IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PLAINTIFFS A, B, C, D, E, F, and OTHERS SIMILARLY SITUATED, WEI YE, and HAO WANG	)	
	)	No. 02 C 7530
Plaintiffs,	)	Judge Kennelly
v.	)	
JIANG ZEMIN and FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 6/10),	)	Magistrate Judge Levin
Defendants.	)	

PLAINTIFFS' MEMORANDUM ON PRELIMINARY AND JURISDICTIONAL ISSUES

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PLAINTIFFS' MEMORANDUM ON PRELIMINARY AND JURISDICTIONAL ISSUES

I. QUESTIONS, OBJECTIONS AND DEFENSES RELATED TO ALLEGED DEFICIENCIES IN THIS COURT'S PERSONAL JURISDICTION MAY BE RAISED ONLY BY DEFENDANTS AND PARTIES TO A PROCEEDING, AND MAY NOT BE BROUGHT BEFORE THE COURT BY A NON-PARTY, AND/OR AN AMICUS.

On October 18, 2002, Plaintiffs filed a complaint against Defendant Jiang Zemin and Defendant Office 6/10 for genocide, torture, and other violations of the "law of nations" under the Alien Tort Claim Act and the Torturer Victim Protection Act. 28 U.S.C. § 1350. At the January 13, 2003 Preliminary Hearing, the Court asked Plaintiffs to analyze preliminary and procedural issues prior to a consideration of the merits of the case. Some of these issues had been raised in an *amicus curiae* submission filed by the United States Government on December 12, 2002.

A. Challenges to the District Court's jurisdiction may be raised either by a party or by the court upon the filing of a motion for default judgment, but may not be raised as a personal defense by a non-party to the case. Nor may it be raised *sua sponte* by the court prior to the filing of a motion for default judgment.

Rule 12 (d) of the Federal Rules of Civil Procedure requires that personal defenses such as those the United States Government has attempted to invoke in this case, be filed only by a party to the case. These include, as enumerated in sections 1-7 of subdivision (b) of Rule 12 of the Federal Rules of Civil Procedure, (1) lack of jurisdiction over a party, (2) insufficiency of process, and (3) insufficiency of service of process. As a non-party to the case, the United States Government does not have standing to submit evidence on issues which pertain to the court's personal jurisdiction over the defendants due to insufficiency of process and/or of insufficiency of service of process. *In re Blutrick, Herman and Miller,* 227 B.R. 53, 58 (S.D.N.Y. 1998); s*ee also De Fazio v. Wright,* 229 F. Supp. 111, 113 (D.N.J. 1964) Moreover, none of the personal defenses enumerated above, may be raised by another *on behalf of a party. Williams v. Life Savings and Loan,* 802 F.2d 1200, 1201 (10th Cir 1986). Having agreed to accept the status of non-party, the United States Government may not assert personal defenses in lieu of or as a proxy for and/or on behalf of the Defendants in this case.

B. FSIA system eliminated diplomatic interventions and pleadings, and required foreign defendants to come to court to present their own affirmative defenses.

Claims challenging personal jurisdiction, whether related to insufficiency of service or immunity based on official status must be made affirmatively by the Defendant appearing as a party to the judicial proceedings, and can not be made indirectly on his behalf using diplomatic channels through non-party interventions by the U.S. Government. Since the passage of the Foreign Sovereign Immunity Act (FSIA) in 1976 there has been a growing recognition by the courts that insufficiency of service and immunity claims, whether made on behalf of governments based on sovereign status, or made on behalf of individuals based on official diplomatic or head of state status, must be made on an affirmative basis by the defendants in legal proceedings, instead of by the U.S. Government acting in their behalf through diplomatic channels. The principle that the FSIA endorsed and established is that these types of claims should no longer be resolved through diplomatic channels that are subject to sometimes intense political pressures and foreign policy considerations, but rather by courts based on legal standards instead of foreign policy considerations.

This is not to suggest that the FSIA, which deals with legal actions against governments, was intended to govern the immunity claims of individuals. Clearly, the FSIA itself was not intended to deal with cases where the foreign sovereign itself was not made a defendant in a case. But the principle embodied in the FSIA to treat these types of claims through the judicial process rather than diplomatically would appear to be equally applicable to immunity claims raised by government officials as it is to foreign sovereignty claims brought by governments themselves. The same reasoning, recognizing the need to treat these matters through the judicial process rather than through diplomatic channels based on foreign policy considerations, applies whether the defendant is a foreign official, or a foreign government. This approach has been proposed in the most comprehensive legal commentary that is available on head of state immunity issues. Jerrold Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev., 169 (1986), suggests that, "Although Congress apparently intended the FSIA to encompass only state immunity" claims, it makes sense for the approach taken under the FSIA to be used "as an acknowledged basis for making head of state immunity determinations." as well. *Id.* at 188.

As the legislative history of the FSIA makes clear, it has become common practice in courts throughout the world for "pleas of immunity [to be] routinely denied in tort and contract cases where the necessary contacts with the forum were present." H.R. Rep No. 94-1487, 94th Cong., USCCAN p. 6604, 6607 (Sept 23, 1992). It was the purpose of the FSIA "to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to 'suggestions of immunity' from the executive branch." H.R. Rep at 6610. For this reason, the FSIA made sovereign immunity "an affirmative defense which must be specially pleaded" by the foreign government, which had the burden of "proving their eligibility for immunity." H.R. Rep. at 6616. It is logical and appropriate, as the Columbia Law Review note on this topic suggests, to apply the same approach and standards in the case of foreign officials seeking to make immunity claims based on their official status. This principle has been affirmed in the case of *In re Estate of Marcos*, 978 F.2d 493 (9th Cir. 1992).

C. Submissions Made by the U.S. Government in the Capacity of Amicus Curiae Should Not be Given the Same Weight as Affirmative Defenses Presented to the Court by a Defendant Party.

Having agreed to accept the status of *amicus curiae* during the preliminary hearing on January 13, the U.S. Government must be bound by normal judicial practice as regards whether, and to what extent, an *amicus* is able to raise issues and defenses that have not been made part of the record of the case through affirmative pleadings by the parties themselves. A number of cases hold that *amici* are limited as regards the issues they can address to those raised in the first instance by the parties. "Amici are allowed to participate ... in order to assist the court in achieving a just resolution of issues raised by the parties. We know of no authority which allows an *amicus* to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." *Lane v. First National Bank of Boston*, 871 F.2d 166 (1st Cir. 1989). *See also*, *Accord National Commission v. FTC*, 570 F.2d 157, 160, note 3, (7th Cir. 1977), and *U.S. v. Sturm, Ruger & Co.*, 84 F.3d 1 (1st Cir. 1996), holding that "While amicus briefs are helpful in assessing litigants' positions, an amicus cannot introduce a new argument into a case."

Along similar lines is the case of *Kreider v. County of Lancaster,* 1999 WL 1128942 (E.D. Pa. 1999) where the court held that, "Because the amicus curiae is not a party to the litigation ...

the Attorney General, as *amicus curiae*, may not raise a defense that has not been raised, or briefed, by the defendants." A similar position was taken by the U.S. Court of Appeals for the Third Circuit in *Newardk Branch, NAACP v. Town of Harrison* 940 F.2d 792 (3d Cir. 1991), where the Court noted that an *amicus* must be "distinguished from an advocate before the court" ... in that, "It serves only for the benefit of the court ... by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Id.* at 808. Given these limitations on the role of the *amicus*, "it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the *amicus*." *Id.*

Plaintiffs contend that this does not include allowing an *amicus* to introduce defenses on behalf of the Defendant, where the Defendants have voluntarily chosen not to appear in Court to plead these or any other defenses in their own capacity, and where the Defendants have chosen to bypass the entire legal proceedings by asking the United States Government to have the case dismissed for them via diplomatic rather than legal channels.

II. THE DELIVERY OF SERVICE ON THE DEFENDANTS PURSUANT TO THE OCTOBER 21, 2002 ALTERNATIVE SERVICE ORDER WAS PROPERLY EFFECTUATED.

Plaintiffs used every conceivable means to serve the Defendants and provide them with adequate notice of the proceedings. Plaintiffs not only delivered copies of the summons, complaint and Prior Order to Commander Griffin of the 18th Precinct Police Department, but also tendered said legal papers to serve several secret service agents. As a result of these efforts, service was effected under the terms of the October 21, 2002 Prior Order, and meets due process and adequate notice standards.

A. Delivery of the summons, complaint, and court order to security personnel was proper.

1. The Legal Papers were delivered to Commander Griffin

There is no dispute that the legal papers were delivered to, and accepted by, Commander Griffin, as the affidavits of the process of service attest.

For example, process server Jason Bobor served two copies of the complaint, summons,

and court order on Commander Griffin at the Ritz Carlton Hotel in the presence of eyewitness David Jerke. Bobor explained to Mr. Griffin in full detail what the papers were and that they were for the defendants. (Affidavit of Jason Bobor ¶ 9). As he tendered the documents, Bobor told Griffin that he was being served with legal papers according to [the terms of] a court order. Griffin asked, "are these the same papers given to Officer Audrey Rogers?" See (Supplemental Affidavit of David Jerke, ¶ 1, (attached as Exhibit B, Affidavit of Marsh. Bobor answered in the affirmative. Jerke further explained by telling Griffin (in words not unlike these) that the Judge authorized him to serve the papers intended for the defendants on Commander Griffin. (Aff. of Jerke ¶ 2)

2. The Legal Papers Were Tendered to the Secret Service Agents Before Being Rejected By Them.

The declarations further demonstrate that on October 21, 2002, Corey Fertel (at or around 1:10 p.m.) and Jason Bobor (at or around 1:35 p.m.) completed service of process on secret service agents detailed to guard Defendant Jiang at the Ritz-Carlton Hotel, where Defendant Jiang resided during his visit to Chicago, Illinois. The affidavit of Jason Bobor is accompanied by a tape recording, which Mr. Bobor took himself. A partial transcript of the recording is submitted herein.

At or around 1:15 p.m. Mr. Cory Fertel and Riordan Galluci, approached a Secret Service agent at the security office of the hotel, located at Mies Van Der Rohe Street. Mr. Fertel told the agent that he "had legal papers to drop off with him and with hotel security as part of process of service upon Jiang Zemin." The Secret Service agent told Fertel he couldn't accept legal papers or documents and asked him instead to leave them on the ground. Mr. Fertel placed the papers consisting of the Prior Order, two copies of the Complaint, and two copies of the Summons (Legal Papers), on the ground, as instructed, (Affidavit of Cory Fertel ¶¶ 4-5.) After Fertel had already delivered the legal papers to the agent in this way, said agent ordered Fertel to remove the papers from the ground and leave. Fertel complied afraid he would be arrested if he did not. (Id. ¶ 5.) [1]

[1] Fertel's service upon the agent does comport with due process. In *Currier v Baldridge,* 914 F.2d 993, 995 (7th Cir. 1990), the 7th Circuit included Illinois among the states accepting the "general method" of placing the papers "in the general vicinity of the person to be served and announcing the nature of the papers." By informing the agent of the contents of the documents, tendering the documents from within arms length, and placing the papers on the ground, in the general vicinity of the agent, Fertel met the requirements of due process. Moreover, in *In re Marriage of Schmitt*, 321 Ill.App.3d 360, 370, 747 N.E.2d 524, 533 (2d. Dist. 2001) Citing *Edward Hines Lumber Co. v. Smith* 29 Ill.App.2d 35, 42, 172 N.E. 2d 429 (Ill. App. 2 Dist. 1961), the court stated without reservation that courts are

As the affidavits indicate, extensive efforts were made by Mr. Bobor who repeatedly tendered the legal papers to several different secret service agents detailed in the lobby of the Ritz Carlton Hotel. Each time the agents refused to accept the tendered papers. They walked away, and they told him he may not leave the papers in the vicinity of the hotel. They threatened him with arrest as a terrorist, they physically escorted him out of the hotel lobby, and they demanded that he instead leave the documents on the podium in the front of the hotel. In each situation, it was clear to the security personnel, as it would be to any reasonable person, that service was being attempted. In each situation, security personnel sought to defeat service upon themselves by rendering service physically impossible. See Partial Transcript of Jason Bobor's Service on Security Personnel (attached as Exhibit C, Affidavit of Marsh.). [2]

B. Service was effectively carried out pursuant to the terms of the Prior Order.

1. The fact that Jiang Zemin may or may not have received copies of the summons, complaint and service order is immaterial under the terms of the Prior Order.

