In the

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Docket No. 03-3989

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

Plaintiffs - Appellants

-against-

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

Defendants – Appellees.

On Appeal From the United States District Court for the Northern District of Illinois
Sat Below: Honorable Matthew F. Kennelly, U.S.D.J.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS PLAINTIFFS A, B, C, D, E, F, AND OTHERS SIMILARLY SITUATED, WEI YE, AND HAO WANG

Terri E. Marsh
Attorney for the Plaintiffs
Counsel of Record
717 D Street, NW, Suite 300
Washington D.C. 30004

Anthony D'Amato
Attorney for the Plaintiffs
Northwestern Law School
357 E. Chicago Ave., Room 311
Chicago, IL 60611

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Appellate Court No: 03-3989

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

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Phone Number: 312-5038474 Fax Number: 312-503-1676

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Introduction

The United States as amicus makes two distinct arguments regarding Defendant Jiang Zemin on this appeal: that American courts cannot exercise civil jurisdiction over him because he has been given immunity by the Executive Branch, and that the defendant is not amenable to service for similar reasons.

We accept the amicus's bifold organization of arguments, and thus we begin with the question of jurisdictional immunity. We argue that head-of-state immunity is at most a personal defense to a judicial action already begun, that it is at best a temporary immunity, and that it is not the same thing as impunity.

I. Defendant Jiang Is Not Entitled to Immunity for His Personal Instigation and Direction of Acts of Torture and Genocide

A. The Executive Branch Cannot Immunize Foreign Officials From Civil Accountability for Their Personal Nongovernmental Acts that Violate International Law

1. The Supreme Court addressed the question of immunity for foreign heads of state in *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352-53 (1822). The Court held that although a public vessel of a foreign sovereign was ordinarily entitled to immunity from libel proceedings in American courts, immunity could not be invoked if the vessel had engaged in acts that violated international law. The Court directly analogized that situation to the immunity of a foreign sovereign or head of state:

> [A] foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bound by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to Judicial process in the same way, and under the same circumstances, as the public ships of his nation.

20 U.S. at 353.[1] The analogy is exact. A public vessel of a foreign sovereign that comes into an American port cannot be captured as prize on

[1] Justice Story's opinion for the Court reflects the clear rule of customary international law summarized in Vattel's treatise: that a foreign ambassador should be given immunity "unless he violates the law of nations by some enormous crime." Emmerich De Vattel, *The Law of Nations* ch. 2, § 34 (1758). Vattel's *Law of Nations* was the authoritative treatise on international law; it had equivalent stature to Blackstone's *Commentaries*, and could be found in the libraries of most of the Framers of the Constitution. In the 19th

the ground that the foreign *nation* violated international law. The ship can only be libeled if it *itself* violated international law. Similarly, defendant Jiang Zemin cannot be personally subjected to American jurisdiction if China violates international law. But if he himself violated international law, such as instigating and ordering genocide and torture—which are as clear violations of international law as one can imagine—then he is personally subject to American jurisdiction when he enters upon United States territory.[2]

2. It is possible that there could be a case where both the state and its leader violate international law. Suppose hypothetically that a head of state orders his state's armed forces to cordon off a large area of the Atlantic Ocean and proclaim it to be an extension of the state's own territorial sovereignty. While such an action itself clearly violates international law, it nevertheless falls within what the Supreme Court calls the "outer perimeter" of the head of state's office and functions. *Nixon v. Fitzgerald,* 457 U.S. 731, 755 (1982). Thus, if that head of state were visiting the United States and served with process in a claim for civil damages resulting from the

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Century, Vattel was the most cited author on international law in the opinions of the Supreme Court.

[2] *Accord Tachonia v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001), *appeal docketed*, No. 03-6033 (2d Cir. Feb. 14, 2003), No. 03-6043 (2d Cir. Feb. 28, 2003) (allowing immunity for a head of state but also allowing service of process upon him).

action of his state on the high seas, his or her motion to dismiss on the affirmative defense of sovereign immunity would be sustained.

3. By contrast, if the head of state's alleged act is itself a serious violation of international criminal law, then it would fall outside the outer perimeter of his office or functions. Head-of-state immunity cannot apply to non-head-of-state acts. As the Ninth Circuit held in *Estate of Ferdinand Marcos, Human Rights Litigation,* 25 F.3d 1467, 1472 (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.

