Case No. 03-3989

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Petitioner-Appellants

v.

JIANG ZEMIN and
FALUN GONG CONTROL OFFICE (*a.k.a*. Office 610)

Respondents-Appellees

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

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BRIEF *AMICUS CURIAE* OF THE WORLD ORGANIZATION AGAINST TORTURE USA AND OTHER GROUPS IN SUPPORT OF THE APPELLANTS

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STATEMENT OF INTEREST

As an international human rights organization focusing on the issues of torture (defined under the Convention Against Torture as "severe pain and suffering") and U.S. compliance with international human rights standards, and closely tied to an international human rights network dealing with these issues, the World Organization Against Torture USA (WOAT) has special qualifications to assist the Court in its consideration of this case in the capacity of amicus curiae. Our amicus brief will provide information and legal analyses that would be relevant to the determination of how international legal standards and practices, including applicable international treaties and interpretive jurisprudence, relate to the subjects and issues raised by the case at bar.

We believe this case raises a number of significant and important issues and concerns that relate to how international legal standards and practices may apply to, or inform, the application and interpretation of legal standards under the Alien Tort Claims Act and Torture Victims' Protection Act. We believe our input, reflective of our international contacts and experiences, and our status as a well-recognized international human rights organization that plays a major role in litigation involving international human rights issues in United States courts, will be useful to the Court and the Parties in the adjudication process, and will provide

an important international perspective that may not otherwise be adequately understood or addressed.

Our organization has previously appeared before this Court in the Convention Against Torture claim case of *Nwaokolo v. Ashcroft*, 314 F.3d 303 (December 27, 2002). We are counsel of record in two other Alien Tort Claims Act and Torture Victims' Protection Act cases in U.S. courts, raising issues very similar to those posed by the present case.

Additional information concerning the World Organization Against Torture USA and its work and interest in this case is provided in the accompanying Motion for Leave to File an Amicus Brief.

This amicus brief also is being submitted on behalf of two other non-governmental organizations that have a special concern for promoting the observance of human rights, and most especially freedom of religion and spiritual belief, in China and elsewhere:

The Global Coalition To Bring Jiang to Justice is an International alliance organized by victims who have suffered human rights abuses as a result of the campaign of persecution against Falun Gong practitioners organized and supervised by former President Jiang Zemin of the People's Republic of China, as well as 87 organizational members that support the effort to bring attention to the persecution campaign, to secure justice for its victims, and to end the impunity of

those leading and carrying out the campaign of persecution. Its mission is to bring the abusers to justice, and to provide redress for the victims. To further this goal it monitors and documents abuses that have taken place, conducts educational efforts to bring attention to the problems, and provides support services for victims.

The World Service Authority is a non-profit human rights organization founded in 1954 to advance understanding and respect for human rights, and to promote its observance globally. It seeks to promote the concept of world citizenship for all members of the international community by supporting international organizations and initiatives that take a global perspective, such as the development of a world parliament, a world court of human rights, a world peace force, and the use of a universally recognized world passport not tied to nationality or citizenship with any one particular nation or government.

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1. Is a former head of state entitled to the same immunity protections as a sitting head of state? Does head of state immunity cover actions of former heads of state taking place after they have left office?

2. Do head of state immunity claims, as opposed to State Department determinations of head of state status, have to be presented as affirmative defenses by named defendants who are former heads of state in their own behalf, or can they be presented by the U.S. Department of State in an amicus capacity?

3. Does head of state immunity protection, for either sitting or former heads of state, apply to torture, genocide and other major violations of jus cogens norms of international law?

4. Does the FSIA provide an alternative basis for absolute immunity for the actions of heads of state, as the opinion below suggests, even in situations involving former heads of state and major abuses of jus cogens norms prohibiting torture and genocide?

5. Are "private" actions of heads of state or former heads of state (i.e. actions that can not be considered officially sanctioned or authorized under any circumstances) proper subjects of immunity claims?

SUMMARY OF ARGUMENT

In his Opinion and Order dated September 12, 2003, Judge Kennelly misapplied his own precedent as well as the legislative intent behind the Torture Victim Protection Act (TVPA) when he summarily dismissed the Appellants' claims of torture and genocide against former head of state Jiang Zemin based on the claim of head of state immunity presented to the court on the Defendant's behalf by the U.S. Department of State in their *amicus* submission. Judge Kennelly failed to properly recognize that certain violations of international human rights norms, such as torture and genocide, are not subject to immunity protections under any circumstances, that former heads of state are not entitled to the same degree of immunity protection as sitting heads of state, that some of the alleged acts of torture and genocide were committed by Defendant Jiang after he left office and therefore were not subject to immunity protections, and that the U.S. Government in its capacity as amicus could not properly raise personal defenses such as head of state immunity on behalf of a defaulting defendant.