The Prior Order anticipates that the security personnel would deliver the legal documents

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generally unreceptive to persons who scheme to avoid receiving service of process, and that this court, like other courts around the country "does not favor those who seek to evade service of summons." By forcing Fertel to remove from the ground the "already served" papers, the agent now seeks to claim that he was not served. Given the agent's unwillingness to accept service, and his evasion of service, the method Mr. Fertel employed does meet the requirements of due process, and is for that reason adequate.

[2] The facts in *Hines v. Smith* are especially relevant herein. In *Hines*, the process server was attempting to serve the defendant at his home, but was repeatedly told he was not at home. Similarly, Mr. Bobor was repeatedly told he could not leave the papers with the security personnel in the hotel, nor might he leave them on the ground or anywhere else in the hotel lobby. In *Hines*, when the deputy sheriff came to the door of his home and asked for the defendant, he was told that he was not at home. The process server stated, 'well I have a summons for him, and a woman who also resided in the home said, 'well I cannot accept it.' The deputy said, I am going to give it to you anyway.' The deputy then told the woman and her husband that he was tying the summons to the door knob. The woman testified in court that she told the defendant about the deputy sheriff being there, but did not tell him that there was a summons on the door knob because it was not there at that time. The *Hines* court held that "a defendant [may not] circumvent the provisions of the act which provides for substituted service of process …[because] to hold otherwise would render the act useless in many cases and encourage the evasion of service of process." *Hines,* 29 Ill.App.2d at 35, 172 N.E. 2d at 432. Also see, *Schmitt,* 321 Ill. App. 3d at 370. *See also, Freund Equip. Inc. v Fox* 301 Ill.App.3d 163, 234 Ill.Dec. 681, 703 N.E.2d 542 (2d Dist. 1998), This issue has also been addressed by other circuits. See, *Doe v. Karadzic,* 1996 WL 194298 (S.D.N.Y. 1996), *In re Ball,* 2 Cal. App.2d 578, 579 (1934); *Crescendo Corp. v. Shelted, Inc.,* 267 F. Spp.2d 209 (1968). As in *Hines v Smith,* in the case at bar, the actions of Bobor were repeatedly and "reasonably calculated" to apprise the defendant of the pendency of this lawsuit., and are, for that reason, adequate.

to the Defendants upon their receipt of them. However, the Prior Order also states quite clearly that service is accomplished upon delivery to the security detail, and not upon delivery to the defendants.[3] This is clear not only from the terms of the Order, but it is also clear from the District Court's interpretation of a virtually identical Service Order, used by the plaintiffs in *Feng Suo Zhou v. Li Peng,* 00 Civ. 6466 (WHP), 2002 WL 1835608 (S.D.N.Y. 2002).

As in *Feng Suo Zhou v. Li Peng*, the Prior Order was issued pursuant to Fed. R. Civ. P. 4(e), that provides that service on an individual may be effected "pursuant to the law of the state in which the district court is located...." In both cases, the diplomatic security personnel guarding the defendants made it impossible to serve the defendants personally. Plaintiffs in the case at bar, as in *Zhou v. Li Peng*, filed an ex parte motion for an order authorizing substituted service pursuant to 735ILCS 5/2-203, which provides that service may be authorized "in such manner as the court, upon motion without notice, directs, if service is impracticable" by the standard means of service. Since the statutory methods of service were impracticable, this court authorized service on Jiang Zemin through, *inter alia*, security personnel.

The Prior Order states: [S]ervice shall be accomplished by the delivery of a copy of the summons and complaint to any of the security agents helping to guard Defendant Jiang during his stay in Chicago and includes [, among others,] Special Agents of the Secret Service and Commander Joseph Griffin, (emphasis added).

After a careful delineation of the permissible intermediaries to whom copies of said documents might be delivered, the order reads: [It is] Further Ordered that said security agent is to forthwith serve said defendant with said copy of the summons and complaint during Defendant's stay in Chicago.

In the related case, *Zhou v. Li Peng,* 00 Civ. 6466 (WHP), 2002 WL 1835608 (S.D.N.Y. 2002), a suit originally filed in the Southern District of New York, the District Court found "that service on Li Peng was complete under an [analogous order]…when plaintiff's process server delivered a copy of the summons and complaint to Special Agent Eckert." According to the District Court, a plain reading of the Li Peng Order supports this conclusion. The Li Peng Order

[3] Even if one were to interpret the Prior Order as stating that Plaintiffs' service obligations are completed upon delivery of the legal papers to the security personnel, the result is the same, because as stated below, the adequacy of service is based not on the Defendant's actual receipt of the legal papers, but the propriety of the method used by Plaintiffs. *See*, Section II (D).

states, "service shall be accomplished by delivering a copy of the summons and complaint to any employee of the United States government or its agencies who is guarding Defendant Li Peng during his stay in New York." Then in a separate sentence it directs "[s]aid employee is to forthwith provide said defendant with said copy of the summons and complaint during defendant's stay in New York." The District Court concluded by noting that, the first sentence specifies how service is to be accomplished, while the next sentence embodies a separate direction to the Security Detail, entirely beyond the orbit of the process server. *Id* at 11.

Similarly, in the case at bar, the operative portion of the court's Prior Order are the numbered paragraphs, which state "service shall be accomplished by the delivery of [said documents] …to any of the security agents… helping to guard Defendant Jiang…." Nothing in the Prior Order intimates that service itself is not complete until the security personnel deliver the documents to Jiang Zemin. To the contrary, the first three paragraphs specify how service is to be accomplished, whereas the next paragraph embodies a separate directive to the security personnel, also entirely beyond the orbit of the process server and not required for the proper completion of service.

2. The security personnel should have delivered or attempted to deliver the legal papers to the Defendant.

The Plaintiffs' obligations were clearly completed upon delivery of the legal papers to the security personnel. Clearly the security personnel should have delivered the tendered papers to the Defendant. The record shows that the Secret Service security detail, as well as Commander Joseph Griffin, were made aware of the nature of the summons and complaint, as well as the Prior Order, and knew they were intended for Jiang Zemin. (Affidavit of Cory Fertel ¶¶ 4-6; Affidavit of Jason Bobor ¶¶ 4-9) They were also apprised more particularly of the identities of the Defendants, the serious nature of the charges, the fact that they were designated by court order as permissible intermediaries of the service process. [4] In light of the fact that Jiang Zemin was scheduled to leave Chicago, Illinois for Houston, Texas the very next morning, a fact known to all security personnel,

[4] Thus, whether or not the process server told Griffin directly that the papers were time-sensitive is of little consequence here. It is clear from what Bobor and Jerke did say that, as an intermediary in the service process, he knew the defendant was scheduled to leave town early the following morning. Based on what he knew, he should have realized that it was his responsibility as the recipient of the legal papers to make a good faith effort to deliver said papers to the Defendant, directly or indirectly through the chain of security personnel detailed to the Ritz Carlton Hotel on October 22, 2002.

a forthwith delivery (or good faith attempt) was appropriate and could have been reasonably expected.[5] The failure of said security personnel to deliver the tendered documents to Defendant Jiang, however, in no ways alters the fact that service of process was completed under the terms of Court Order.

C. Griffin was properly included in the prior order.

In the case at bar, it is eminently clear that Plaintiffs had a reasonable basis for believing that Commander Griffin was in a position to deliver the legal papers to the Defendant. In a meeting held a few days before the visit of Jiang Zemin to Chicago, Commander Griffin told those present 1) that he would be responsible for the safety of Jiang Zemin while he resided at the Ritz Carlton hotel from October 21 through the morning of October 22 of 2002, (emphasis added), 2) that he would be on site at the hotel throughout the day; and, should they need assistance, he invited them to speak directly to him. Affiants, Dana Cheng and Peng Su, both spoke with and noted Griffin's presence at the Ritz Carlton in the morning, afternoon, and evening hours of October 22, 2002, the day on which the Commander accepted the legal papers on behalf of Defendant Jiang. In fact, Ms. Peng spoke with Mr Griffin at or around 9:00 a.m. on the morning of the 22st of October, at several times during the afternoon, and later again in the evening at or around 9:00 p.m, at which time he told Ms. Peng that he would not be departing until later that evening. (Affidavits of Peng Su, Dana Cheng, and Stephen Gregory, attached as Exhibits D-F to Affidavit of Marsh.)

The distinction Commander Griffin draws between protecting the security of the visiting President of China, and control of protestor demonstrations, is at best strained. Surely by controlling the demonstrations, one is also responsible for the protection and security of the President. But more importantly, the testimony of Mr. Gregory, Ms. Su, and Ms. Cheng all contradict Commander Griffin's assertion that he was not responsible for the security of the defendant. All three heard Commander Griffin state quite succinctly that he would be responsible for the safety of Defendant Jiang. Based on Commander's Griffin's rendering of his role, Plaintiffs and presumably Judge Hibbler included him as one of the security personnel who was in a

[5] That Commander Griffin was also apprised of the legal papers by Officer Audrey Roberts, prior to his acceptance of the documents from Bobor, (Affidavit Of Jerke ¶2) further underscores these points.

position to accept and deliver legal papers on behalf of Defendant Jiang during his stay in Chicago Illinois. (Aff. of Peng, Aff. of Cheng, Aff. of Gregory)

Even a conservative estimate of the time spent by the Commander at the hotel suggests he had adequate and reasonable opportunity to attempt to deliver the service papers to a member of Jiang Zemin's personal delegation if not to Defendant Jiang himself. Secret service agents were in the lobby of the hotel throughout the entire day, and Commander Griffin easily could have transmitted the documents through them, if he did not choose to deliver them himself.

D. The Prior Order Comports with Due Process

The October 21, 2002, Prior Order of this court meets constitutional requirements. Requiring plaintiffs to deliver a copy of the summons and complaint to Jiang Zemin's security detail satisfies the requirements of due process since it was reasonably calculated to give actual notice of this lawsuit to the defendant. The basic constitutional test requires that "notice be reasonably calculated, under the circumstances to apprise the parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).[6] The Supreme Court, interpreting *Mullane*, has recognized that "in some cases, it might not be reasonably possible to give personal notice." *Walker v. City of Hutchinson,* 352 U.S. 112, 115 (1956). The test is not whether the best form of service has actually been accomplished, but whether the best service under the available circumstances was performed. [7]

In the leading New York case of *Dobkin v. Chapman*, 21 N.Y.S. 2d 161, 171 (1968), the New York State Court of Appeals, in upholding service under the predecessor of the CPSR 308(5), the New York state variant of 735 ILCS 5/2-203, acknowledged that this method of service would occasionally result in failure to bring actual notice to the defendant, but went on to say: "Our law has long been comfortable with many situations in which it was evident as a practical matter that parties to whom notice was ostensibly addressed would never in fact receive it." [8]

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[6] This test was reiterated in *Peralta v. Heights Medical Ctr. Inc.,* 485 U.S. 80, 84 (1988).
[7] *See*, *4A Federal Prac. & Proc. 1074 (Wright and Miller Treatise)*.
[8] In *Bossuk v Steinberg*, 58 N.Y.2d 916, 918, 460 N.Y.S. 2d 509, 510 (1983), the court similarly noted, "It is hornbook law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases the

This principle has also been recognized and upheld by the District Courts of Illinois, as well as the 7th Circuit. For example, in *United General Title Insurance Co. v. Robert Hilton Tyer II*, 2001 WL 487957 (N.D. Ill. 2001) plaintiffs obtained leave from the court to serve the summons and complaint upon the Defendants by certified mail, return receipt requested, pursuant to Fed. R. Civ. P. 4(e) and 735 ILCS 5/2-203.1. Pursuant to the court order, Plaintiff delivered four copies of the summons and complaint to the business address and place of residence of the defendants under the terms of the court order. Those documents were all refused and/or returned. The District Court upheld service of process in spite of the fact that the Defendants never actually received the documents because due process only requires that service be reasonably calculated to inform a party of the pendency of the lawsuit and provide that party with an opportunity to respond. *Swaim*, F. 3d at 720 (citing *Mullane*, 339 U.S. 306. Thus, "in spite of the fact that the notices sent to the Defendants were returned as refused, service has been properly effected." *Id.* at 720.

