

to overrule the Report and Recommendation and grant Defendant's Motion.

I. Factual and Procedural Background

On November 8, 2000, the Court entered a default judgment against Defendant. It then referred the case to Magistrate Judge Kay for all purposes, including trial on damages. On March 27, 2001, Magistrate Judge Kay conducted a three-day non-jury trial on damages. Plaintiffs presented the testimony of eight witnesses: (1) Richard Tanter, Professor of International Relations and Comparative Politics at the Kyoto Seika University in Japan; (2) John Doe III; (3) Jane Doe I; (4) Theodore Folke, documentary filmmaker for the United Nations; (5) John Doe II; (6) Arnold Kohen, author on East Timor and consultant for The Humanitarian Project, a human rights organization; (7) Ian Thomas, cartographer and remote sensing specialist; and (8) Estella Abosch, social worker and member of Advocates for Survival of Torture and Trauma. Plaintiffs also presented approximately 40 exhibits in support of their claims. Defendant made no appearance and presented no defense. See Doe I, et al. v. Lumintang, No. 00cv674 (GK/AK), September 13, 2001, Findings of Fact and Conclusions of Law, at 2.

Based on the evidence presented at trial, Magistrate Judge Kay made the following findings of fact and conclusions of law:

On December 7, 1975, Indonesia invaded East Timor. Over the next four years, as a result of actions by the Indonesian military,

133,000 to 200,000 East Timorese disappeared. Defendant, then a lieutenant or captain in the infantry, took part in the invasion. Id. ¶¶ 2, 3.

Defendant later held senior command positions in military field operations posts. From 1993-1994, he was the Commander of Military Resort Command in East Timor, identified as "Koren 164." He was then promoted to the position of Commander of the First Infantry Division of "Kostrad," the army strategic reserve command. In 1996, he became the Chief of Staff of Military Area Command 8, which included the province of Irian Jaya, the western part of New Guinea and the Island of Moluccas. Id. ¶ 4. On January 18, 1999, he was promoted to Army Deputy Chief of Staff. As Army Deputy Chief of Staff, he became the third highest ranking officer in the Indonesian military. Id. ¶ 6.

On January 28 1999, Dr. Bacharuddin Jusuf Habibie, Indonesia's President, announced that a vote would be held "to allow the East Timorese people to decide between 'autonomy' as a special part of Indonesia or independence." Id. ¶ 5. Militia assaults throughout East Timor against independence leaders, their families, and ordinary civilians began shortly thereafter. Id. ¶ 10.

At a meeting on February 16, 1999, Lieutenant Colonel Yayat Sudrejat, head of the Indonesian military's Combined Intelligence Task Force, "demanded that independence leaders and their families be 'wiped out.'" Id. ¶ 11. Defendant, as Army Deputy Chief of

Staff, was specifically responsible for supervising the implementation of Sudrejat's plan by the "Kopassus," the Indonesian military's special forces. Id.

On March 26, 1999, Abilio Soares, the Governor of East Timor, "directed the militias to prepare to liquidate all senior pro-independence people and their parents, sons, daughters, and grandchildren. If they sought shelter in the churches, they were to be killed along with the nuns and priests." Id. ¶ 12. Pursuant to Soares' order, 54 people who had gathered seeking safety in a church in Liquica, a large town west of Dili, were killed. Id. ¶ 13. The massacre of these people in Liquica "was not an isolated incident; such killings had been happening repeatedly on a lesser scale and continued thereafter." Id.

On May 5, 1999, Defendant issued a telegram instructing military commanders in East Timor to "anticipate situations which may arise from the vote and to prepare a security plan with the aim of preventing the outbreak of civil war...." Id. ¶ 16. "Although this suggested possible civil war, there was no two-sided fighting. Instead, there were assaults by pro-integration forces, supported by the military, on anyone who spoke or was believed to be speaking for independence." Id. Defendant also directed the military commanders to prepare for "evacuation." Id.

At a meeting on June 18, 1999, high-ranking military officials acknowledged the possibility that the East Timorese would vote for

independence and developed plans for the Indonesian military to respond to such an outcome. The plan was structured in two parts. The Indonesian military would first attempt to disrupt the vote, "either in the days leading up to the vote or by interference with voting on the day of the vote." Id. ¶ 18. If these efforts were unsuccessful, and the East Timorese voted for independence, the military was "to reject the results and to demand that East Timor be partitioned into a pro-Indonesian part and an independent part." Id. This part of the plan included the "forced relocation of the local East Timor population and the re-population and transmigration into what would then be empty regions of East Timor." Id.