ARGUMENTS

I. Congress And The Courts Are Limiting the Availability of Immunity Claims Involving Major Human Rights Abuses.

1. The increasing likelihood that major human rights abusers will be held responsible for major violations of international law is evidenced in U.S. law by several cases arising under the Alien Tort Claims Act (ATCA) and the Torture Victims Protection Act (TVPA) holding former heads of state and other high ranking officials who have left office subject to tort liability for major violations of human rights norms despite their official status when the acts of torture were committed, or when their claims of immunity were considered by the courts. These include: 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 His-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). As the Court in *Tachiona v. Mugabe,* 169 F.Supp.2d 259 (S.D.N.Y.2001) indicated,

> "if any trend emerges from recent developments in international law, it is precisely in the direction of heightened sensitivity to international human rights, less tolerance for the older barriers that shielded the sovereign's private wrongful conduct and greater relaxation of jurisdictional rules so as to facilitate vindication of individual rights against extreme misconduct violating international norms." *Id.* at 278-80.

2. The U.S. Congress both recognized and endorsed the trend towards expanding the personal liability of government officials for violations of international law when it passed the TVPA. In fact, the report of the Senate Judiciary Committee supporting the passage of the TVPA makes clear that:

> "the Committee does not intend [head of state or other immunity claims based on official status] to provide former officials with a defense to a lawsuit brought under this legislation …. [T]he FSIA should not normally provide a defense to an action taken under the TVPA against a former official …. [T]he committee does not intend the 'act of state' doctrine to provide a shield from lawsuit for former officials." S.Rep.No. 249, 102d Cong., 1st Sess., at 8 (1991).

Moreover, the Senate Committee report notes:

> "since [the act of state] doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield

> former officials from liability under this legislation." S.Rep. No. 249, 102d Cong., 1st Sess., at note 15.

3. In accordance with this clearly enunciated legislative intent, the Department of State has:

> "acknowledge[d] the expanding body of judicial decisions under the TVPA holding *former* foreign government officials liable for acts of torture and extrajudicial killing despite (or indeed because of) the fact that the defendants abused their governmental positions…." [and that the TVPA provides an]"explicit statutory basis for suits against former officials … for acts of torture and extrajudicial killing committed in an official capacity."
> *Plaintiff A, et. al. v. Xia Deren,* No. C 02 0695 CW(EMC) (C.D.Cal.2003) Letter, dated September 25, 2002, from William H. Taft, IV, Legal Advisor, U.S. Department of State, to Robert D. McCallum, Jr., Assistant Attorney General. (emphasis in original.)

4. In addition to the clear congressional intent to limit immunity claims that is embodied in the TVPA, particularly for former officials, and the case law that acknowledges the reduced availability of immunity defenses and increased personal liability for the most serious human rights abuses, the need to limit the scope of official immunity claims also is recognized in other areas of law touching on U.S. foreign policy and foreign relations concerns. Since the passage of the Foreign Sovereign Immunity Act (FSIA) in 1976, there has been a growing recognition by the courts that immunity claims, whether made on behalf of governments claiming sovereign immunity, or individual officials based on diplomatic or official status, must be made on an affirmative basis by the

defendants in legal proceedings, instead of by the U.S. Government acting on their behalf through diplomatic channels. The principle that the FSIA endorsed and established is that these types of immunity claims should no longer be resolved through diplomatic channels that are heavily influenced by political pressures and foreign policy considerations, but rather must be determined by courts based on legal standards as opposed to political concerns. This principle would appear to be as applicable to immunity claims raised by government officials as it is to foreign sovereign immunity claims brought by governments themselves. *See e.g*. Jerrold Mallory, *Resolving the Confusion Over Head of State Immunity*, 86 Col.L.Rev. 169, 188 (1986)("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 standard for making head of state immunity determinations.")

5. In his decision in the proceedings below, Judge Kennelly did not give adequate and proper deference to the clearly articulated intention of Congress in passing the TVPA to limit the availability of head of state and other immunity claims where acts of torture and genocide have been alleged as the basis of a TVPA lawsuit. Nor did Judge Kennelly properly take into account the general trend in U.S. case law to restrict the availability of immunity, especially when these defenses are presented by the U.S. Department of State rather than by the

defendants themselves, through the type of diplomatic channels that the FSIA sought to discourage.