The Illinois District Court based its holding on the Seventh Circuit case, *Swaim v. Moltan Company*, 73 F. 3d 711 (7th Cir. 1996). In *Swaim v. Moltan,* the 7th Circuit upheld service notwithstanding the fact that the papers which had been mailed by certified mail, return receipt requested, were three times returned as "unclaimed." *Swaim,* 73 F. 3d at 716. The test cited as the basis for the holding in *Swaim*, is not "whether or not the affected party was actually notified," but rather the reasonableness of form of service. As the *Swaim* Court noted, "the service of process that is reasonably calculated to inform, consistent with Trial Rule 4.15(F) is sufficient even if it fails to actually inform the party to which it is directed." *Swaim,* 73 F. 3d at 721. [9]

Moreover, many acceptable methods of service do not require that the person receiving the summons and complaint actually forward copies to the defendant being served. [10] In fact, other

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defendant will in fact receive actual notice." *See also*, *Baker v. Lathan Sparrowbush Assocs*., 72 F.3d 246 (2d Cir. 1995) (service on New York Secretary of State upheld on behalf of foreign corporation, although the corporation never received actual notice).

9 *See also*, *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985) (court upheld service upon the Defendant, Fujitsu Ltd, by the special process server's delivery of summons and complaint for Fujitsu Ltd., to Kathy Learn at FMI's Illinois office, notwithstanding the fact that she refused to take the process); *Hines Lumber Co. v Smith*, 172 N.E. 2d at 432, (Although the housemate of the defendant refused acceptance of the legal papers, service was upheld because the method of service was reasonably calculated to provide adequate notice). Other circuits which have addressed the issue have ruled similarly. *See Katzson Bros. Inc. v. U.S. Env. Prot. Agency,* 839 F.2d 1396, 1400 (10th Cir 1988); *Day v. J Brendan Wynne, D.O.,Inc*., 702 F.2d 10, 11 (1st Cir. 1983) and *Stateside Mach. Co. v. Alperin*, 591 F. 2d 234, 241 (3d Cir. 1979).

10 For example, 735 ILCS 5/203 permits service on a person of suitable age and discretion at a person's dwelling house, or usual place of abode accompanied by a mailing to the defendant at the same address. This method does not

methods of effecting service that are arguably less likely to result in actual notice to a defendant have been held to satisfy due process.[11]

In the case at bar, plaintiffs employed a number of approaches reasonably calculated to give notice to Jiang Zemin. They employed the same method that had been used successfully in *Doe v. Karadzic,* 1996 WL 194298 (S.D.N.Y. 1996) where a State Department security agent who was handed the summons and complaint passed the papers on to the defendant. Neither the plaintiffs nor Judge Hibbler, who signed the October 21, 2002 Prior Order, had reason to anticipate that the United States, city or municipal officials would either seek to evade service completely or, upon receipt of the legal papers, refuse to deliver said documents aware that those papers were intended for the person they were guarding and did not constitute a physical threat to him.

All of the security personnel occupy positions of sufficient responsibility as to permit a reasonable person to expect said official to accept legal papers tendered to them as part of a service of process and, at minimum, to make a good faith attempt to deliver said documents to the defendant and/or a member of his personal delegation. Moreover, all of the security personnel, directly or through their superiors, had access to the Jiang Zemin delegation at the Ritz Carlton Hotel. Based on Fertel's conversation with Donnis Roberts, (*See* Memorandum of Law In Support of Ex Parte Motion … For Alternative Form of Service), as well as the conversations of Peng, Cheng, and Gregory with Commander Griffin (Aff. of Peng, Aff. of Cheng, Aff. of Gregory), Plaintiffs knew that Security Personnel would be detailed to the Ritz Carlton hotel during October 22, 2002. Plaintiffs also knew that it would have been easy for each to pass the service documents to a member of the Jiang Zemin delegation, if not to Defendant Jiang himself.

Based on the above referenced facts, Plaintiffs had a reasonable basis to believe that the police chief was in a position to deliver said papers to the Defendant or to one of the several

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require that the recipient of service papers actually deliver the papers to the defendant before service is deemed complete.The plaintiff is only required to deliver the copies to an intermediary who has access to the party being served. Typically, but not necessarily, this could be a member of the defendant's immediate family. The same is true for service on corporations; service is deemed complete once plaintiffs deliver the summons to an agent authorized to accept service, and is not dependent on whether or not the agent forwards the summons to the corporation. *See* Fed. R. Civ. P. 4(h)(1); 735 ILCS 5/2-204.

[11] *See* 735 ILCS 5/2-202 (authorizing service on defendant by publication in newspaper accompanied by a certified mailing to defendants at addressed listed in affidavits); *see e.g., Fleet Mortgage Corp., v. Bryant,* No. 88 C 1684, 1988, U.S. Dist. Lexis 14061 (N.D. Ill. Dec 9, 1988) (where service by publication was upheld as the best possible notice under the circumstances and therefore adequate).

security personnel also on site at the hotel on the day in question. That Commander Griffin did not even attempt to deliver the legal papers must be considered unreasonable and a violation of his obligation to the Court as a law enforcement official.

III. DEFENDANT JIANG ZEMIN RECEIVED ACTUAL NOTICE OF THE LAWSUIT AND OF THE LEGAL PAPERS

Another important indication of the adequacy of service efforts is the fact that it is clear that defendant Jiang received actual notice of the proceedings, both on behalf of himself, and on behalf of the Office 6/10.

A. Defendant Jiang received actual notice of the lawsuit while still in the United States and most likely while still in Chicago, Illinois.

The federal courts generally support the adequacy of service even if some defects in service may be present where actual notice is demonstrated. Thus, in *McMasters v. United States of America,* 260 F. 3d 814 (2001), the 7th Circuit upheld service in spite of defendant's claim that Plaintiffs failed to serve the defendants and the district court denied defendant's motion for default judgment, determining that service was proper because: 1) plaintiff "substantially complied with Fed. R. Civ. P. 4; and 2) it was clear from the filing of their opposition to default that defendants had actual notice of the lawsuit.[12] Similarly, in *Baker v. Latham Sparrowbush,* 72 F.3d 246, 254 (2d Cir. 1995), the Second Circuit held that the due process clause is not offended "if a party receives actual notice that apprises it of the pendency of the action and affords an opportunity to respond. *See also*, *Grammenons v. Lemon,* 457 F.2d 1067, 1070 (2d Cir. 1972) ("The standards set in Rule 4(d) for service on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in cases in which the party has received actual notice." [13]

In the case at bar, there is substantial evidence that Chinese government officials and key

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In cases where actual notice to the defendant is deemed insufficient, it is because the plaintiffs did not comply with the proper methods of service. *See, for example, Mid-Continent Wood Prod., Inc. v. Harris,* 936 F.2d 297, 301-02 (7th Cir.1991) (stating that neither actual notice nor substantial compliance is sufficient to [substitute for and hence] satisfy the requirements of Rule 4); *see also, Gabriel v. United States*, 30 F.3d 75, 77 (7th Cir.1994) (upholding dismissal where plaintiff served U.S. Attorney by mail because, at that time, Rule 4(d)(4) required personal service.)

[13] *Also see*, *United States (Drug Enforcement Agency) v. One 1987 Jeep Wrangler,* 972 F.2d 472, 482 (2d Cir.1992)*; Lehner v. United States,* 685 F.2d 1187, 1190-91 (9th Cir.1982), *cert. denied,* 460 U.S. 1039, 103 S.Ct. 1431, 75 L.Ed.2d 790 (1983); *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 822 (9th Cir.1981); *Wiren v. Eide,* 542 F.2d 757, 762 (9th Cir.1976).

members of Jiang Zemin's entourage knew about the service of the summons and the contents of the complaint before Jiang Zemin left Chicago Illinois and/or while he was still in Houston, Texas. It is therefore reasonable to infer that such knowledge was shared with Jiang Zemin.

On October 22, 2003, news reports both in Beijing and in the United States, indicate that the news of the lawsuit had been aired and was being discussed openly in the press while the defendant was still in Chicago Illinois. (Exhibits G and H, attached to Brief) Moreover, there is Mr. Donald W. Keyser's testimony that "the Chinese Ambassador to the United States Yang Jichi approached me on October 23 in Houston, when we were both traveling with Jiang Zemin's delegation, to ask (on what he said were explicit instructions from 'very senior levels') that we look into the reported service of process immediately." (Decl. of Donald W. Keyser ¶7). Mr. Keyser goes on to state in the same paragraph of his sworn declaration that, "on each of the next two days Ambassador Yang, Chinese Executive Vice Foreign Minister Li Zhaoxing, and Chinese Ministry of Foreign Affairs North American Department Director-General He Yafew all approached me to register the Chinese government's serious concerns about the matter and to insist that the U.S. side take immediate steps to address any such suit." In fact, Mr. Keyser, in the same paragraph of his sworn declaration states, "when the lawsuit against President Jiang became public, the Chinese government immediately and forcefully protested to the Department of State." This occurred as early as October 23 when former President Jiang was on route from Chicago to Houston, and present for a portion of that day in both cities.

Although news reports are not dispositive with respect to evidencing actual notice, a reasonable inference of actual notice arises from the fact that officials of the Chinese Government in Houston and Beijing knew that this action had been filed and acknowledged this fact as evidenced by the affidavits filed by the U.S. officials in this case. That inference, together with the delivery of the summons and complaint to the Security Detail, supports a finding that the method of service authorized in the Prior Order met fundamental due process requirements and produced actual notice of the proceedings. Moreover, the media reports released while Jiang Zemin was in Chicago, buttress this finding. *See, e.g., Mullane,* 339 U.S. at 315-20 (upholding service via publication of notice in a newspaper.)

It is further clear that by the 7th of November, President Jiang had no doubts that the lawsuit had been filed and served, as indicated by Assistant Chinese Foreign Minister Zhou

Wenzhong's phone call to U.S. Ambassador Clark T. Randt in Beijing wherein he noted the Chinese government's objection to the suit, and emphasized "his government's particular dissatisfaction that U.S. security personnel had reportedly accepted documents relating to the suit, and had failed to ensure that President Jiang's visit was free of disruption." It belies common sense to believe that the Chinese Government would protest the service on the security personnel and ask the United States to take immediate steps to address the allegations of the lawsuit, if the defendant, President Jiang, was not aware that it had been filed, and understood its contents.

By December 7, 2002, the Chinese government and the defendant had formally asked the United States Government to take all steps necessary to have this legal action dismissed. (Letter from William H. Taft, IV to Robert D. McCallum, Jr. of Dec, 2002) When the Government of China decided to submit its views to this Court regarding this case, albeit indirectly through the United States Government, asking them to have the case dismissed based on immunity and other grounds, it tacitly acknowledged that notice of the lawsuit had been properly carried out, and due process requirements regarding service of process fulfilled. The Defendants must have received a copy of the complaint, prior to the onset of such negotiations, in order for the formal request and statements of the Chinese Government regarding this case to have been made, and the formal objections to the lawsuit enumerated. Given the Department of State's submission to this Court, it strains credulity to believe that the State Department has handled this matter without conferring with China and sharing legal documents filed and submitted in this case. This provides further evidence that service was accomplished and that the government of China and the defendants have had full and complete access to the pleadings in this case sufficient to meet due process and notice concerns.

In addition to the above, subsequent actions were taken by the Plaintiffs to assure that the Defendants were properly notified and aware of these proceedings. For example, on December 13, 2002, a copy of the Clerk's Notice of Scheduling Hearing, in English, and in Mandarin Chinese, a letter explaining the Notice to the defendants, in English and in Mandarin Chinese, along with a copy of the complaint, summons, and court order granting leave for substitute service were delivered to Defendant Jiang by Federal Express Mail to his Official Office, at People's Republic of China, Zhongnanhai, Beijing China. The documents were received at the posted address in

Zhongnanahi, at 3:33 P.M. on December 18, 2002, and officially accepted by Mr. T. Huang, who signed for their receipt upon delivery. [14]

Pursuant to the January 13, 2003, Minute Order, actual notice of the lawsuit was provided by delivery to Defendants in Mandarin Chinese and English of the Application for Entry of Default pursuant to Fed. R. Civ. P. 5(b)(2)(A). *See*, Proof of Service of Application for Entry of Default, filed on or around the 14th of April 2003.