On June 30, 1999, a manual bearing Defendant's signature was issued which provided instructions for army secret warfare, including training in abduction, killing, kidnapping, terror and agitation. Id. ¶ 17. This manual was distributed to and used by soldiers in East Timor, including those at Koren 164, Defendant's previous command. Id.

On August 30, 1999, the vote was held and nearly 79 percent of the East Timorese voted in favor of independence. Id. ¶ 19. Immediately following the vote, "pro-Indonesian militias and [the Indonesian Army] began a sustained and coordinated program of massive destruction which continued until the arrival of an international military peacekeeping force ("INTERFET") on

[September 21, 1999].” Id. ¶ 20. Violence was directed against pro-independence leaders, their families, and ordinary civilians. “Many people were killed immediately. The destruction also took other forms: major buildings, homes, cars, and shops were blown up or burnt. Most schools were destroyed.” Id. ¶ 21.

“Information released by the United Nations indicates that between September 4th and September 21st 1999, the date INTERFET arrived in Dili, some 240,000 people, or a third of the population, was relocated from East Timor.” Id. ¶ 23. “The forced evacuation of approximately one-third of the East Timor population was the result of long-term strategizing and planning that required the coordinated work of the Indonesian military.... This depopulation was consistent with the strategies discussed at the June 18, 1999 meeting ... and with the general character of the telegram sent by [Defendant] on May 5, 1999.” Id.

Magistrate Judge Kay concluded that Plaintiffs were among the hundreds of thousands of citizens of East Timor who were terrorized and tortured by the Indonesian military. See id. ¶¶ 25-98. He also concluded that Defendant, as the third highest ranking officer in the Indonesian military, “is both directly and indirectly responsible for the human rights violations committed against the Plaintiffs.” Id. at 32. Specifically, he found that Defendant, along with other high-ranking officers in the Indonesian military, “planned, ordered, and instigated acts carried out by subordinates

to terrorize and displace the East Timor population, to repress [the] East Timorese who supported independence from Indonesia, and to destroy East Timor's infrastructure following the vote for independence." Id. Magistrate Judge Kay then awarded Plaintiffs \$66 million in compensatory and punitive damages.

On March 25, 2002, more than six months after the entry of judgment for damages and approximately fifteen months after the entry of the default judgment, Defendant filed a Motion to Set Aside Default Judgment and Order and Judgment on Damages, claiming that the Court lacked personal jurisdiction over him and subject-matter jurisdiction over Plaintiffs' claims.

On March 3, 2004, Magistrate Judge Kay submitted a Report and Recommendation denying Defendant's Motion to Set Aside Default Judgment and Order and Judgment on Damages. He determined that personal service was properly effectuated on Defendant at Dulles International Airport in Fairfax County, Virginia. He further determined that, "[h]aving found valid personal service, the Court had personal jurisdiction over Defendant; therefore, the issue of constitutional due process, vel non, is not implicated." Report and Recommendation at 13. He also concluded that the Court had subject matter jurisdiction over Plaintiffs' claims under both the Alien Tort Claims Act and the Torture Victim Protection Act. See id. at 13-19. For purposes of ruling on the Report and Recommendation, the Court assumes, without actually deciding, that

personal service was properly effectuated on Defendant at Dulles International Airport in Fairfax County, Virginia.¹

II. Analysis

A. The Assertion of Personal Jurisdiction over Defendant Does Not Meet the Requirements of Constitutional Due Process

"To establish personal jurisdiction over a non-resident defendant, a court must engage in a two-part inquiry: A court must first examine whether jurisdiction is applicable under the state's long-arm statute and then determine whether a finding of jurisdiction satisfies the constitutional requirements of due process." GTE New Media Servs. v. BellSouth Corp., 199 F.3d 1343, 1347 (D.C. Cir. 2000).

The District of Columbia long-arm statute, D.C. Code § 13-423,² "is coextensive in reach with the personal jurisdiction

¹ The Court declines to make any determination on whether personal service was properly effectuated on Defendant because the parties submitted conflicting declarations on the issue and no evidentiary hearing was held.