II. While The FSIA May Not Be Directly Controlling In Head Of State Immunity Cases, It Does Provide An Indication Of Congress' Intent To Limit The Availability Of Immunity Claims.

6. In his decision, Judge Kennelly misinterpreted Appellants' argument concerning the role that the FSIA plays in cases involving head of state immunity claims. Appellants were not suggesting that the FSIA is controlling in a head of state immunity case, but that the FSIA provides an indication of a general movement in the direction of applying immunity standards less stringently, and removing the type of traditional political and foreign policy basis for deciding immunity claims that the court below relied on in dismissing this case.

7. Moreover, in granting immunity to Defendant Jiang and dismissing the case, Judge Kennelly made a fundamental error by suggesting that heads of states are absolutely immune from suit, regardless of the unlawful nature of their actions, based on the broad sovereign immunity protections applied under the FSIA. *Plaintiffs A, et. al. v. Jiang*, 2003 WL 22118924, *6 (N.D.Ill.2003). Judge Kennelly seemed to be suggesting that foreign sovereign immunity considerations applied under the FSIA attach automatically to heads of state because heads of state are indistinguishable from the foreign sovereign. This argument is inconsistent with position that Judge Kennelly takes in other portions of his

decision suggesting that the FSIA and head of state immunity claims are unrelated, and that the FSIA limitations on immunity should not be applied to heads of state.

8. This inconsistency in logic led Judge Kennelly to inappropriately place great reliance on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) when he concluded that Defendant Jiang could not be held liable for the systemic human rights abuses inflicted against Falun Gong practitioners by the Chinese government. It is critical to understand that unlike the suit against Defendant Jiang, the suit in *Nelson* was not filed against the individual officials responsible for the tortuous conduct, but was filed against the Saudi Government itself. In that case, there was no question that the FSIA applied, since the lawsuit directly implicated the Saudi government. In the case at bar, the defendant official was acting outside his official capacity and his lawful authority, so that the justification for applying either head of state or FSIA immunity is not present.

9. Since heads of state do not fall within the statutory definition of a foreign state as that term is used in the FSIA, the automatic presumption of immunity accorded to foreign sovereigns cannot be extended to heads of state, as Judge Kennelly suggests, and it is improper to conclude that Defendant Jiang as head of state must be equated with the foreign sovereign and be considered immune from suit on that basis.

10. Another reason why it is illogical and improper for foreign sovereign

immunity to be applied to heads of state responsible for significant human rights abuses is that, by definition, these abuses must be recognized as outside of their official authority. As the Senate Committee on the Judiciary noted in its report recommending passage of the TVPA, major human rights abuses, such as torture, cannot under any circumstances be considered legitimate public acts that can be shielded from liability. S.Rep.No. 249, 102d Cong., 1st Sess., at note 15 (1991).

11. Defendant Jiang's head of state immunity claim does not rest on any treaty or statutory provision, as was true in *Nelson*, but instead derives only from the customary judicial practice of comity and the long-recognized custom in international law of not allowing international courts to interfere with heads of state in the conduct of their duties. Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). "Comity is a discretionary doctrine. It is 'not a rule of law, but one of practice, convenience and expediency'." *United Kingdom Mut. Streamship Assurance Ass'n [Bermuda] Ltd. v. Continental Maritime of San Francisco, Inc.*, 1992 WL 486937, *8 (N.D. Cal. Aug.31, 2002) (quoting *Somportex Ltd. v. Philadelphia Chewing Gum Co.*, 453 F.2d 435, 440 (3d Cir.1971)).

12. The principles of comity and supporting the mutual dignity of nations are not disturbed by finding that a former head of state is not immune from suit

under the TVPA, and can be held liable for acts of torture and genocide committed outside the scope of his official authority or the recognized authority of any government official.

13. For purposes of ruling on Judge Kennelly's summary dismissal based on jurisdictional grounds it must be taken as given that the facts alleged in the complaint, namely the Defendant's direct supervision and involvement in acts of torture and genocide, are true. Given that stipulation, dismissal of the complaint on immunity grounds based on the principle of comity, or the concept of sovereign immunity as embodied in the FSIA, cannot be justified.

III. Heads Of State Cannot Be Granted Immunity For Private Acts Such As Torture, Genocide, And Other Violations Of *Jus Cogens* Norms Of International Law.