These additional efforts, together with the indications of actual knowledge of the lawsuit on the part of defendant Jiang, supports plaintiffs' position that service and delivery under the Prior Order were properly accomplished, especially in view of the subsequent deliveries of court documents in the case to keep Defendants appraised of developments in the proceedings.

IV. THE COURT'S JURISDICTION IS NOT BARRED BY SOVEREIGN IMMUNITY THEORIES.

The claim presented by the U.S. government that its sovereign immunity rights have been adversely affected by requiring its security personnel to deliver service of process to visiting dignitaries is misplaced.

A. The Doctrine of Sovereign Immunity Applies Only When Substantial Action on the Part of the United States Government is Required.

The Doctrine of Sovereign Immunity is far more limited in scope than is acknowledged in the brief submitted by the Department of Justice and not applicable to the case at bar. In its most direct and straightforward of applications, sovereign immunity claims are applied only when the United States government is a named defendant to a lawsuit and the purpose of the lawsuit itself is directed at requiring government action. *See United States v. Nordic Village,* 503 U.S. 30 (1992), where the United States Internal Revenue Service is the named defendant in the underlying

[14] A copy of the aforementioned documents were also sent by certified mail to President Jiang Zemin in care of the Chinese Embassy of the People's Republic of China, 2300 Connecticut Avenue NW, Washington DC 20008. This was returned to Plaintiffs' counsel, marked "unable to forward." Although the Hague Convention is not a required vehicle for service, nonetheless, Plaintiffs did additionally send four copies, two in Mandarin Chinese and two in English, of the Application for Entry of Default to the Ministry of Justice on February 25, 2003. The Ministry of Justice of the People's Republic of China returned the Hague filing on the ground that they "infringe upon the sovereignty or security of China." Plaintiffs also attempted delivery of said documents in various other manners, described in earlier pleadings.

lawsuit, and the purpose of the legal claim and relief sought would mandate government action. *Nordic Village*, and many similar cases which name the United States as a defendant in the lawsuit are indeed different from the case at bar, which names Jiang Zemin and the Office 6/10 as the defendants, not the United States Government, and any action required of government officials is only peripherally related to the substance of the case.

Favorable applications of the doctrine of sovereign immunity also include those cases where the United States, though not a named party to the lawsuit, is nonetheless "the party in interest," insofar as the ultimate relief sought in the complaint by the plaintiffs must be carried out by the United States. The United States government is the "party in interest" where "the effect of [a] judgment would be 'to restrain the Government from acting, or to compel it to act."' *Dugan v. Rank,* 372 U.S. 609, 620 (1963) *(*citing *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949)). Similarly, where a lawsuit is nominally filed against a government official, but the real party in interest is the United States government, sovereign immunity is also triggered because the "'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." *Land v. Dollar,* 330 U.S. 731, 738 (1947), (quoting *Ex parte State of New York,* 256 U.S. 490, 500, 502 (1921)). In the case at bar, the United States Government is not the named defendant, nor are they a "real party in interest," insofar as the relief sought by Plaintiffs targets the named defendants and not the United States Government. Moreover, the Prior Order now challenged by the Government, does not require any significant action on the part of security personnel. Thus, sovereign immunity claims are irrelevant to this action.

B. The October 21st Prior Order Did Not Implicate Sovereign Immunity Claims.

As indicated above, at least one court, the District Court for the Southern District of New York has held that an analogous court order did not require the security personnel to deliver the legal papers to the Defendants to complete or effectuate service obligations. Such an interpretation derives support from the wording of the Prior Order which clearly deems service of process complete upon delivery of the documents to security personnel. It is also perfectly consistent with federal and Illinois state law, where the emphasis is not on actual receipt of notice, but rather on

the appropriateness of the methods employed. [15] These provisions make clear that the question of the adequacy of "delivery" of the summons and complaint in substituted service cases pursuant to 735 ILCS 5/2-203 and in cases in which the defendant is served directly turn on the duty of the process server and not on any duty, obligation, or action of the intermediary and/or the defendant.

C. Even if the Court finds that the Prior Order Authorizing "Delivery" of the Summons and Complaint Imposed an Obligation on the Government, such an Obligation does not Implicate Sovereign Immunity.

Even if the Court finds that the Prior Order authorizing "delivery" of the summons and complaint to the Government employee imposed some duty on the part of some government officials to deliver legal papers, such an obligation to participate in the service process does not implicate sovereign immunity. Indeed, the Government can point to no case in which a court has found that the government cannot be expected to participate in service based on sovereign immunity concerns.

As discussed above, the sovereign immunity doctrine generally applies to cases in which the Government or a government employee is a party, and the Government will be obligated to take action that is related to the substantive merits of the case. Thus, even in the context of third party discovery requests, where the action required of government officials is far greater than in the case at bar, courts have been reluctant to deny discovery and give the executive branch control over whether the evidence must be presented. This is the position of the 9th Circuit panel that decided *Exxon Shipping Co. v. U. S. Dep't of Interior,* 34 F.3d 774, 778-80 (9th Cir. 1994) (holding that sovereign immunity is not implicated where a litigant seeks disclosure of non-privileged material or testimony). Among the bases for its holding was its concern that, if upheld, a sovereign immunity claim would authorize the executive branch to make conclusive determinations as to whether federal employees may comply with a federal court subpoena. *Also see*, *Connaught Labs., Inc. v. SmithKline Beecham P.L.C.,* 7 F. Supp.2d 477, 479 (D. Del.1998) (stating that "in an action in federal court, sovereign immunity does not bar the federal court from

[15] In deciding questions of validity of service, Federal Courts place great emphasis on the principle that the purpose of service is to give the defendant notice of the proceedings. *See above*, Section II (D) of Brief. Due process does not require that the defendant receive actual notice in ever case. *See* Restatement (Second) of Conflict of Laws § 25 cmt (e) (1969).

enforcing a federal subpoena against the federal government"); and *Leyh v. Modicon,* 881 F. Supp. 420, 422-423 (S.D. Ind.1995) (holding that sovereign immunity did not bar enforcement of subpoena issued to non-party government agency, but quashing subpoena on other grounds).[16] These cases make a distinction, for sovereign immunity purposes, between action required of government officials in connection with the judicial process, and action related to the merits of the case.

Even in those (albeit few) cases where sovereign immunity has been upheld in third party discovery cases, it is eminently clear that considerably more substantial action is required in the third party discovery context than in the case at bar. The extent of the government official's involvement in any case where sovereign immunity has been deemed validly invoked has been considerably greater than the circumstances in the present case. Unlike this case, compliance with third-party discovery orders involves an intrusive and extensive process through which the Government is asked to undertake an often-time-consuming and expensive search for documents and to provide them in a timely manner to private litigants. It is understandable, under these circumstances, that the Government be considered to have a more substantial interest that may raise sovereign immunity concerns.

By comparison, the Prior Order in this case might at the very most be interpreted to have permitted the Government official to serve as the passive recipient of a "delivery" of legal papers, and to pass them on to the designated parties.[17] The Government has not cited any cases in which a court order permitting acceptance of a delivery of legal papers in a case to which the Government is not a party has been found to implicate sovereign immunity concerns.

Moreover, such a holding could itself significantly impair the power of Article III courts to implement their Congressionally-assigned authority to supervise the service of process upon individuals physically present in their territory. [18]

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[16] As the District of Columbia Circuit Court noted in 1984, although no federal court had ever explicitly addressed the issue, "[s]ince at least 1965, ... this court has assumed the non-applicability of sovereign immunity to such a subpoena." *Northrop Corporation v. McDonnell Douglas Corporation,* 751 F.2d 395, at 398 n. 2 (D.C. Cir.1984)

[17] Surely, if the security personnel perceived the Prior Order as a requirement to act, they would not have ignored its directives, as they did.

[18] In *Houston Business Journal Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1212 (D.C. Cir 1996), for example, the Court of Appeals noted that, if upheld, such a decision could upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III.

V. SERVICE ON JIANG ZEMIN DOES NOT IMPLICATE PRINCIPLES OF SEPARATION OF POWERS

A. The Separation of Powers issue is not relevant to a consideration of the jurisdiction of the court in this matter.

Plaintiffs and courts freely acknowledge that political and foreign policy implications are present in all suits brought against foreign officials for violations of the norms of international law. But that does not mean that courts are prevented from dealing with such cases or the underlying issues they raise. The mere suggestion of a potential foreign relations impact does not automatically place a matter beyond reach of a judicial determination. In *Baker v. Carr,* 369 U.S. 186 (1962), the Supreme Court made it clear that not all questions involving political matters are beyond the purview of the courts. The Court explained that the political question doctrine is "one of `political questions,' not one of `political cases.'" Rejecting its own sweeping statement in *Oetjen v. Central Leather Co.,* 246 U.S. 297, 302 (1918), the Court wrote: "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. .l.." *Id.* at 211. Similarly, in the case of *Nicaragua v.U.S.*1984 I.C.J. 392, 1984 WL 501. and the *South Africa (Nambia)* cases, Advisory Opinions of the ICJ, 21 June 1971, ICJ 1950 Reports 16; 31 Dec. 1962, ICJ Reports 919-47; 1050 ICJ Reports 137) , the International Court of Justice make clear that judicial review is not precluded just because foreign relations and political matters are in issue so long as there are clear and definitive legal standards that can be interpreted and applied through the judicial process.

1. The Act of State Doctrine Does not Render this case Non-Justiciable.

Plaintiffs' claims are not non-justiciable under the act of state doctrine.[19] Moreover, the State Department's views on this issue are not binding.[20]

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[19] Like other defenses, the act of state doctrine must be pleaded and proved by the party asserting application of the doctrine. *See Liu v. The Republic of China,* 892 F.2d 1419, 1432 (9th Cir.1989) (defendant bears burden of proving defense); *Republic of the Phillipines v.Marcos,* 862 F.2d , 1361 (1998). Defendants' failure to enter an appearance in this case waives the act of state defense. *See also Kadic v Karadezic,* 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996) (declining to address doctrine where not asserted by defendant).

[20] *See Environmental Tectonics v. W.S. Kirkpatrick, Inc.,* 847 F.2d (1052), 1057 n.6, 1062 (3rd Cir. 1988) *affirmed at* 493 U.S. 400, 406 (1990) (noting that six members of the Supreme Court rejected Justice Rehnquist's assertion that a State Department letter was binding as to the applicability of the act of state doctrine.)

The act of state doctrine calls for courts to refrain "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its territory, when prudential factors call for judicial abstention." *Banco Nacional de Cuba v. Sabbatino*, 375 U.S. 398, 401, 418 (1964). The Supreme Court has emphasized however that the doctrine does not call for judicial abstention in all cases involving the actions of foreign governments and their officials. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp, Int'l,* 493 U.S. 400, 409 (1990). To the contrary, the act of state doctrine may only be invoked to bar adjudication of a plaintiff's claim when the nature of the claims or defenses will require the court to declare invalid a foreign sovereign's "official" or "public" acts where clear legal standards do not exist that bar said conduct. *Kirkpatrick,* 493 U.S. at 405, 406 ("official action"); *Sabbatino, 376 U.S. at 401* ("public acts"); *see also*, *National Coalition of the Union of Burma v. Unocal, Inc., ("NCGUB"),* 176 F.R.D. 329, 350, n.25 (C.D. Cal. 1997).

A finding that an "official act" of a sovereign nation may be at issue is simply a threshold inquiry. The Supreme Court in *Sabbatino* emphasized in its holding that courts in this country are empowered to pass judgment on matters taking place abroad where clear standards of law exist that courts have been called upon to apply. The Supreme Court made clear that the Act of State jurisdictional exclusion would not apply where clear international standards precluded the actions in question: "It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it:' *Sabbatino*, 376 U.S. at 428.

2. Defendants actions do not constitute Official Acts.

In this matter, it is quite clear that the defendants' violations of such *jus cogens* standards of international law as torture and genocide, can never be endorsed as official acts that justify immunity from judicial review. Courts have uniformly found that actions taken by government officials in violation of basic and universally recognized norms of customary international law are not "official" acts for purposes of the act of state doctrine. For example, in *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984), the court noted that Paraguay had not ratified, and could not be held to have ratified, the defendant's unlawful acts of torture, and concluded: "this alone is sufficient to show that they were not acts of state." *Filartiga*, 577 F. Supp. at 862. In *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996), the court came to a

similar conclusion concerning the defendant's acts of torture and genocide: "We doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be called an act of state." *Kadic,* 70 F.3d at 250.