4. Torture, and *a fortiori* genocide, are not only violations of international criminal law, but they are also violations of the national criminal laws of all or nearly all countries in the world. Thus, torture in China is a felony punishable by three years in prison.[3] When the Chinese Ministry of Civil Affairs, in July 1999, declared the Falun Gong an evil religion, there was no authorization nor even mention of any possible use of

[3] Criminal Law of the People's Republic of China §§ 247-48 (1997). *See also* Ministry of Public Security of the People's Republic of China, Responsibilities and Duties of Public Security Organs §§ 4, 22 (prohibiting the beating of prisoners).

forceful police methods against Falun Gong practitioners.[4] China itself disclaims the alleged violations.[5]

5. As the Supreme Court instructed in *Nixon v. Fitzgerald*, "In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes." 457 U.S. at 755. The most that can be said for the State Department's suggestion of immunity is that there might be some justification for extending *temporary* immunity to defendant Jiang during his term as head of state on the ground that a judicial proceeding against him might interfere with his busy schedule.[6] But it would be well

[4] Article 22 of People's Police Law of the People's Republic of China (12th session, 8th National Congress General Secretariat, February 28, 1995) directly prohibits forcible police interrogation of suspects.

[5] Report and Recommendation of Judge Edward M. Chen in the related cases of *Jane Doe v. Liu Qi* (case number C-02-0672 CW), and *Plaintiff A v. Xia Deren* (case number C-02-0695 CW, (D.C.N.D.CA, June 11, 2003): "Where, as here, the People's Republic of China appears to have covertly authorized but publicly disclaimed the alleged human rights violations caused or permitted by Defendants ... and asserts that such violations are in fact prohibited by Chinese law, Defendants cannot claim to have acted under a valid grant of authority for purposes of the FSIA. The authorities presented by Plaintiffs establish that the alleged conduct for which the Defendants are responsible were inconsistent with Chinese law. Accordingly, their alleged acts are not acts of an agency or instrumentality of the People's Republic of China within the meaning of the FSIA, and sovereign immunity thereunder does not lie." *Id*. At 29.

[6] Any such interference would be slight, as there would be no requirement in a civil proceeding for the defendant to appear in court. When President Clinton asked for temporary immunity from a civil action for damages filed by Paula Jones on the ground that appearing in court would disrupt and interfere with his duties as President, the Supreme Court held that he was not entitled to temporary immunity. *Clinton v. Jones*, 520 U.S. 681 (1997).

beyond the justifying purposes of a grant of immunity to extend *impunity* to Jiang for the alleged crimes themselves. The State Department of the United States has no power to acquit or absolve any person for acts of torture or genocide committed either at home or abroad.

6. The apparent claim by the Executive Branch that it can immunize visiting heads of state from all civil accountability in American courts is not only contradicted by *The Santissima Trinidad* but has also been logically displaced by the Foreign Sovereign Immunities Act of 1976.[7] Suppose that a foreign country is entirely owned by its Emperor, dictator, sovereign, or head of state. In the 1930s, for example, all the land, title, and real estate of the nation of Ethiopia was owned personally by Emperor Haile Selassie. (Today in Chicago, all the land, title, and real estate of the Archdiocese of Chicago is owned personally by the Cardinal.) If the Executive Branch could immunize a sovereign who enjoys sole ownership of his entire national territory, that immunization would block the application of the FSIA to that foreign territory. Even if a foreign sovereign owns a large portion, but not all, of his nation's real estate, then a certificate of

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[7] The amicus apparently fears the force of this argument about displacement, because it contends that the plaintiffs "did not press this point in their opening brief and thus have now waived it." Am. Br. at 15 n.7. However, a United States Court of Appeals is not constrained by the submissions of the parties regarding the scope of relevant legal rules or principles.

immunization issued on his behalf by the Executive Branch would exempt that portion of his national assets from the jurisdiction of American courts. In brief, it is clear that even though the FSIA does not refer in so many words to heads of state,[8] a logical implication of the momentous shift to the restrictive theory of foreign sovereign immunity incorporated in the FSIA of 1976 is the removal of the unfettered discretion that the Executive Branch claims in its practice of bestowing immunity on individuals like Jiang Zemin for their nongovernmental acts.[9] As the Ninth Circuit held, the FSIA shifted from the State Department to the courts responsibility for determining all claims of foreign immunity, including those filed on behalf of heads of state. *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990). Although the FSIA is not applicable to the present case, its enactment in 1976 swept away many of the old immunity doctrines and theories.