14. Judge Kennelly's conclusion that heads of state are immune from suit regardless of how unlawful and eggregious their conduct may be is inconsistent with the clear mandate of Congress embodied in the TVPA, as well as the broader emerging trend towards holding foreign government officials liable for private actions taken outside their scope of their authority, especially where violations of *jus cogens* standards are involved. *Plaintiffs A, et. al. v. Jiang*, 2003 WL 22118924, *6 (N.D.Ill.2003). Judge Kennelly recognized that *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, (1812), a case that he relies upon heavily to conclude that foreign heads of state are absolutely immune from suit,

"leaves open the possiblity that even a 'prince' or head of state may not be immune for his purely private ventures." But though Judge Kennelly recognized this private action exception, he inexplicably failed to apply it to acts of torture and other violations of *jus cogens* norms of international law that are widely recognized as being private in nature by definition because they cannot be considered authorized or lawful under any circumstances. *Plaintiffs A, et. al. v. Jiang*, 2003 WL 22118924, *5-6 n. 4 (N.D.Ill.2003). There are a growing number of court decisions indicating that U.S. courts are not extending FSIA immunity to officials responsible for the most significant violations of *jus cogens* norms of international law because they are deemed, by definition, unlawful and unauthorized in nature, and outside the scope of an official's authority.[1]

15. The underlying justification for revoking immunity for officials who violate *jus cogens* norms of international law is that a sovereign state cannot defend these acts as official since "*jus cogens* violations are considered violations of peremptory norms, from which no derogation is permitted." *Presbyterian Church of Sudan v. Talisman Energy, Inc. and the Republic of Sudan*, 244

[1] See, e.g., *In re Estate of Ferdinand E. Marcos, Human Rights Litig. ("Hilao II")*, 25 F.3d 1467, 1471 (9th Cir.1994)(finding that acts of torture, execution, and disappearance were "clearly outside [Marcos'] authority as President."); *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir.1992), cert. denied 508 U.S. 972 (1993)(alleged acts of torture and summary execution "cannot have been taken within any official mandate," and therefore immunity does not apply.); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1197 (S.D.N.Y.1996)(agreeing that FSIA is inapplicable to the "commission of acts which exceed the lawful boundaries of a defendant's authority."); *Xuncax v. Gramajo*, 886 F.Supp. 162, 175 (D.Mass.1995)(refusing to apply immunity because the alleged violations of human rights "exceed[ed] anything that might be considered to have been lawfully within the scope of Gramajo's official authority."); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir.1990)(FSIA immunity is lost if an official acts "completely outside his governmental authority.")

F.Supp2d. 289, 345 (S.D.N.Y.2003), *citing* Restatement (Third) of Foreign Relations § 702 cmt. n (1987); see also *Siderman de Blake v. Republic of Arg.,* 965 F.2d at 714-15 (finding that torture constitutes a violation of *jus cogens*.) Since a sovereign state cannot endorse a head of state's actions that violate *jus cogens* norms of international law as official, the actions must be considered private acts.

16. In light of the above precedents foreclosing the granting of immunity to government officials who act outside their mandate of authority, it follows that even if Judge Kennelly is correct in concluding that a head of state "can be understood to enjoy any immunity that states retain after the FSIA's enactment" is correct, a head of state who violates *jus cogens* norms of international law is not entitled to immunity for acts that cannot be classified as lawfully within his authority, or the authority of any state to carry out. *Plaintiffs A, et. al. v. Jiang*, 2003 WL 22118924, *6 (N.D.Ill.2003). These acts should have been recognized as unofficial and private in nature, and subject to the private action exception that Judge Kennelly acknowledges to exist, but inexplicably fails to apply in this case.

17. As the Ninth Circuit astutely observed in *Sidermand de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir.1992), cert. denied, 507 U.S. 1017 (1993), "[t]hat states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens." To conclude that officials, including

heads of state, who violate *jus cogens* norms of international law are entitled to immunity for these acts is inconsistent with a developing body of case precedent holding that actions of officials should not be considered immune from challenge only when they are taken in furtherance of their official duties. Since torture and genocide cannot, under any circumstances, be recognized as lawful or official acts, immunity cannot be applied to anyone who commits acts of torture and genocide, regardless of their official status.

IV. Head Of State Immunity Is Not Available To The Defendant As A Basis For Challenging The Jurisdiction Of The Court In These Proceedings Because The Defendant No Longer Holds The Position Of Head Of State, and Some Violations Occurred After He Left Office.