3. Defendant's actions violate of clearly established norms of International Law.

In the case at bar, some of the clearest and most widely recognized standards involving torture and genocide form the basis for the complaint. The "Act of State Doctrine" is always inapplicable as a jurisdictional bar in suits against officials accused of torture and violations of other clearly established *jus cogens* norms of international law. In *Sabbatino*, the Supreme Court emphasized the need to protect the integrity of the judicial process to deal with cases that touch upon foreign policy matters so long as clear and well-established legal standards were available to be interpreted and applied by the courts.

Courts have interpreted this statement to mean that where the principle of international law at issue is clear and universal, the courts are not precluded from dealing with the case, and the act of state doctrine does not apply. *Filartiga, 577 F. Supp. at 860*. In *Filartiga* the court held that the Act of State Doctrine did not bar suit against a Paraguayan official charged with torture because there was a clear international consensus condemning torture, providing a well-established legal standard the court could apply. There have been a number of other cases holding that Act of State and Separation of Powers concerns are inapplicable to situations where the defendant official was charged with not only torture, but genocide as well. *See, e.g., Forti v. Suarez-Mason*, 672 F. Supp. 1530 (N.D.Cal. 1987) (torture), *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996) *(*torture and genocide*).*

The act of state doctrine is all the more inapposite where these same clear legal standards and the authority of U.S. courts to apply them have been established and confirmed by Congress. As the Supreme Court stated in *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986), "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." This clearly pertains to both the Alien Tort Claim Act (ATCA) and the Torture Victim Protection Act (TVPA), which directly confirm the authority of the U.S. courts to consider cases such as the one at bar. Congress specifically passed the TVPA to "make

sure that torturers and death squads will no longer have a safe haven in the United States." S. Rep. No. 249, 102nd Cong., 1st Sess. 1991, 1991 WL 258662. The Senate Report describes the statute as "carrying out the intent of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment of Punishment," which obligates state parties to ensure that torturers within their jurisdiction are held legally accountable. S. Rep. No. 249 at 3. The legislative history also expresses strong support for the ATCA, noting "section 1350 has important uses and should not be replaced." H.R. Rep. No. 367 at 3. It also stated that the *Filartiga* decision "met with general approval." *Id*.

4. The Implications of Adjudication for U.S. Foreign Policy are Minimal.

Both because Defendant Jiang is accused of engaging in violations of international norms which are per se outside the scope of his authority during his tenure as President of China (a position he no longer holds, see Notice of Change in Status, filed April 14, 2003), and because the United States has uniformly and unambiguously condemned the Chinese government for abuses against Falun Gong practitioners, adjudication of this suit will not interfere with the United States foreign policy, despite concerns along these lines raised by the U.S. government.

As the Ninth Circuit stated in *Hilao v. Marcos, (In Re Estate of Marcos Human Rights Litigation),* 25 F.3d 1467 (9th Cir. 1994) "A lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in the United States courts." *Id.* at 1472. As discussed earlier, Defendant's alleged conduct clearly falls outside the scope of his lawful authority. More importantly, Plaintiffs' lawsuit does not challenge the power of the Executive or Legislative Branches to conduct U.S. foreign policy. In fact, Plaintiff's case is consistent with the United States' government's condemnation of the Chinese government's repression against Falun Gong. Clearly, this is not "the sort of case that is likely to hinder the Executive Branch in its formulation of foreign policy, or result in differing pronouncements on the same subject." *Liu,* 892 F.2d at 1433; *see NCGUB*, 176 F.R.D. at 354 (noting, in examining foreign policy factor, that "the coordinate branches of government have already denounced the foreign state's human rights abuses and imposed sanctions:).

Human rights concerns have long been considered a key aspect of U.S. foreign policy. Each year the Department of State conducts an annual review of the human rights conditions

around the world, setting forth concerns about systematic and ongoing human rights abuses. One such report available (for 2001), addressing China, concludes:

> "The Government's human rights record throughout the year remained poor and the Government continued to commit numerous and serious abuses. Authorities still were quick to suppress any person or group, whether religious, political, or social, that they perceived to be a threat to government power, or to national stability, and citizens who sought to express openly dissenting political and religious views continued to live in an environment filled with repression." US Department of State, 2001 Human Rights Country Reports Bureau of Democracy, Human Rights, and Labor. <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm.>

Moreover, a State Department spokesman last year declared:

> "As we have said and noted many times before, China is a signatory to the International Covenant on Civil and Political Rights, which includes provisions on the freedom of expression. We have raised with China on many occasions our concerns about the crackdown on Falun Gong and reports of torture and mistreatment of detained and imprisoned practitioners, and we are going to continue to raise those issues… And we will continue to call upon China to end its crackdown on the Falun Gong and to respect the fundamental rights of citizens." Philip T. Reeker, Daily Press Briefing, U.S. Department of State, August 20, 2001. <http://www.state.gov/r/pa/prs/dpb/2001.4576pf.htm> accessed June 18, 2002.

Finally, and most recently, in remarks to the U.N. Commissioner on Human Rights, the head of the U.S. delegation urged the Commission to, "speak out" and thereby "serve the cause of human rights and fundamental freedoms. It should not be silent when the Chinese authorities…brutally repress Falun Gong practitioners exercising rights to freedom of belief and expression." Ambassador Shirin Tahir-Kheli, Remarks to the 57th Session of the U.N. Commission on Human Rights, March 30, 2001 http://www.state.gov/g/drl/rls/rm/2001/1806pf.htm>, accessed June 18, 2002.[21]

[21] In many reports, the State Department uses extremely strong language to condemn the crackdown of the Jiang regime against Falun Gong, stating, for example, "Since mid-1999, the Government has waged a severe political, propaganda and police campaign against the Falun Gong spiritual movement." U.S. Dep't Of State, Country Reports On Human Rights Practices -- China (2002) available at http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.htm. Moreover, the State Department has labeled the campaign "harsh and repressive." U.S. Dep't Of State, Country Reports On Human Rights Practices -- China (2001) available at http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm. Specific instances described by the State Department include: harsh prison terms for nonviolent dissenters of government policies towards the Falun Gong, *Id*; torture by electric shock and the shackling of hands and feet, *Id*.; confinement of practitioners in mental hospitals, Id.; use of excessive force in detaining peaceful protesters, *Id*.; the death of more than 200 practitioners while n police custody with many

The above referenced, carefully detailed, extremely critical inventory of the rampant and serious human rights abuses being committed by the Government of China against Falun Gong has been compiled and issued by the U.S. Government itself. In light of the foregoing, adjudication of this lawsuit will not only have minimal impact upon U.S. foreign policy, but also may assist the United States Government in its announced objective of persuading China to end its persecution of Falun Gong and to respect the fundamental rights of all of its citizens.

Not only the Circuit Courts, but also even the United States Department of State has taken the position that enforcing customary human rights norms under the ATCA does not contravene U.S. foreign policy. In *Filartiga*, the first human rights case under the ATCA, the State Department submitted an amicus brief in support of plaintiffs. *See Memorandum for the United States as Amicus Curiae*, 19 I.L.M. 585 (May 1980) where the State Department confirms that when an international consensus exists about a right, "there is little danger that judicial enforcement will impair our foreign policy." *Id.* at 604. Although acknowledging that such cases may implicate foreign policy considerations, the brief concludes: "the protection of fundamental human rights is not committed exclusively to the political branches of government." The Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), agreed with the State Department,

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of their bodies bearing signs of severe beatings and torture, *Id*.; and the cremation of bodies before relatives examine them. U.S. Dep't Of State, Country Reports On Human Rights Practices -- China (2000) Available at http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.ht. Since 1999, the United States Commission on International Religious Freedom has Designated China as a country of particular concern. *See, e.g.,* Report Of The United States Commission On International Religious Freedom, 25 (May 2002) (http://www.uscifr.gov/reports/02AnnualRpt/2002report.pdf,accessed June 4, 2002). This designation is given by the President annually when he determines that a country "has engaged in or tolerated particularly severe violations of religious freedom." 22 U.S.C. 6442, § 402(b), 112 Stat. 2802. Particularly serious violations means "systematic, ongoing, egregious violations of religious freedom, including violations of (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons." 22 U.S.C. 6402, § 3(11), 112 Stat. 2791. As a result of this designation, China is subject to "multiple, broad-based sanctions" and the Secretary of State restricts exports of crime control and detection instruments and equipment. United States Commission On International Religious Freedom, Country Report – China, available at http://www.uscirf.gov/crptPages/china.php3. Because of its abysmal human rights record, in October 2000, the Congressional-Executive Commission on China (CECC) was created to monitor China's compliance with international human rights standards, encourage the development of a rule of law, and maintain a list of victims of human rights. After extensive hearings and roundtables involving 63 witnesses, as well as visits to China, and meetings with key decision-makers in the U.S. and China, the inaugural CECC Annual Report, <http://www.cecc.gov> ("CECC Rpt."), was submitted to the 107th Congress on October 2, 2002, with findings highlighting violations of religious freedom and of the right to assemble peacefully, censorship and surveillance over the Internet, political manipulation of the judiciary and the criminal process, extensive due process violations, corruption, and increasing labor and social unrest. CECC Rpt. at 3-5. This and other reports also refer to the violent crackdown on Falun Gong. CECC Rpt at 3.

and specifically rejected the argument that judicial resolution of ATCA suits is barred by the political question doctrine. See *Memorandum for the United States in Filartiga v. Pena-Irala, reprinted in* 12 Hastings Int'l & Comp. L. Rev. 34 (1988).

Numerous cases under the ATCA and TVPA are based on the Second Circuit precedent in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the first in a long line of cases to hold that foreign officials traveling to the U.S. may be sued for human rights violations considered violations of the law of nations.[22] For example, in *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996), the Second Circuit explained that even when the State Department believes that the case involves a political question because of foreign policy, the court need not defer. *Id.* at 250. Courts have ruled against officials in a wide array of political circumstances and in many cases concerning officials from countries allied with the United States where the lawsuits might be considered by some to have embarrassing elements or consequences.[23]

The argument proffered by the Department of Justice -- that the lawsuit risks provoking retaliatory lawsuits against U.S. officials -- has already been addressed and dismissed by Congress. At the time of the passage of the TVPA, the Bush Administration initially opposed the TVPA's passage, stating among other concerns that the statute risked provoking retaliatory lawsuits against U.S. officials, and involved individual litigants in foreign policy decisions. Hearings on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the Sen. Judiciary Comm. 101st Cong. 2d Sess. [June 22, 1990] at 12-16 (prepared statement of John O. McGinnis, Dept. of Justice) and at 23-29 (prepared statement of David P. Stewart, Department of State). The exact concerns expressed by the Government in this case were considered and rejected by Congress, and later even by President Bush, when the law was enacted. When President Bush signed the TVPA into law, he acknowledged the "danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries," but continued,

"These potential dangers, however, do not concern the fundamental goals that this

[22]In the Second Circuit alone, *see, e.g., Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996); *Cabiri v. Assasie-Gyimah,* 921 F. Supp. 1189 (S.D.N.Y. 1996); *Mushikiwabo v. arayagwiza,* 94 Civ. 3627 (JSM), 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. April 8, 1996).

[23]*Hilao v. Estate of Marcos,* 103 F.3d 789 (9th Cir. 1996) (Philippines); *Cabiri v. Assasie-Gyimah,* 921 F. Supp. 1189 (S.D.N.Y. 1996) (Ghana); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (Guatemala); *Todd v. Panjaitan*, Civ. No. 92-12255, 1994 WL 827111 (D. Mass. Oct. 26, 1994) (Indonesia).

legislation seeks to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." *Statement upon Signing the Torture Victim Protection Act of 1991* (March 16 1992).

B. Since the Defendant left the office of the President of China and Chair of the Communist Party, concerns about potential foreign policy impacts of a lawsuit against Defendant Jiang, as a former official, are greatly reduced.

Any diplomatic or foreign policy impacts of lawsuits against foreign officials are greatly diminished when the subject of the suit is no longer a government official or representing his government in an official capacity, since the potential for embarrassment to a foreign government is greatly reduced at that point. Since he is a former official, Defendant Jiang is no longer in a position to raise foreign policy concerns on behalf of the government of China.