7. Indeed, the doctrine of head-of-state immunity began a long journey into disrepute at around the time of the American and French revolutions. Yet there are those who still assert that it is a privilege of

[8] The Ninth Circuit in *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), noted that although the FSIA may not explicitly include individuals within its definition of foreign instrumentalities, neither does it expressly exclude them.

[9] The district court in *Tachonia v. Mugabe*, 169 F.Supp.2d 259, 291-92 (S.D.N.Y. 2001), *appeal docketed*, No. 03-6033 (2d Cir. Feb. 14, 2003), No. 03-6043 (2d Cir. Feb. 28, 2003), distinguishes between "the traditional identity of the sovereign as both the state and its ruler, a residual political embodiment that still holds sway in some countries."

royalty, even in countries that have presidents instead of kings. American courts, however, are increasingly finding exceptions to the State Department's broad assertion of head-of-state immunity. See cases collected in *Tachonia v. Mugabe*, 169 F.Supp.2d 259, 304-05 (S.D.N.Y. 2001), *appeal docketed*, No. 03-6033 (2d Cir. Feb. 14, 2003), No. 03-6043 (2d Cir. Feb. 28, 2003). The *Mugabe* court asks for case-by-case determination as opposed to "reflexive expansion of the Executive Branch's categorical reading" of personal inviolability. 169 F. Supp. 2d at 305.

B. The Reliance by the Amicus Upon the Doctrine of Separation of Powers is Misplaced

8. Amicus argues at length that "the constitutional separation of powers doctrine requires that the courts recognize and give force to Executive Branch assertions of immunity for foreign heads of state . . . ." Am. Br. at 2. In the present context, separation of powers is not a reason, just a conclusion. Although the organization of the Constitution follows the advocacy of Montesquieu that the powers of government should be divided in order to help avert tyranny, the ingenuity of the work of the Framers is that they built an elaborate system of checks and balances into the structure of government. Thus the Chief Executive was given "legislative" power by his veto over legislation; Congress was given "executive" capacity by its powers to declare war, raise armies, and call forth the militia; and the

judicial branch (under the early and definitive Supreme Court interpretation), was given the power of judicial review of both executive and legislative decision-making. "Separation of powers" was abandoned altogether in the treaty-making power which was given to the President and the Senate in tandem.

9. Head-of-state immunity is one of those checks and balances; it involves both the Executive and Judicial branches.[10] It is misleading for the amicus to assert that the doctrine of separation of powers requires that every Executive Branch suggestion of immunity must be rubber-stamped by the Judicial Branch.[11]

C. American Foreign Policy Interests Are Fostered by Holding Defendant Jiang Accountable for "Heinous Acts"

10. Amicus asks this Court to believe that the State Department's assertion of immunity for Jiang Zemin is wholly unrelated to its policy of "strongly condemn[ing] the systematic persecution by the Chinese Government of the followers of Falun Gong." Am. Br. at 3. But with the advent of teleconferencing over secure lines, nearly all the purposes of

[10] In any event, separation-of-powers principles go to justiciability and not jurisdiction. *Powell v. McCormack*, 395 U.S. 486, 512 (1969).

[11] The use of the phrase "rubber-stamped" is an accurate interpretation of the term "allows" in the letter of the Legal Adviser, Department of State, saying that "The Department of State recognizes and allows the immunity of President Jiang from this suit." *Memorandum Opinion and Order,* District Court, Appendix A of Opening Brief, at 11.

diplomacy can be conducted at long distance. What additional reason is there to invite Jiang Zemin, at the very end of his term in office, to enter upon United States territory—except perhaps to honor him with pomp, circumstance, and a phalanx of armed guards at taxpayer expense?[12] To be sure, the decision to invite him is within the discretion of the Executive Branch, but it is singularly unpersuasive for the Executive to argue that inviting him is justified because on balance it furthers American foreign policy interests.

11. The Complaint, taken as true for the purpose of this appeal, alleges that Jiang Zemin

> has designed, ordered, implemented and directed a program of eliminating the practice of Falun Gong in China. Defendant Jiang's actions resulted in selective murder, disappearance, widespread torture and genocide against thousands of practitioners of Falun Gong . . . .

