior control as to the extent of the duties and the manner in which they are executed. *Grammenos v. Lemos*, 457 F.2d 1067, 1073 (2d Cir. 1972); s*ee* 2 *Moore's Federal Practice* § 4.22[2]. Second, he or she should be "a responsible party in charge of any substantial phase" of the corporation's activity, *Gottlieb*, 452 F.2d at 513. Third, the general or managing agent will have a degree of continuity in his or her relationship with the organization, and the authority to act as an agent in a single transaction or sporadically is not sufficient to make them a person authorized to accept service. *Gottlieb*, 452 F.2d at 513, *see Am. Jur. 2d* Process § 273 (2003). Fourth, an individual's involvement in the financial affairs of an entity is sufficient to make him or her an agent for service. *In re Grand Jury Subpoenas Issued to*

Thirteen Corporations, 775 F.2d 43 (2d Cir. 1985). And fifth, the rule significantly "does *not* require that service be made solely on a restricted class of formally titled officials, but rather permits it to be made upon a representative so integrated with the organization that he will know what to do with the papers. Generally, service is sufficient when made upon any individual who stands in such position as to render it fair, reasonable and just to imply authority on his part to receive service." *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa*, 428 F.Supp. 1237, 1251 (S.D.N.Y.1977) (emphasis added) (analyzing Rule 4(d), which was later to become Rule 4(h)).

Further, the purpose of the rule is to bring home to the defendant notice of the filing of the action; service should be made upon a representative so integrated with the organization that he or she will know what to do with the papers. 2 *Moore's Federal Practice* § 4.22[2].

The Complaint here contains allegations sufficient to meet the requirements of Rule 4(h). It alleges that Office 6/10 is under Jiang Zemin's "command and control," Complaint at ¶¶ 6, 7; is under his "mandate and direction," Complaint at ¶ 25; that the campaign to persecute Falun Gong was "initiated, designed, authorized, and implemented by defendant JIANG at the highest levels of the Communist Party and the government."), Complaint at ¶ 27; and that he "has exercised command authority over the clandestine operation of the Office 610, at both national and local - city and province – levels," Complaint at ¶ 40.

That Jiang "control[s]" and "direct[s]" and "command[s]" the Office and has "designed" and "implemented" the anti-Falun Gong campaign necessarily means that he meets the key tests outlined in the case law—that he "exercises judgment" with regard to the Office, *Grammenos,* 457 F.2d at 1073; that he has "powers of discretion," *id.;* that he is not "under direct superior control," *id.;* and that he is a "responsible party in charge of [a] substantial phase of operations."

Gottlieb, 452 F.2d at 513. In fact, Jiang has a degree of authority and connection even stronger than what is required under Rule 4(h)—not only is he a person with some degree of authority over some segment of Office 6/10, he is in fact the ultimate authority with complete control over the entire office.

Further, Jiang has exercised his authority "with a degree of continuity, " *Gottlieb*, 452 F. 2d at 513, and not "sporadically," *id*, as he founded the Office on June 10, 1999, Complaint at ¶ 7, "developed and instituted" a harsher campaign by April 2001, Complaint at ¶ 35, and has "continued to play a critically important role in the continued commission of human rights abuses against Falun Gong in China," Complaint at ¶ 40. Whether he has a formal title within Office 6/10 is irrelevant, as Rule 4(h) does *not* require that service be made "solely on a restricted class of formally titled officials." *Top Form Mills*, 428 F. Supp. at 1251. He surely "will know what to do with the papers"--it is inconceivable that service upon Jiang Zemin would result in Office 6/10 being unapprised of the suit.

In sum, Jiang Zemin, who is the very personification of Office 6/10, and is the single most important person within it, fits the definition of "managing or general agent" under Rule 4(h).

VI. PERSONAL JURISDICTION EXISTS OVER OFFICE 6/10

As an alternate ground for dismissal of the case against Office 6/10, the Court held that personal jurisdiction was lacking, finding that the Office lacked the requisite contacts with Illinois, and that also Fed. R. Civ. P. 4(k)(2) did not apply. Opinion at 18-24, Reconsideration Opinion at 2. Dismissals for lack of personal jurisdiction are reviewable *de novo. Claus v. Mize*,

317 F.3d 725, 727 (7th Cir. 2003).

Appellants submit that Office 6/10 has sufficient contacts with Illinois to support the exercise of personal jurisdiction. However, assuming purely *arguendo* that the Illinois contacts are insufficient, Appellants contend that Rule 4(k)(2) and its concomitant nationwide contacts test applies. Fed. R. Civ. P. 4(k). *See Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp,* 230 F.3d 934, 946 (7th Cir. 2000) ("[I]f Illinois could not exert personal jurisdiction, [plainitiff] could take advantage of Fed. R. Civ. P. 4(k)(2), under which we analyze all of [defendant's] contacts with the United States.").