18. 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 can no longer be deemed the head of state of the People's Republic of China. As a former head of state, Defendant Jiang, and the Government of the United States acting on his behalf as *amicus,* is no longer in a position to challenge the jurisdiction of the court, and the validity of ATCA and TVPA proceedings, based on head of state immunity grounds. In dismissing the Appellants' claims, Judge Kennelly failed to distinguish the importance of Defendant Jiang's departure from office as he had in

Abiola v. Abubakar, 267 F.Supp.2d 907 (N.D.Ill.2003), an opinion he authored only three months earlier.

19. In *Abiola,* the Plaintiffs alleged that the severe human rights abuses inflicted during Nigeria's military regime were carried out as a result of orders initiated by the Defendant. The Defendant was a General in the military regime that controlled Nigeria from November 1993 to May of 1999. During the last year of that period, the Defendant also served as interim head of state. The Plaintiffs claimed that the Defendant's orders, both during the time he served as a General, and the time he was recognized as head of state, resulted in numerous human rights abuses. Judge Kennelly concluded that the Defendant was entitled to head of state immunity only with respect to the human rights abuses occurring during the very limited time that he held office as Nigeria's head of state. *Abiola*, 267 F.Supp.2d at 919. In essence, by refusing to extend head of state immunity to the human rights abuses carried out by the Defendant prior to his term as head of state, Judge Kennelly recognized that only during the period that an individual is a sitting head of state is a claim of head of state immunity viable since "[a] head of state's immunity [is] premised on the concept that a foreign state and its ruler [are] one and the same…the personification of the sovereign state, and a former head of state no longer can make this claim." *Abiola*, 267 F.Supp.2d at 911. In the case at bar, Judge Kennelly erroneously neglected to recognize and apply his own *Abiola*

standard that once a sitting head of state leaves office, the justifications for treating a head of state as a "personification of the sovereign," as well as the reasons for applying the principles of comity and mutual dignity between nations by extending immunity from lawsuit, no longer are present.

20. At a minimum, the same reasoning applied by Judge Kennelly for refusing to apply head of state immunity to the Defendant's actions prior to his term as head of state in the *Abiola* decision should also be applied to Defendant's Jiang's continued role in the persecution of Falun Gong practitioners after his departure from the offices of Chair of the Communist Party and President of the People's Republic of China.

21. The Court in *Estate of Domingo* recognized that a suit against a former head of state has minimal foreign policy implications. Any potentional for disruption to foreign relations is greatly diminished because the purpose of granting immunity is to ensure the protection of the relationship between the United States and that country's current regime.

> Head of state immunity serves to safeguard the relations among foreign governments and their leaders, not … to protect former heads of state regardless of their lack of official status." *Estate of Domingo v. Republic of the Philippines*, 694 F.Supp. 782, 786 (W.D.Wash.1988).

22. These same principles, limiting immunity to acts taking place only during the period the Defendant served as head of state, should be applied here. Judge Kennelly's outright dismissal of the lawsuit in its entirety, without taking

account of the Defendant's loss of head of state immunity status as of March 15, 2003, therefore constitutes reversible error.

V. Immunity Claims Are Personal In Nature And Must Be Presented By The Affected Party. They Cannot Be Raised As A Defense By A Non-Party Such As the U.S. Department Of State In Their Capacity As Amicus.

23. In addition to the substantive deficiencies in Judge Kennelly's decision to apply immunity protection to Defendant Jiang that are outlined above, there also is a major procedural problem that Judge Kennelly did not properly take into account regarding how Defendant Jiang's head of state immunity claim was presented to the court. In the proceedings below, Judge Kennelly allowed the Government to effectively serve as counsel for the Defendant by allowing affirmative defenses to be raised on the Defendant's behalf by the United States Government in its *amicus* submission, despite the fact that these defenses are personal in nature and must be raised by a party to the case on their own behalf.

24. The Amicus is not calling into question the deference that courts should grant the Executive Branch when a suggestion of immunity is made by the State Department in connection with the purely factural determination as to whether (and when) a defendant serves in the office of head of state. That factual determination, and the U.S. government's right to inform a court of that fact, is properly within the authority of the U.S. Department of State, and deserves to be given absolute deference by the courts. However, when the Executive Branch effectively takes

over as Defendant's counsel through an *amicus* submission, raising a variety of defenses and legal issues, significant problems arise concerning the propriety and appropriateness of the Executive Branch's interventions.