C. There are no other Separation of Powers Issues Relevant to this Court's Jurisdiction.

While the Government asserts that this case interferes with foreign relations, none of the cases which they cite are relevant to the facts of this case,[24] or are applicable to situations such as those involved here where specific Congressional authorizations under ATCA and TVAP are present. [25]

The government provides a number of unpersuasive examples of the potential foreign policy damage resulting from this case and the service on former President Jiang while in the U.S. The claim that the service orders "discourage heads of state and other foreign dignitaries from visiting the United States" (Gov. Br. at 17) fails to acknowledge the fact that most foreign dignitaries and high ranking visiting officials have not perpetrated a campaign of torture and

[24] For example, *Flynn v. Shultz,* 748 F.2d 1186 (7th Cir. 1984) does not deal with the type of case where very clear legal standards as those provided in the case at bar by the ATCA and TVPA. Moreover, as the court also notes, it is not only the lack of clear standards upon which to base judicial review which render Flynn not justiciable, but the fact that there is no factual basis for the court to review.

[25] In other instances, the cases the Government cites are either outdated (*Oetjen v. Central Leather Co.,* 246 U.S. 297, 302 (1918)), specifically narrowed by *Baker v. Carr*), do not concern justiciability (*United States v. First Nat. City Bank,* 396 F.2d 897 (2d Cir. 1968)), took place in contexts of war (*United States v. Pink,* 315 U.S. 203, 222-23 (1942) (government recognition of the U.S.S.R.); or concerned intelligence information (*Department of the Navy v. Egan,* 484 U.S. 518, 529 (1988); *Haig v. Agee*, 453 U.S. 280 (1981); *Chicago & Southern Airlines v. Waterman Steamship Corp.,* 333 U.S. 103 (1948)) or threats to national security (*Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1970), *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)).

genocide against their own citizen population, which the U.S. Congress has permitted to be the bases for litigation in U.S. courts. Mr. Keyser's statement about the inappropriateness of legal "actions that we might regard as offensive, politically-motivated and disruptive" (¶ 9), ignores the fact that Congress, under the ATCA and the TVPA, has determined such actions to be authorized and not unduly disruptive. See also Jacques Delisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DePaul L. Rev. 473, 487, 496-97 (2002).

Similarly, the Government's argument that allowing the order on Jiang Zemin to stand would cause future officials to fail to cooperate with their security details could be addressed by explaining the rules of service to visiting foreigners. The State Department has no authority to grant any visitor to the United States de facto immunity by placing them behind a shield constructed by State Department security officials. The goal of security is to protect the subject from threats to safety, not from legal process. It is the responsibility of the State Department to explain to visitors that non-diplomats are subject to service of process when they are physically present in this country, and that the security detail cannot insulate them from it. As the United States District Court for the Southern District of New York has recognized, security is not the same thing as immunity from service of process. *August 8, Order, id at 10.* The fact that those who travel to the United States are subject to suit in our courts is a basic facet of our democratic system of government and the rule of law one that should be explained to foreigners visiting our shores. There are "good reasons to discount the parade of horribles that the usual critiques imply would flow from U.S. suits by Chinese nationals for human rights abuses in China." Delisle, *supra,* at 484.

> "In these circumstances, it is unwarranted and unwise . . . to accept at face value statements from foreign governments (including notably China) that exaggerate opportunistically their incomprehension of U.S. separation of powers law, and that express shock and offense at judicial decisions . . . and that purport to construe them as expressions of the foreign policy positions of the American government." Delisle, *supra,* at 545-46.

Of critical importance, the rules that govern our legal system are themselves the product of our system of separation of powers. Applying constitutional principles of due process, interpreting congressionally mandated rules of procedure, and applying state statutory regimes, our judicial system has developed fair and just rules governing service of process and standards of personal

jurisdiction. Combined with the rules governing justiciable cases and sufficiency of process, this complex web of norms governs this case. The foreign policy claims asserted by the Government represent an unauthorized and inappropriate effort to evade these basic rules.

In light of the above, adjudication of this case is entirely consistent with Executive Branch's policy regarding China's abuses against Falun Gong practitioners, and is entirely consistent with U.S. foreign policy.[26]

VI. A HEAD OF STATE IMMUNITY CLAIM IS NOT AVAILABLE TO THE DEFENDANT AS A BASIS FOR CHALLENGING THE JURISDICTION OF THE COURT IN THESE PROCEEDINGS.

In its Corrected Statement of Interest and Suggestion of Immunity submission to the Court, dated December 12, 2002, which the Court agreed to consider as an *amicus curiae* submission in the preliminary hearing of January 13, 2003, the Government of the United States suggests, as alternative grounds for challenging the jurisdiction of the Court in this case, the immunity of Defendant Jiang as Head of State, and the inappropriateness of service upon Defendant Jiang given his head of state status.

There are a number of grounds for believing that the head of state immunity argument is not available to Defendant Jiang in the context of this case, either as a basis for challenging the jurisdiction of this Court in these proceedings, or for challenging the validity of service.

A. Head of State Immunity Claim Does Not Apply Where the Defendant No Longer Holds the Position of Head of State.

Having left his post as head of the ruling Communist Party of the People's Republic of China in November, 2002, and his post as President of the People's Republic of China on March 15, 2003, Defendant Jiang no longer is in a position to challenge the jurisdiction of this Court, and the validity of the proceedings before this Court, on head of state immunity grounds. The nature of head of state immunity is linked to the customary practice and judicially applied principle of comity among nations. It seeks to assure that the highest-level officials of our country will not be unnecessarily subjected to litigation in the courts of foreign states by making their

[26] The State Department has taken the position that enforcing human rights norms under the ATCA does not contravene U.S. foreign policy. *See, Memorandum for the United States as Amicus Curiae*, 19 I.L.M 585 (May 1980), and the discussion thereof on p. 26 of this submission.

counterpart heads of state from other countries immune from the jurisdiction of courts in this country ***while they are in office***. This is done through customary judicial practice rather than through treaty provisions or legislation, as is the case for diplomatic and foreign sovereign immunity. (*See*, Jerrold Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev., 169, 188 (1986)).

However, there is a long line of cases making clear that the need for this type of protection no longer applies when a head of state or other high-ranking official has left office and is no longer serving in that capacity. A number of former heads of state and other government officials have been found subject to judicial proceedings in U.S. courts after the date that they left office. Among the former heads of state and other government officials who have been found subject to the jurisdiction of U.S. courts, and subject to tort liability claims based upon proceedings instituted under the Alien Tort Claims Act and the Torture Victims Protection Act (which are the grounds cited for the jurisdiction of the Court in the present proceeding) are: Ferdinand Marcos, former President of the Philippines*, Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir.1996); Prosper Avril, Former head of the Haitian military, *Paul v. Avril,* 812 F.Supp. 207, 211 (S.D.Fla.1993) (where the court stated "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."); Hector Gramajo, former Guatemalan Minister of Defense, *Xuncax v. Gramajo,* 886 F. Supp. 162 (D. Mass. 1995); Wong Hsi-ling, former Director of the Defense Intelligence Bureau of the Republic of China, *Liu v. The Republic of China,* 892 F.2d 1419 (9th Cir.1989); Armando Fernandez Larios, former Chilean military officer, *Estate of Cabello v. Fernandez-Larios,* 157 F.Supp.2d 1345 (N.D.Fla.2001).

To the extent that head of state immunity might have been a potential basis for Defendant Jiang challenging the jurisdiction of the Court during the period of time when he served as head of the ruling political party of his country, or the head of its government, that possibility expired the moment that Defendant Jiang left both of those positions in November, 2002 and on March 15, 2003, respectively.

In *Domingo v. Republic of the Philippines*, 694 F.Supp. 782 (W.D.Pa. 1988) the claim that "head of state immunity protects foreign rulers from liability for decisions made while in office, even after they leave office," was specifically rejected. The court noted that "the purpose of head

of state immunity is to avoid the disruption of foreign relations," and this purpose was not relevant after a head of state leaves office. *Domingo*, 694 F.Supp. at 786.

The applicability and availability of a potential head of state immunity claim must be determined not according to the time when the acts in question leading to the legal proceedings in question were committed, but according to the actual status of the defendant when the claim of immunity and the substantive merits of the proceedings are under consideration by the court. This is not comparable to the situation in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* 14 February 2002 General List 121 (International Court of Justice), *available at* http://icj-cij.org where the International Court of Justice held that a Minister of Foreign Affairs was subject to immunity and could not be subjected to criminal prosecution while in office. In that case the Minister had left his office to take another position in government during the time that the appeal was pending before the ICJ, but the court held that his status as of the time when the criminal prosecution was pending, not defendant's status when the appeal was heard, was controlling. In the instant case we are not dealing with a case on appeal, where the facts are frozen as of the time the proceedings below took place. Defendant Jiang left the position that could have granted him head of state immunity during the course of legal proceedings that presently are still in progress, so the principle of an appeals court being bound by the facts existing during the proceedings below would not be applicable. The case is not being considered on the basis of a closed record and past circumstances that already have been established, and must be taken as given. The availability of a head of state immunity claim in the instant proceeding must be decided on the basis of the current official status of Defendant Jiang at this stage of the proceedings, which is as a former, not a sitting, head of state.

As indicated above, a number of court decisions make clear that the justification for a head of state immunity claim, since it relates to potential embarrassment to the U.S. Government in the carrying out of our foreign policy, disappears when the foreign official in question leaves office, since the basis for producing conflict with foreign policy considerations is eliminated at that point.

B. Head of State Immunity Does Not Apply to Conduct Involving Torture, Genocide and Other Major Abuses Constituting International Crimes that Violate Jus Cogens Norms of International Law.

There is substantial precedent suggesting that even currently sitting heads of state can not exercise immunity claims in connection with certain types of actions that constitute universally condemned international crimes, such as torture, extrajudicial executions and genocide that violate *jus cogens* norms of international law.

A number of international treaties, as well as customary practice, incorporate the principle that even heads of state are not immune from legal proceedings related to particularly heinous and universally condemned practices, such as torture, extrajudicial execution and genocide. For example, the Convention on the Prevention and Punishment of the Crime of Genocide specifies that "persons committing genocide" are subject to punishment, "whether they are constitutionally responsible rulers, public officials or private individuals." Convention on the Prevention and Punishment of the Crime of Genocide, Article IV, entered into force January 12, 1951, 78 UNTS 277 (hereinafter Genocide Convention). Similarly, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, specifies that "An order from a superior officer or a public authority may not be invoked as a justification of torture." Convention Against Torture, Article 2(3), entered into force June 26, 1987, UN Doc. E/CN.4/1984/72, 23 ILM 1027 (hereinafter Convention Against Torture).