[12] Another possibility is that Jiang simply asked to be invited. His term of office was nearly over, and he may have wanted to come to the United States to meet with leaders of Office 6/10 who were engaged in the suppression of Falun Gong practitioners. On information and belief, he did meet with several such persons during his brief stay in Chicago. Jiang Zemin may have been looking forward to devoting full time to the suppression and elimination of Falun Gong practitioners and supporters in the United States and other countries. There is substantial evidence that he has been working full time in this endeavor since the expiration of his term of office. Plaintiffs so far have been at an unfair disadvantage in this litigation because we have not been able to proffer such evidence in dialogue with legal representatives of the defendants. Instead, we have been relegated to the hit-and-run tactics of the amicus who is basically a statutory intruder in this litigation. If the litigation so far in the district court had proceeded in the normal fashion, counsel on both sides could have assisted the district court in determining the parameters of Jiang's meetings in Chicago and his continuing involvement in the persecution tactics of Office 6/10.

Compl. ¶ 2. These allegations hardly describe a person who has a legitimate expectation to stand above the law. If the President of the United States is not above the law, why should the President of China be above the law? If President Clinton can be served with process, why exempt the President of China? The Supreme Court in *Clinton v. Jones,* 520 U.S. 681, 697 (1997), observed that even President Clinton did not contend that the President is "above the law"

> in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law.

12. A higher source than the State Department's view of the foreign policy interests of the United States is treaty law, binding on the State Department as part of the supreme law of the land under Article VI, clause 2 of the Constitution. One of the relevant treaties is the Convention on the Prevention and Punishment of the Crime of Genocide, *done* Dec. 9, 1948, *ratified by* United States Feb. 23, 1989, 78 U.N.T.S. 277:

> Article 1. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2 in part provides:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; . . .

The Falun Gong is a religious group,[13] and defendant Jiang is accused of committing acts with the specific intent of destroying the members of the Falun Gong on the basis of their religion. Upon the allegations of the Complaint, Jiang's acts exactly fit the treaty definition of genocide.

13. A second important treaty is the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 23 I.L.M. 1027 (1984), *ratified by* United States Oct. 21, 1994, 34 I.L.M. 590 (1995). Article 4 § 1 provides:

> Each State Party shall ensure that all acts of torture are offenses under its criminal law.

There is no restriction in this section as to where the torture takes place, even though the Convention contains other sections that specifically apply to acts

[13] It is one of the many variants of Buddhism. Although numbering only a few hundred persons in China 1992, Falun Gong since then has grown at a steeper rate than any religion in the history of the world. It presently numbers between 70,000,000 to 100,000,000 members (called "practitioners") worldwide.

of torture that take place on the State Party's own territory. In contrast to these other sections, Article 4 § 1 applies to "all" acts of torture wherever committed. Then Article 5 of the treaty, referring to the above-quoted Article 4, binds the United States to

> take such measures as may be necessary to establish its jurisdiction over such offenses [the Article 4 offenses] in cases where the alleged offender is present in any territory under its jurisdiction . . . .

This clearly establishes a treaty-mandated policy of establishing jurisdiction over any person, such as defendant Jiang, who at any time is physically present in United States territory. Although the United States may choose to delay implementing Articles 4 and 5—arguing that they are "non-self-executing"[14]—those Articles as they now stand oblige the United States at least to refrain from taking steps that directly frustrate their stated goals. One of the clearest cases is that of a torturer who is physically present in United States territory. His presence subjects him personally to the jurisdiction of federal courts. To then "immunize" such a person would be to take away a jurisdiction already established, in clear violation of the letter and purpose of Articles 4 and 5.

[14] As the amicus puts it, "Non-self-executing treaties do not create privately enforceable rights in our courts." Am. Br. at 33. But whether the plaintiffs have privately-enforceable treaty rights has not yet been litigated below. It is not an issue on this appeal. But even assuming that there are no privately enforceable treaty provisions directly applicable to the present case, plaintiffs suffered damages in tort that are plainly remediable under the Alien Tort Statute, 28 U.S.C. § 1350.