² D.C. Code § 13-423 provides, in relevant part,

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's -

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

(continued...)

allowed by the due process clause of the United States Constitution.'" United States v. Phillip Morris, Inc., 116 F.Supp.2d 116, 128 (D.D.C. 2000) (quoting Shoppers Food Warehouse v. Moreno, 746 A.2d 320, 329 (D.C. 2000)). Thus, "where the exercise of jurisdiction violates the requirements of due process, it is not permitted by the long-arm statute." Phillip Morris, Inc., 116 F.Supp.2d at 129 n.14.

When a defendant resides in or is present in the forum state, due process concerns are minimal. "Jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice." Burnham v. Superior Court, 495 U.S. 604, 619 (1990). Thus, if personal service was properly effectuated on Defendant at Dulles International Airport in Fairfax County, Virginia, such service would unquestionably confer personal

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- (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
- (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

D.C. Code § 13-423(a).

jurisdiction over Defendant upon the state courts of general jurisdiction in the state of Virginia.

However, if, as in this case, "the defendant is not present within the forum territory, due process requires that 'he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" El-Hadad v. Embassy of the United Arab Emirates, 69 F.Supp.2d 69, 78 (D.D.C. 1999) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). "A defendant has minimum contacts with a jurisdiction when [he] has 'purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arose out of or relate to those activities.'" Phillip Morris, 116 F.Supp.2d at 129 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985) (emphasis added)). "If a defendant purposefully directed [his] activities towards a forum, [he] can expect to be subject to jurisdiction in that forum." Phillip Morris, 116 F.Supp.2d at 129.

In the instant case, it is undisputed that personal service was not effectuated on Defendant in the District of Columbia. It is, therefore, necessary for this Court, which sits in the District of Columbia, to examine whether assertion of personal jurisdiction over Defendant meets the requirements of constitutional due process.

There is no evidence that Defendant purposefully targeted his activities at residents of the District of Columbia, or even that he committed a single act within the District of Columbia that has any nexus to Plaintiffs' cause of action. The fact that Defendant made six official visits to the United States over a twenty-four year period does not constitute sufficient minimum contacts to support this Court's assertion of personal jurisdiction over him. See Burnett v. Al Baraka Inv. and Dev. Corp., 292 F.Supp.2d 9, 21-22 (D.D.C. 2003) (citing Kulko v. Superior Court of California, 436 U.S. 84, 93-94 (1978) (holding that temporary visits to the state are an insufficient basis for the assertion of personal jurisdiction over an unrelated action)). It would, therefore, violate the fundamental requirements of due process for this Court to exercise personal jurisdiction over Defendant.

B. Federal Rule of Civil Procedure 4(k)(2) Does Not Provide a Basis for Assertion of Personal Jurisdiction over Defendant

Federal Rule of Civil Procedure 4(k)(2) "allows a district court to acquire jurisdiction over a foreign defendant which has insufficient contacts with any single state but has contacts with the United States as a whole."³ In re Vitamins Antitrust Litig.,

³ Federal Rule of Civil Procedure 4(k)(2) states,

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to

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94 F.Supp.2d 26, 31 (D.D.C. 2000) (internal quotation omitted). “The rule’s fabric contains three strands: (1) the plaintiff[s]’ claim must be one arising under federal law; (2) the putative defendant must be beyond the jurisdictional reach of any state court of general jurisdiction; and (3) the federal courts’ exercise of personal jurisdiction over the defendant must not offend the Constitution or other federal law.” Biton v. Palestinian Interim Self-Gov’t Auth., 310 F.Supp.2d 172, 177 (D.D.C. 2004) (quoting United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 38 (1st Cir. 1999) (emphasis added)).

Applying this tripartite test in the instant case, it is clear that this Court cannot exercise personal jurisdiction over Defendant under Rule 4(k)(2). Assuming personal service was properly effectuated on Defendant at Dulles International Airport in Fairfax County, Virginia, such service would subject him to the exercise of personal jurisdiction by the state courts of general jurisdiction in Virginia. See Burnham, 495 U.S. at 619. Therefore, the requirement of Rule 4(k)(2) that a defendant “must

³(...continued)

establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Id. The Commentaries “stress[] that subdivision (k)(2) jurisdiction is available only when it is shown that the defendant ‘is not subject to the jurisdiction of the courts of general jurisdiction of any state.’ This means that the availability of jurisdiction in any state court at all can become a bone of contention.” Id., C4-35.