The Statutes of both the International Criminal Tribunal for Former Yugoslavia and for Rwanda contain similar provisions, as does the treaty establishing the newly constituted International Criminal Court. The Rome Statute of the newly established International Criminal Court specifies that "official capacity as a Head of State or Government [or other government official] ... shall in no case exempt a person from criminal responsibility under this Statute," and that "Immunities ... which may attach to the official capacity of a person ... shall not bar the Court from exercising its jurisdiction over such a person." (Rome Statute for the ICC, Article 27 (1) and (2)) Similarly, the Statutes of the International Tribunal for the Former Yugoslavia, and for the International Tribunal for Rwanda, specifically preclude official position "as Head of State or Government or as a responsible Government official" as being used "to relieve such person of criminal responsibility...." (Articles 7 and 6 of the respective Statutes)

It is true that all of these international instruments reject head of state immunity in the context of criminal prosecutions relating to the types of abuses in question. But the principle that they express, namely that even heads of state are not able to make immunity claims where universally condemned international crimes are involved is equally applicable to civil proceedings filed in national courts based on these types of violations. Indeed, many of the same international instruments that specifically exclude head of state immunity claims in the context of criminal prosecutions make provision for the granting of monetary compensation to the victims of the abuses, along the lines of these ATCA and TVPA proceedings. Compensation for victims of violations of human rights is imbedded in international law. Article 8 of the Universal Declaration of Human Rights provides everyone with the "right to an effective remedy by the competent national tribunals for acts violating the fundamental right granted him by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 9th Sess., Pt I, Resolutions, at 71, U.N.Doc. A/810 (1948). The International Covenant on Civil and Political Rights takes that premise one step farther by ensuring that rank or political stature does not effect the ability of a victim from obtaining compensation by stating that "each state party to the present covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized as 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, Dec. 16, 1966, 999 U.N.T.S.171 at 174 (emphasis added). Likewise, the European Convention on Human Rights and the American Convention on Human Rights protect a victim's ability to be compensated. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

There is only one federal case that specifically addresses the issue of whether the revocation of immunity for certain international crimes that appear in international treaties also applies to civil liability claims. In *Aidi v. Yaron*, 672 F.Supp. 516 (D.D.C. 1987) the court indicated that the Vienna Convention on Diplomatic Relations and its implementing statute (the Diplomatic Relations Act of 1978, 22 U.S.C. section 254(a), *et seq*.), maintained immunity for diplomats in civil liability cases, even if they could not invoke that claim when charged with international crimes, and accepted a motion to quash service that had been filed by the defendant based on a diplomatic immunity defense invoking the treaty and statutory provisions. But there are

significant differences between the *Yaron* case and the present proceedings against Defendant Jiang. In *Yaron*, there was a clear treaty provision in the Vienna Convention on Diplomatic Relations, as well as equally specific immunity provisions in the implementing legislation passed by the U.S. Congress, confirming the immunity of diplomats against tort actions. Similar treaty and statutory provisions do not exist as a basis for a head of state immunity claim, which derives from customary international practice rather than treaty standards and legislative provisions.

Defendant Jiang's claim of head of state immunity does not rest on any treaty or statutory provision, as was true for the defendant in *Yaron*. Instead, the basis for his head of state immunity claim derives from the customary judicial practice of comity, which should not be given the same weight as treaty provisions that have been specifically adopted and approved by an implementing Congressional statute. Moreover, the defendant in *Yaron,* unlike the situation in the present case, presented himself in court to submit his affirmative defense of treaty-based and statutory immunity. Defendant Jiang has chosen to not appear in court through counsel to present his potential immunity defense, but has relied upon diplomatic means to seek to bring this issue to the attention of the court. Consequently, Defendant Jiang can not avail himself of the *Yaron* precedent without appearing and presenting an affirmative head of state immunity defense as part of a motion to quash service, and to directly challenge the court's jurisdiction over the case, as was done by the defendant in the *Yaron* case.

Another important distinction that must be made between these cases is that the defendant in *Yaron* held diplomatic status at the time of the judicial proceedings and when the Court was required to make its determination regarding his eligibility for immunity. In the present case defendant Jiang surrendered any claim to head of state immunity that he might have had when he left his posts as President of his country and head of the ruling political party, and is therefore no longer in a position to make an immunity claim on the same basis as was done successfully in the *Yaron* case.

These examples show the move towards the elimination of immunity for heads of state and other government officials that are involved in, or allow human rights atrocities to occur under their supervision. The United States has established precedent and should continue to follow the international trend to allow the prosecution of former heads of state at the bare minimum. Other foreign courts have adopted this approach and have followed suit by allowing cases to proceed

against former heads of state and government officials who violate international norms. *See, e.g.* Amnesty International of Canada, Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity, Section III, Criminal Responsibility Under International Law of Heads of State for Crimes Against Humanity, <http://www.web.amnesty.org/ai.nsf/index/EUR450011999> for a list of over 13 countries which have, based on international law, opened criminal investigations and prosecutions in their own national courts against heads of state or high ranking government officials or permitted the extradition of heads of state involved based on violations of international law.

C. Actions Taken Outside of Official Capacity Are Deemed to Be of a Private Rather Than Public Nature Are Not Subject to Immunity Claims.

Another important limitation that must be placed on acceptance of head of state immunity claims is that this type of privilege does not apply to unlawful, unofficial or private actions. This reasoning was applied, for example, by the U.S. Supreme Court when it rejected immunity claims presented by President Clinton in the case of *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636 (1997). That case involved a tort action lawsuit against President Clinton that was filed while he was the sitting chief executive of the U.S. The Supreme Court held that while presidential immunity normally apples to a sitting President, it does not afford immunity from civil damage litigation arising out the events occurring before the President took office, and events that could not be considered having been taken in his official capacity. The Court agreed that there is no case "in which any public official ever has been granted any immunity from suit for his unofficial acts," since "the rationale for official immunity" does not apply "where only personal, private conduct" is the subject of the complaint.

It is true that these cases focus on Presidential privilege rather than head of state immunity *per se,* in that they involve U.S. presidents rather than heads of state of other countries. But both concepts share the similar basis and rationale of preventing judicial interference with executive branch concerns. Given this linkage, the Supreme Court's justification for denying Presidential privilege to private, non-official acts would seem equally applicable in the context of head of state immunity claims related to actions universally deemed unlawful and ultra vires under international law.

In the present case, Defendant Jiang can not claim that the acts of torture, genocide and arbitrary executions and detentions are subject to head of state immunity when they constitute international crimes of the highest order, and violations of *jus cogens* norms of international law, as well as being in violation of the domestic law and Constitution of China.

U.S. courts have made it abundantly clear that human rights abuses carried about as *de facto* government policy will not be considered official acts of the sovereign. *See, e.g., Hilao v. Marcos, (In Re Estate of Marcos Human Rights Litigation),* 25 F.3d 1467 (9th Cir. 1994) (holding that acts of torture and execution could not be considered within any official government mandate); *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996) (determining that deliberate and intentional ethnic cleansing was not an officially approved state policy); *Sarei v. Rio Tinto,* 221 F.Supp.2d 1116 (C.D.Cal.2002) (finding that torture, rape, pillage, war crimes and crimes against humanity were not official acts). The systematic eradication of the Falun Gong cannot be recognized as an official state policy when acts of torture and genocide are being committed in direct violation of *jus cogens* norms of international law.

D. A Head of State Immunity Claim Must be Made Affirmatively by the Defendant Appearing As A Party to the Judicial Proceedings, and Can Not Be Made Indirectly On His Behalf Using Diplomatic Channels Through Non-Party Interventions By the U.S. Government.

As noted in Section I (B), *supra,* of this brief, head of state and other immunity claims must be affirmatively presented by a party to the case to be considered properly before the court. The Defendants in this case have failed to appear, and have failed to present affirmative defenses to this court.

E. Submissions Made by the U.S. Government in the Capacity of *Amicus Curiae* Should Not be Given the Same Weight as Affirmative Defenses Presented to the Court by a Defendant Party, or Official Suggestions of Immunity.

Closely related to the question of whether it is appropriate for the Court to accept immunity claims on behalf of Defendant Jiang that initially were presented through diplomatic channels by the Government of China rather than through affirmative defenses by the defendant himself, is whether the U.S. Government is able to properly bring these issues before the Court in its capacity as *amicus curiae*. As noted in Section I (C), supra, of this brief, the arguments and

issues presented by the U.S. Government in its capacity as *amicus* do not have the same weight as affirmative defenses presented by the parties directly.

While Plaintiffs are aware that this Court must bend over backwards to assure that the interests of the Defendants are properly presented and considered, especially given the high profile, politically sensitive nature of this case, and the defendants' default, we must question whether this includes allowing an *amicus* to, in essence, introduce defenses on behalf of the Defendant, in a situation of default where the Defendant has failed to appear in Court to plead these or any other defenses in his own capacity.

Another highly important factor that must be taken into account in evaluating the weight that should be given to the U.S. Government's submission in this case is that an *amicus* submission does not have the same status, and does not deserve the same deference, that might be accorded to an official "Suggestion of Immunity" made on behalf of a foreign defendant. The Government, in prior cases of a similar type, has taken the position that "Executive Branch suggestions of immunity for foreign heads of state and foreign ministers are binding on the judiciary." *Memorandum for the United States in Tachiona v. Mugabe*, *at* <http://www.mdczimbabwe.com/docs/civilsuitmug/argforimm.rtf > (hereinafter *Tachiona* Gov. Memorandum). *See also, Tachiona v. Mugabe,* 169 F.Supp.2d 259 (S.D.N.Y.2001) and *Tachiona v. Mugabe,* 234 F.Supp.2d 401 (S.D.N.Y 2002). The Government supports this position by citing a number of cases where the courts have recognized and applied this doctrine, and accepted the principle of giving deference to Executive Branch suggestions of immunity. They note that "To the best knowledge of the United States, only one court ... has ever found a suggestion of immunity filed by the Executive Branch not to be binding on the court." *Tachiona* Gov. Memorandum*,* at A (1), footnote 2. However, the same weight is not given to more general *amicus* submissions.

Moreover, Plaintiffs do not accept the thesis that complete and unrestricted deference of this type applies to situations where foreign government officials have committed unofficial and unauthorized actions that violate core human rights standards such as the prohibitions against torture and genocide that are recognized as *jus cogens* norms of international law, and that come within the specific grant of judicial authority under the Torture Victims Protection Act and the Alien Tort Claims Act. But even if these elements were not present, it is important to note that all

of the cases cited by the government in support of granting judicial deference involve situations where official "suggestions of immunity' were deposited with the court and accepted as such. The pleading presented by the U.S. Government in the present case does not have that status, since it was agreed at the hearing that the government's submission would be treated as an *amicus* submission. Even the government has noted, and accepted, that an *amicus* submission does not have the same stature, and does not require the same deference, as official suggestion immunity. Consequently, even if this Court were inclined to accept a formal suggestion of immunity as binding, it need not do so for a similar suggestion made in the form of an *amicus* submission.

VII. HEAD OF STATE IMMUNITY IS NOT A VALID BASIS FOR QUASHING SERVICE IN THIS CASE.

In addition to challenging the jurisdiction of the Court to consider this case based on a head of state immunity challenge, it also has been suggested that head of state immunity provides a basis for quashing service on the Defendants, and thereby an alternative basis for dismissing the case on procedural grounds. There are two serious flaws to the argument that head of state immunity can be used as a basis for quashing service against Defendant Jaing in the present case.

A. Motions to Quash Service Based on Head of State Immunity or Any Other Grounds Must Be Presented Affirmatively to the Court by the Defendant or Other Party to the Case, and Can Not Be Made Indirectly By Non-Parties.

The U.S. Government, as *amicus*, argues that the service of process on Defendant Jiang should be quashed as improper based on his status as head of state. In addition to questioning the appropriateness of the U.S. Government introducing these claims in its capacity as *amicus* (as discussed above), Plaintiffs note that the key cases amicus cites in support of their argument, *Aidi v. Yaron*, 672 F.Supp. 516 (D.D.C. 1987) and *LaFontant v. Aristide,* 844 F.Supp.128 (E.D.N.Y. 1994) while supporting motions to quash service on grounds of a claim of immunity, do so on the basis of the defendant appearing in the proceeding, making an affirmative defense based on his immunity, and moving the quash service on that basis through a direct pleading. The court in *Aristide*, for example, notes that "Defendant submitted a suggestion of immunity ... claiming that President Aristide is immune from suit because of his status as the head of state of the Republic of Haiti ... and asks the court to quash service of process and dismiss the action" on that basis.

Aristide, 844 F.Supp. at 130. Similarly, in *Yaron*, the court notes that the "defendant moves to quash the service of process as well as for dismissal of the action" based on his diplomatic status, and filed a Motion to Dismiss to that effect. *Yaron,* 672 F.Supp. 516.

If Defendant Jiang had followed the approach taken by the defendants in the *Yaron* and *Aristide* cases, by appearing to defend the lawsuit, and making an affirmative defense that included a motion to quash service, there would at least be a procedural basis for these claims to be considered by the Court. As it stands, Defendant Jiang has not appeared in his defense, has not presented any affirmative defenses in his own behalf, and has not made any motions in his own right. Instead, the U.S. Government, as a non-party to the case that has been granted *amicus* status by the Court, is seeking to quash service by presenting Defendant Jiang's immunity claims on his behalf. This cannot be done by an *amicus* in a situation where the defendant in the case has chosen not to appear and defend in his own capacity, and where no motion to quash service is properly before the Court.

B. The Change in Status of the Defendant Has Invalidated or Mooted Out the Relevance of Any Head of State Immunity Claim He Might Have Had As Regards Inappropriateness of Service.