14. Adding salt to the wounds, amicus claims that American courts "have a duty" to immunize officials designated by the State Department "even when the foreign head of state is accused of heinous acts" because "recognition of immunity will be vital to the achievement of U.S. foreign policy objectives." Am. Br. at 3. Clearly the State Department is not taking the Genocide and Torture treaties seriously. The Department's mere assertion that protecting an accused torturer and genocidaire is vital to U.S. foreign policy does not make it so.

15. As for the policy advocated by the State Department in the present case, it might do well to read its own annual publication *Country Reports*, which states that China in 2003

> continued its crackdown against the Falun Gong spiritual movement, and thousands of practitioners remained incarcerated in prisons, extrajudicial reeducation-through-labor camps, and psychiatric facilities. Several hundred Falun Gong adherents reportedly have died in detention due to torture, abuse, and neglect since the crackdown on Falun Gong began in 1999.

U.S. Dept. of State, *Country Reports on Human Rights Practices: China* (Feb. 25, 2004).[15] It is difficult to reconcile this explicit language with the

[15] In a previous Country Report, the State Department specified that the bodies of many of the Falun Gong practitioners who died from torture "bore signs of severe beatings or torture, or were cremated before relatives could examine them . . . ." U.S. Dept. of State, Country Reports on Human Rights Practices: China (Feb. 23, 2001).

same Department's claim that shielding an alleged perpetrator of these atrocities is vital to the achievement of U.S. foreign policy objectives.

16. The State Department's desire to hand out immunization certificates to visiting foreign dignitaries is, moreover, a self-imposed snare. Every visiting foreign official would then demand a certificate of immunization and would be grievously insulted if they do not receive one.[16] Friction would be reduced if the Executive Branch could say to foreign dignitaries: "No matter how much we would like to guarantee your immunity, we do not have that decision-making power under the American legal system." After all, when serious violations of international criminal law are at issue, these same dignitaries would not even enjoy immunity in their home countries if the decision were made to prosecute them.

D. Immunity Does Not Equal Impunity

17. If this Court were to sustain temporary immunity from civil accountability during defendant Jiang's term of office, that is a far cry from the amicus's desire to grant him impunity for torture and genocide. In an early case affirming the extradition of Marcos Perez Jiminez to Venezuela, its former head of state, the Fifth Circuit held that the his acts

[16] Foreign dignitaries are of course protected by federal and state rules that impose penalties for filing frivolous or vexatious lawsuits. This Court might take judicial notice of the hundreds of thousands of foreign dignitaries, heads of state, and government officials who have visited the United States in the past two hundred years who have not been served with process simply because there were no claims against them.

> were done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an "Act of State."

Jiminez v. Aristeguieta, 311 F.2d 547, 558 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963). The amicus surely cannot be taken to argue that Jiang, before, during, or after his term of office, may with impunity instigate and order acts of torture and genocide. The amicus surely cannot be telling this Court that the Executive Branch has the power to issue a certificate of *impunity* to a person who commits internationally "heinous acts," as the amicus terms them. Am. Br. At 2. At most, the amicus may contend that judicial proceedings against Jiang should be suspended during his term in office.[17] That's what happened in *Estate of Domingo v. Republic of Philippines*, 694 F. Supp. 782, 786 (W.D.Wash. 1988). Defendants Ferdinand and Imelda Marcos, while they were heads of state, allegedly planned, executed and covered up the murder of two Filipino union leaders. The plaintiff estates filed their suit in September 1981 while the Marcoses were still in power, but the court found in December 1982 that sovereign immunity protected the Marcoses. However, five years later, in November 1987, the court reinstated the Marcoses as defendants because by then they

[17] However, the Supreme Court, in *Clinton v. Jones*, 520 U.S. 681 (1997), held that civil proceedings are *not* suspended during a President's term in office. The Court refused to grant temporary immunity to President Clinton.

were no longer heads of state. The court found that immunity for the defendants lasted only so long as they were heads of state: "Head of state immunity serves to safeguard the relations among foreign governments and their leaders, not as the Marcoses assert, to protect former heads of state . . ." 694 F.Supp. at 786. The murders allegedly committed by the defendants in the *Domingo* case occurred while they were in office as heads of state. Similarly, some or many of the acts of genocide and torture allegedly committed by defendant Jiang in the present case occurred while he was in office as President of China.[18] There can be no impunity for those acts; there is at most a temporary immunity from judicial proceedings in United States courts. Even so, we shall argue in the next section that the issue of temporary immunity for defendant Jiang is moot.