In order for Rule 4(k)(2) to apply, four conditions must be present:

> (1) [T]he plaintiff's claims must be based on federal law; (2) no state court could exercise jurisdiction over the defendants; (3) the exercise of jurisdiction must be consistent with the laws of the United States; and (4) the exercise of jurisdiction must be consistent with the Constitution.

Id. at 940.

Here, the first condition is easily met, as the plaintiff's claims are based on federal law, namely the Alien Tort Claims Act and Torture Victim Protection Act. The third condition is also easily satisfied--the exercise of jurisdiction would be consistent with the laws of the United States because the statutes under which this case arises do not contain their own specific service provisions and thus do not conflict with or override Rule 4(k)(2) service. *See id.* at 940-42.

As to the second condition, that no state court could exercise jurisdiction, the Seventh Circuit has sensibly placed the burden of proof upon the defendant:

> Now one might read Rule 4(k)(2) to make matters worse by requiring 51 constitutional decisions: The court must first determine that the United States has power and then ensure that none of the 50 states does so. The constitutional analysis at the federal level is unavoidable but usually simple (as in this case). Constitutional analysis for each of the 50 states is eminently avoidable by allocating burdens sensibly. A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal

> jurisdiction there (personal jurisdiction, unlike federal subject-matter jurisdiction, is waivable). If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2) .

ISI Intern., Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir. 2001).

Here, as defendants have not come forward to name another state "where this suit could and should proceed," *id.,* they have not met their burden of proof and therefore the second prong of the test must be deemed met under Seventh Circuit standards.

In denying Appellants' Motion to Reconsider, the District Court rejected this burden of proof argument, stating that "plaintiffs *conceded* that jurisdiction over both Jiang and Office 6/10 existed in other states, see Plaintiff's Memorandum on Preliminary and Jurisdictional Issues at 44, and thus there was no need to deal with the allocation of the burden of proof." Reconsideration Opinion at 2 (emphasis original). However, this distorts and overstates the effect of Appellants' "concession." Under this second prong of the *Central States* test, the application of Rule 4(k)(2) is barred only when another state "could exercise jurisdiction over the defendants." *Central States,* 230 F.3d 934 at 940. Appellants below simply did not have the power to unilaterally, via a "concession," *create* jurisdiction over Office 6/10 in another state. As plaintiffs, they could not *vest* another court with jurisdiction over Office 6/10; only a defendant has the power to create personal jurisdiction through its assent. Nor could the District Court deem that another court had jurisdiction, as that type of speculative constitutional decision-making is specifically proscribed by *Central States*.

As to the fourth and last prong, whether the exercise of jurisdiction is constitutional, the relevant question is whether Office 6/10 has sufficient contacts nationwide. *Central States*, 230 F.3d at 946. Here, Office 6/10 has ample contacts with the United States to support the exercise of personal jurisdiction. In Illinois, defendant Jiang visited Chicago and allegedly conducted activities in furtherance of Office 6/10's goals. Complaint at ¶ 8. In Minnesota, a plaintiff was allegedly prevented though the efforts of Office 6/10 from boarding an international flight.

Complaint at ¶ 21. Office 6/10 also allegedly conducted activities aimed at monitoring and harassing Falun Gong demonstrations in Illinois, such as assaults on demonstrators, intimidation of Chicago hotels in order to prevent their hosting of Falun Gong members, and the destruction of leaflets and signs at Falun Gong demonstrations. Opinion at 21; Pl.'s Mem. on Preliminary and Jurisdictional Issues at 44.

CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully request reversal of the District Court's opinions below and recognition that defendant Jiang Zemin is not entitled to immunity with respect to acts in violation of international law addressed in Plaintiffs' Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

I hereby certify that this brief complies with the type volume limitation of Circuit Rule 32(a)(7). The brief contains 13753 words.

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31 (e), versions of the brief and all of the appendix items that are available in a non-scanned PDF format.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 20 day of January, 2004, two (2) true and correct copies of the above and foregoing brief and a digital versions containing the brief were served upon:

Jeremiah E. Goulka
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883, Rm. 6136
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Jiang Zemin, Chair
Central Military Committee
Zhongnanhai
Beijing China

by regular U.S. mail on or before the hour of 5:00 p.m. this 20th day of January 2004.

_____

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), the Appellants' Appendix contains all the materials required by Circuit Rules 30(a) and (b).

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ATTACHED REQUIRED SHORT APPENDIX

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