Through the submission of the *amicus*, Defendant Jiang seeks to claim that his immunity as head of state makes him unreachable through service of process, and thereby invalidates any service that may have taken place while he held that position.

The cases dealing with efforts to quash service based on immunity claims all are predicated on an initial determination first having to be made of whether the defendant in the action actually is entitled to immunity from suit. If he or she is found to be entitled to immunity, then a motion to quash service will be granted. If, on the other hand, the defendant is found not eligible to make an immunity claim, then the motion to quash will not be granted. In *Aidi v. Yaron*, 672 F.Supp. 516 (D.D.C. 1987) for example, the court agreed that provisions in the U.S. Diplomatic Relations Act (22 U.S.C. section 254(d), (since repealed) making service of process on a diplomat illegal and a crime, "imply that a diplomat who enjoys immunity is also immune from service of process. *Yaron*, 672 F.Supp. at 517. "It is axiomatic," the court continued, "that if jurisdiction is not available, then service of process is void, making a motion to quash service of process a valid remedy." But it is important to note the court's conclusion that it is necessary to first make a

determination of eligibility for immunity before deciding whether the defendant "is likewise shielded from service of process." *Yaron*, 672 F.Supp. at 518. In the present case, Defendant Jiang, having lost his immune status when he left the post of head of the Communist Party in November, 2002, and the office of President on March 15, 2003 to be replaced by current President Hu Jintao, no longer is in a position to seek to squash service based on that status. As of March 15, a threshold inquiry as to the availability of an immunity claim must result in the conclusion that Defendant Jiang is no longer in a position to make a claim of immunity, and therefore can not seek to quash service, even if he had made appropriately such a claim through an affirmative pleading and defense, which was not the case.

It is important to note, for example, that the court in *Aristide*, gave special weight to the finding that the defendant could not be held subject to suit "because he ***now*** enjoys head-of-state immunity" as the elected President of Haiti, and that as a result, "The courts are barred from exercising personal jurisdiction over him." *Aristide*, 844 F.Supp. at 139 (E.D.N.Y. 1994). Where a defendant does not hold head of state status at the time of proceedings, there is no basis for a head of state immunity claim to be accepted.

It is true that in the case of diplomatic immunity claims, some courts have held that the issue of immunity must be decided based on the time that service was made, or that the actions that were the subject of the lawsuits took place. In those cases, motions to quash were approved even though the defendant had surrendered his diplomatic status subsequent to the time of service. For example, in highly publicized case of *Mongillo v. Vogel*, 84 F.Supp. 1007 (1949) a diplomat who had been involved in a drunk driving accident resigned from his position after the accident and after service of process took place. The Court found that because the defendant was "clothed with diplomatic immunity when the summons was placed in his hands," the motion to quash should be granted. Similarly, in *Shaffer v. Singh*, 343 F.2d 324 (1965), the U.S. Court of Appeals for the District of Columbia found that a diplomat who had returned home after an automobile accident and therefore could no longer claim diplomatic status was nevertheless subject to immunity because he held a diplomatic post at the time of the accident.

However, these rulings should not be applied to the present case, since there is a fundamental difference between diplomatic immunity claims, which are based on treaty-based and statutory standards, and head of state immunity, which derives from customary rule that U.S.

courts should not impose their jurisdiction on sitting foreign heads of state. The justification for this customary rule of comity, namely the concern that U.S. courts not interfere with, or potentially embarrass, sitting heads of state, no longer exists when a foreign head of state has left office, as is presently the case with Defendant Jiang. As noted earlier in this brief, there is a large and growing body of case law recognizing that head of state immunity cannot be invoked once an official in that capacity has left office.

Moreover, even if Defendant Jiang were still eligible for immunity and able to quash service on that basis, as was true in the *Yaron* case, he would have to invoke this privilege himself by appearing and making this affirmative defense. The United States, as *amicus*, and not a party to the proceedings, is not in a position to make a motion to quash service since only parties can such make motions to the court. In *Geyer's Lessee v. Irwin*, 4 U.S. 107 (1790) the court noted, "every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges are not bound, judicially, to notice a right of privilege, nor to grant it without a claim." *Geyer's Lessee,* 4 U.S. at 107-108. Where "neither the defendant, nor his attorney, suggested the privilege as an objection ... this amounts to a waiver, by which the party is forever concluded." *Geyer's Lessee,* 4 U.S at 108.

The other case cited by the U.S. Government in support of its claim that service on an immune official can be quashed, *Hellenic Lines v. Moore*, 345 F.2d 978 (D.C. Cir. 1965) was based on the statutory provision (cited above) making service on an immune diplomat illegal and a criminal act. As noted above, this provision in the law has long since been repealed, consistent with the approach of treating these claims judicially in the context of cases that are filed, rather than as diplomatic matters. In addition, in *Hellenic Lines*, the issue focused on whether a U.S. Marshall, the defendant in that case, was justified in refusing to deliver service on an immune diplomat based on the then criminality of the requested service. It was not a case where the diplomat, as defendant, directly sought to invoke immunity and quash service.

VIII. THE JURISDICTION OF THE COURT OVER DEFENDANT OFFICE 6/10 REMAINS IN PLACE, EVEN IF DEFENDANT JIANG IS FOUND TO BE PERSONALLY IMMUNE FROM SERVICE AND NOT SUBJECT TO THE JURISDICTION OF THE COURT BY VIRTUE OF HIS CAPACITY AS HEAD OF STATE.

Even if Defendant Jiang is found to be immune from service of process, and not subject to the exercise of the jurisdiction of this Court by virtue of his prior head of state status, that immunity would not prevent the Court from exercising jurisdiction over Defendant Office 6/10, and dealing with that portion of the complaint. The Falun Gong Control Office (Office 6/10) was created by Defendant Jiang in his capacity as head of the ruling Communist Party as an operating entity of the Politburo (governing body) of the Party. As such, it operated as a private entity, as part of the governing body of a private political party, even though, as a practical and functional matter it played a major role in controlling and supervising the activities of a number of governmental agencies involved in law enforcement, judicial and propaganda dissemination activities aimed at the eradication of the Falun Gong spiritual movement, and the punishment and intimidation of its individual members. At no time during its operation was Office 6/10 considered a government entity. Rather, it operated as part of the ruling political party in China, subject to the control and supervision of Defendant Jiang as head of that party, and other individuals serving in leadership positions of the Communist Party through its governing body Politburo. See, Declaration of Andrew J. Nathan, Exhibit I, attached to affidavit of Marsh.

As a private entity associated with a political party, Office 6/10 is not eligible to claim immunity from the jurisdiction of the Court, nor is it covered by any head of state immunity claim that may apply personally to Defendant Jiang. For example, in *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (DC SDNY, 2001), while the Court dismissed claims against the President and Foreign Minister of Zimbabwe based on head of state and diplomatic immunity grounds (both individuals were serving in the capacity of temporary representatives to the United Nations at that time), it held that Zimbabwe's ruling political party remained subject to the jurisdiction of the Court, pursuant to a lawsuit filed under the Alien Tort Claims Act and the Torture Victims Protection Act, for its role in helping to organize and carry out a massive campaign of murder, torture, terrorism and rape. The Court in *Tachiona* also held that service of process on President Mugabe and Foreign Minister Mudenge, in their capacities as senior officials of the ruling political party

remained valid for purposes of obtaining jurisdiction over the party, even though they could not be properly served in their official capacities. The Court dismissed the argument that Mugabe's and Mudenge's immunity claims extended to invalidate service of process insofar as it applied to the actions of the political party in which they exerted leadership roles. The Court held that immunity claims "do not arise to the same extent in connection with the service of process upon a foreign state official intended to effectuate jurisdiction concerning matters and parties collateral to the head-of-state's or diplomat's official status.... Grounds to give affront to the person or dignity of the foreign official, or to interfere with the officer's governmental functions, do not arise in this context, or may do so only minimally or to a degree substantially outweighed by other interests of justice .... In this case, for example, it is ZANU-PF [the political party] institutionally, rather than Mugabe or Mudenge personally, to which the exercise of the Court's jurisdiction applies...." *Tachiona,*169 F.Supp.2d at 305, 306.

This approach conforms to standard practice and procedure with regard to perfecting service and securing jurisdiction over political parties in general. In *Bloom v. Democractic National Committee*, 2002 WL 31496272 (S.D.N.Y. 2002) the court indicated that a political organization can properly be served in conformity with the requirements of service set out in Fed. R. Civ. P. 4(h)(1) "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 by law to receive service of process," or by complying with similar state law laws regarding proper service. Since Defendant Jiang was the head of the Communist Party, a member of the Politburo of the Party, and the founding official who established Office 6/10 as an entity of the Party and who provided ongoing oversight and direction for its work, service on Defendant Jiang constituted adequate and proper service under the terms of Fed. R. Civ. P. 4(h)(1) and comparable Illinois statutory standards for establishing the jurisdiction of the Court over Defendant Office 6/10 for the purposes of the present lawsuit.

Moreover, jurisdiction over Office 6/10 conforms to the standards set out in Fed. R. Civ. P. 4(k) (1)(A) and the Illinois Long-Arm Statute. The due process, "minimal contacts" and "reasonably fair" requirements that are necessary to establish "specific" jurisdiction under these standards are met as a result of a series of transactions and activities of Office 6/10 and its campaign of persecution against Falun Gong that involves direct and substantial impacts within

the State of Illinois and the jurisdiction of the Court.

For example, seven residents of Illinois were placed on a "blacklist" of Falun Gong practitioners and supporters that has been used by the Government of China to pressure airlines to deny public travel accommodations to ticket-holders seeking to travel to sites visited by Defendant Jiang in order to peacefully protest his campaign of persecution against Falun Gong. These seven Illinois residents had their tickets cancelled by Iceland Arilines between June 11 and 14, 2002, when they attempted to board flights to Iceland just prior to Defendant Jiang's visit to that country. Office 6/10 was directly involved in these unlawful blacklisting and denial of public accommodations efforts that affected Illinois residents.

Similarly Office 6/10 and Defendant Jiang were directly involved in the persecution, illegal detention and torture of at least six individuals who have since become residents of Illinois, who were subjected to these abuses in China as a result of their spiritual beliefs in and practice of the cultivation way of Falun Gong. Moreover, at least five residents of Illinois have close relatives who have been the victims of the persecution, illegal detention and torture of practitioners of Falun Gong in China. [27]

Furthermore, Defendant Jiang and Office 6/10 are directly implicated in a series of other activities here in Illinois aimed at monitoring and suppressing peaceful demonstrations and protests against the persecution of Falun in China. These include, but are not limited to, assaults on peaceful demonstrators in Illinois, intimidation of Chicago hotels seeking to prevent their hosting of Falun Gong activities, and the destruction of leaflets and signs at Falun Gong demonstrations in Illinois. Moreover, many of these same types of practices have been conducted not only in Illinois, but also in many states in the United States, and thus qualify under the general personal jurisdiction test relating to systematic and continuous impacts of a substantial nature both within the forum state and in other states. [28]

Both the direct impacts of Defendants' conduct in Illinois and the more general conduct

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[27] The names of these persons have been omitted deliberately to protect the safety of other relatives still in China. However, all parties reside in Illinois and are available to testify if the court should seek further inquiry into this matter.

[28] The impact on Illinois (and U.S. residents) is all the more constant and ever-present because it is still ongoing; it is indeed substantial because it targets all practitioners of Falun Gong (tens of millions) and their families in the United States (several thousand); and it is indeed significant because it targets the universally recognized moral principles of compassion, truthfulness, and tolerance, principles constitutive of our humanity.

affecting many jurisdictions including Illinois meet the due process requirements of the Illinois Long-Arm Statue, 735 ILSC 5/2-209(c) based on the effects of the Defendants' actions in Illinois.[29]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court reject the preliminary and jurisdictional matters raised by the U.S. Government in its capacity as *amicus*, and proceed with a consideration of the substantive merits of the case, including the default status of the Defendants.

Dated:_____

Respectfully submitted,

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[29] According to the Advisory Committee Notes, Rule 4(k)(2) of the Federal Rules of Civil Procedure was enacted to fill a specific gap in the federal law presented when a foreign defendant has significant aggregate contacts with the United States. Upon request from the court, Plaintiffs can provide evidence of ample contacts between Office 610 and the United States so as to quality under the jurisdiction test relating to Rule 4(k)(2).