[18] Many of the acts alleged in the Complaint are by their very nature continuing acts. Kidnapping and disappearance of persons are crimes that continue until the victim is rescued or is found to have died. (Otherwise, a statute of limitations could run out while the victim remains hidden.) Some of the torture victims of defendant Jiang have been cremated, and their disappearances have not been verified. Thus he is allegedly committing the continuous crimes of kidnapping and disappearance each day. Since March, 2003, he continues to commit these crimes as a private citizen of China.

E. The Alleged Immunity of Foreign Heads of State Is an Affirmative Defense, Not a Barrier, to Judicial Proceedings Against Them, and in Any Event Is Moot in the Present Case

18. It is well-settled law that a claim of immunity is an affirmative defense to a civil action.[19] On appeal, the amicus asks this Court, among other things, to uphold that immunity defense. However, there is no need for this Court to address the issue of temporary immunity. Defendant Jiang is no longer head of state; he is now a private citizen of China.[20] His failure to appear in the court below has already—if unfortunately—operated in practical terms to "immunize" him from proceedings in the district court during the remaining five months of his term in office. Nevertheless, his decision not to show up in court bars him at the present time from claiming head-of-state immunity. Arguably he lost the right to make that claim on March 15, 2003, the day he left office, while the case against him was proceeding. This was nearly six months *before* the district court below

[19] The FSIA provides that a foreign state shall not be immune from the jurisdiction of U.S. courts in any case in which the foreign state has "waived its immunity either explicitly or by implication." Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1). Of course, a case has to be filed, and the foreign nation served with a Complaint, before it can explicitly waive its immunity. In short, immunity is an affirmative defense to a civil action. The legislative history of the FSIA makes this point clear. The FSIA makes sovereign immunity "an affirmative defense which must be specially pleaded" by the foreign government, which has the burden of "proving their eligibility for immunity." H.R. Rep. No. 94-1467, 94th Cong., at 6616.

[20] Jiang's temporary immunity, if he had any, expired on March 15, 2003. Plaintiffs promptly brought this fact to the attention of the district court. In its opinion of Sept. 12, 2003, the court refers to Jiang as the "former" head of state.

issued its opinion. Nor can the amicus presently make a claim on behalf of defendant Jiang that the defendant himself is not legally empowered to make.

19. The judicial proceedings against Jiang, however, are still active. The Complaint against him can be reinstated, as was the Complaint against the Marcoses in the *Domingo* case previously described (*supra* at p. 17 of this Reply Brief) when their term of office expired during the litigation. Indeed, in the present case we attempted to amend our Complaint, but our request was refused by the district court in its *Memorandum Opinion* of October 6, 2003.

II. Defendant Jiang was Duly Served with Process

20. Personal jurisdiction over defendant Jiang Zemin was established by service of process upon him. The amicus then successfully raised the affirmative defense of immunity on his behalf in the district court.

21. However, the amicus now asks this Court to reach deep and review the validity of service on defendant Jiang. Am. Br. at 35-49. The amicus asserts that "it is not uncommon for foreign heads of state and their governments to view service of process as an affront to the dignity of both the leader and the state." Am. Br. at 37. Of course the amicus could have added: "and so does every defendant in every lawsuit ever filed." If there is

a special impairment of human dignity involved in having one's bodyguards receive a document, it fairness it could be compared with the impairment of human dignity suffered by a torture victim. Since the amicus has not claimed in the present case that the allegations against Jiang Zemin are frivolous, why does it argue that he somehow has not validly been served? Handing legal documents to his bodyguards did not disrupt his day. Indeed, it gave him notice that a lawsuit has been filed against him. If he were then to enjoy a temporary immunity from the lawsuit, he would have gained an extension of time to prepare his defense. These are bonuses, not impediments.

22. The amicus then proceeds to its "critical point" as follows:

> The critical point for our argument is that, in Article II, Section 3, the Constitution specifically assigns to the President the authority to decide how to receive visiting heads of state.

Am. Br. at 38. However, Article II, Section 3 of the Constitution specifically says no such thing.

23. Next, the amicus relies heavily on "the only court of appeals case on point," Am. Br. at 40, namely *Hellenic Lines, Ltd.v. Moore*, 345 F.2d 978 (D.C. Cir. 1965). That case held that an ambassador cannot be forced to serve as an involuntary agent for service on his country. The amicus does not explain *why* it is the only case it has found. It is because the FSIA of

1976 preempted all service questions on foreign countries, providing for service primarily by mail. Foreign Sovereign Immunities Act, 28 U.S.C. at § 1608. One of the purposes of the FSIA was to get rid of the traps of interference-with-service cases like *Hellenic Lines*. In any event, *Hellenic Lines* is definitely *not* "on point." Defendant Jiang was *not* served as an involuntary agent for the sovereign state of China or for any political subdivision of the state of China. He was served in his personal capacity for the deaths and injuries resulting from his own non-governmental acts and in his capacity as agent for a private torture organization.

24. Finally, the amicus devotes the last six pages of its Brief to a wholly irrelevant argument that the *alternative* service of process upon defendant Jiang was defective. Although it is true that the plaintiffs attempted to use the alternative service of process method, they did so out of an abundance of caution. In fact, by the time they resorted to it, their process servers had already completed service upon Jiang not once but twice.

25. Defendant Jiang was served the first time when Cory Fertel, Director of United Processing Inc. Detective Agency, attempted to hand the legal documents to a Secret Service agent guarding Jiang at the Ritz-Carleton Hotel in Chicago in the afternoon of October 21, 2002. The hotel

was surrounded by armed guards. Mr. Fertel explained that the documents were part of process of service upon Jiang Zemin. A security guard said that he could not allow anyone to serve papers on any member of the Chinese delegation. Mr. Fertel then approached a Secret Service agent at the hotel's security office at street level. The agent told Mr. Fertel to leave the papers on the sidewalk. Mr. Fertel did so. At this point, service of process was completed.

26. Case law and common sense support this result. In *Duffy v. St. Vincent's Hospital*, 198 A.D.2d 31, 603 N.Y.S.2d 47 (1st Dept. 1993), the process server was stopped from entering defendant's residential community by a security guard at the gate. The process server tried to hand the summons and complaint to the security guard but the guard refused to accept service. The process server then left the papers on the lawn in the general vicinity. Although the defendant claimed he never received the papers, the court held that service of process was made. In *International Controls Corp. v. Vesco*, 593 F.2d 166 (2d Cir 1979), the Second Circuit held that despite attempted interference by defendant Vesco's security guards, process was successfully served. Security guards initially threatened and intimidated the

process server and prevented her from entering the premises. When she later returned and threw the papers over the fence, they tossed the papers back at her.

27. In the instant case, after Mr. Fertel placed the papers on the ground, the Secret Service agent changed his mind and ordered Mr. Fertel to pick the papers up and go away. Intimidated by the implied threat of force, Mr. Fertel picked up the papers and left. However, the return of the papers to him, just as the tossing of the papers back to the process server in the *Vesco* case, can not operate *ex post* to invalidate a service already made.

28. At around the same time that afternoon, another process server associated with Mr. Fertel's firm, James Bobor, entered the lobby of the Ritz-Carlton. Two Chinese guards came over and flanked him. The guards told Mr. Bobor that they knew he was trying to serve process on Jiang Zemin. A United States Secret Service agent came over and stood directly in front of Mr. Bobor's face. The agent said, "If you drop those papers, I will classify that as a terrorist act and you will be taken down." Each Chinese guard then took one of Mr. Bobor's arms and escorted him to the door. As they were walking toward the door, the Secret Service agent told Mr. Bobor that he could leave the legal papers outside the door on the hotel podium that was standing on hotel property. Mr. Bobor proceeded to put the

documents on the hotel podium, thus effectuating a second service of process upon defendant Jiang Zemin.[21]

III. The District Court has Jurisdiction Over Office 6/10

30. Office 6/10 is a torture chamber. It operates outside Chinese law under the aegis of the Communist Party. It was established in 1999 by defendant Jiang while he was head of the Communist Party. Any person who might attempt to serve process on Office 6/10 by knocking on its door would presumably be escorted inside and disposed of in the usual fashion. There is something Kafkaesque about the amicus and the district court pondering whether Office 6/10 may have or should have *appointed an agent* to receive service of process.

31. A recent district court decision in the Southern District of New York presents facts that are strikingly similar to the present case. In *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y., 2001), *motion by United States for reconsideration denied,* 186 F.Supp.2d 383 (S.D.N.Y., 2002), *default damages awarded,* 216 F.Supp.2d 262 (S.D.N.Y., 2002), torture victims brought an action against Robert Gabriel Mugabe, the

[21] Defendant Jiang Zemin may have heard right away about the service of process, although proof of his actual knowledge is not required for service. Donald W. Keyser, Deputy Assistant Secretary of State, testified in an affidavit for the amicus that he was approached in Houston on October 23, 2002 (two days after the service in Chicago), by Yang Jiechi, the Chinese Ambassador to the United States, on what the Ambassador said were instructions from "very senior levels" requesting that the State Department immediately look into the reported service of process in the instant case.

President of Zimbabwe, under the Alien Tort Statute and the Torture Victims Protection Act. Defendant Mugabe was sued in his personal capacity and not as head of state. He was also served with process as agent for the National Union Patriotic Front, a political party in Zimbabwe. The district court dismissed the charges against Mugabe, who remained head of state at all relevant times in the litigation, on the basis of the State Department's suggestion of immunity which the court treated as an affirmative defense. However, the court entered a default judgment against the Patriotic Front, which was charged with murder, beatings, and torture of Mugabe's political opponents. Thus, despite defendant Mugabe's "immunity" and his status as head of state, he was treated as the legal agent of the Patriotic Front for the purpose of receiving service of process. Like Office 6/10 in the present case, the Patriotic Front is a private organization with no official connection to the government.

32. The identities of the members, workers, or associates of Office 6/10 are for the most part unknown. This is not surprising, considering that they are engaging in criminal acts. Defendant Jiang Zemin is publicly known as the founder of Office 6/10. He continues to supervise its operation even after the expiration of his term as head of state. He could be prosecuted as a criminal under the law of China, although he obviously has

no fear that any prosecutor would dare do such a thing. The district court below erred in holding that the founder, officer, active participant, and publicly identified member of an illegal organization is not its agent for service of process.

33. Not only is Jiang an agent of Office 6/10, but as its founder and active officer he has been personally involved in promoting its persecution of Falun Gong practitioners in the United States. As the plaintiffs have alleged in the district court, he was engaged in Office 6/10 business during his visit to Chicago in October 2002. Through him and his contacts in Chicago, Office 6/10 has been "doing business" in Chicago.

IV. Conclusion

34. For the foregoing reasons, plaintiffs respectfully request reversal of the district court's dismissal of claims against defendant Jiang Zemin and defendant Office 6/10, and in addition request remand to the district court allowing plaintiffs to amend their Complaint and allowing defendants a reasonable time to answer or otherwise plead to the Complaint.

Respectfully submitted,

_____
Anthony D'Amato
One of the attorneys for Plaintiffs
Northwestern Law School
357 E. Chicago Ave., Room 311
Chicago, IL 60611
(312) 503-8474
(312) 503-1676 fax

_____
Terri E. Marsh
Attorney for the Plaintiffs
Counsel of Record
717 D St., N.W., Suite 300
Washington, D.C. 20004
(202) 369-4977
(202) 628-6618 fax

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

I hereby certify that this brief complies with the type volume limitation of Circuit Rule 32(a)(7). This brief contains 6,583 words.

Terri E. Marsh
Lead Counsel for the Plaintiffs-Appellants
717 D Street NW, Suite 300
Washington D.C. 20004
Tel: 202-369-4977
Fax: 202-628-6618

CIRCUIT RULE 31(e) CERTIFICATION

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

Terri E. Marsh
Lead Counsel for the Plaintiffs-Appellants
717 D Street NW, Suite 300
Washington D.C. 20004
Tel: 202-369-4977
Fax: 202-628-6618

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 19th day of March, 2004, two (2) true and correct copies of the above and foregoing brief and a digital versions containing the brief were served upon:

Jeremiah E. Goulka
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883, Rm. 6136
Washington DC 20044

Jiang Zemin, Chair
Central Military Committee
Zhongnanhai
Beijing China

by regular U.S. mail on or before 5:00 p.m. this 19th day of March 2004.

Terri E. Marsh
Lead Counsel for the Plaintiffs-Appellants
717 D Street NW, Suite 300
Washington D.C. 20004
Tel: 202-369-4977
Fax: 202-628-6618