25. It must be remembered that this case arises in the context of a default judgment, where the Defendants have failed to make an appearance in their own defense, and have instead relied upon the U.S. Department of State to represent their interests and to enter their defenses in the case through peripheral means. Even if there were some merit to Defendant Jiang's head of state immunity claim or to any of the other defenses that have been presented on his behalf by the U.S. Government, the tactic of attempting to bring these claims before the Court, not directly by the defendants themselves, but through an ancillary *amicus* submission by the U.S. Department of State, is of doubtful validity.

26. In *Sea Hunt, Inc. v. the Unidentified, Shipwrecked Vessel or Vessels, etc.*, 22 F.Supp.2d 521 (E.D.VA.1998), the court explicitly rejected an attempt by the U.S. Government to assert a claim of the behalf of the Government of Spain. The court explained that even if the United States contends that its interests are at stake in the matter at hand, it cannot "act as counsel for the foreign sovereign." *Id.* at 524. The Court in *Sea Hunt* expressly denied the Government's contention that 28 U.S.C. § 517 grants the Government authority to represent a foreign government. *Id.* at 525. Instead, the court looked to the United States'

involvement in *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir.1986), as an illustration of the proper role that United States should play when diplomatically or politically pressured to intervene in a case.

27. In *Jackson,* the Chinese Government, faced with a possible default judgment, requested diplomatic assistance from the United States and threatened retaliatory suits against the United States if assistance was not afforded. In response to that threat, the United States, instead of intervening on behalf of the Government of China to seek dismissal of the case, advised China to "retain counsel to appear in the district court and urge sovereign immunity and other defenses." *Jackson*, 794 F.2d at 1495. See *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir.1999)("The legislative history of the FSIA reveals that Congress viewed a foreign state's sovereign immunity not as a bar to suit, but as an affirmative defense which the foreign state ultimately has the burden of proving.")

28. Judge Kennelly erred by allowing the U.S. Government to effectively serve as counsel for the Defendant in light of the fact that head of state immunity or sovereign immunity claims require an affirmative defense that must be submitted directly by the defendant, and not through an *amicus* submission by the U.S. Government. *Kreider v. County of Lancaster, PA.,* 1999 WL 1128942 (E.D.PA.1999)("Because the amicus curiae is not a party to the litigation …the

Attorney General, as amicus, may not raise a defense that has not been raised, or briefed, by the defendants.")

VI. The Policy Implications of Judge Kennelly's Decision

29. The Executive Branch's approach towards this case must be seen in the context of its broader attempt to limit the effectiveness of the ATCA and TVPA in human rights litigation without utilizing the appropriate legislative means to amend or repeal these acts. See Harold Hongju Koh, Wrong on Rights, Yale Global (July 18, 2003)(http://www.globalpolicy.org/intljustice/atca/2003/0721koh.htm) ("The [Bush] Administration's approach would virtually repeal these laws by granting immunity to all human rights abusers.") In response to the increase in ATCA and TVPA cases being litigated in U.S. courts and in an attempt to restrict judicial action in this area, the Administration has increased its efforts to put pressure on U.S. courts to dismiss ATCA and TVPA complaints, and has presented objections to this litigation through a variety of submissions. Brian C. Free, Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions In Alien Tort Claims Act Litigation, 12 Pac. Rim L. & Pol'y J. 467, 476 (2003). In these submissions, the Executive Branch is "urging a position that would wipe out nearly twenty-five years of appellate precedent," basically "insisting that victims of gross abuse cannot sue under the ATCA." Harold Hongju Koh, Wrong on Rights, Yale Global (July 18, 2003) (available at:

http://www.globalpolicy.org/intljustice/atca/2003/0721koh.htm).

30. In the face of the government's attempts to limit the availability of the ATCA and TVPA remedies, ATCA and TVPA litigants have been trying to convince the courts that they can adjudicate cases based on identifiable legal standards, instead of submitting to the intense political pressures and foreign policy considerations that surround many of the submissions of the Executive Branch. *See generally,* Jerrold Mallory, Resolving the Confusion Over Head of State Immunity, 86 Col.L.Rev. 169 (1986). The need for the judiciary to independently adjudicate immunity determinations is evidenced by the drastic change in policy that is being put forward by the U.S. Government. Without independent judicial review, the broad immunity standards proposed by the Executive Branch have the potential for gutting the ATCA and TVPA provisions, and for leaving the question of the appropriateness of particular lawsuits to political determinations based on the views of whatever administration happens to be in power at the time the cases are filed. Applying these broad immunity policies violates the clearly enunciated congressional intent embodied in the TVPA to make sovereign government officials who commit torture subject to civil claims by their victims in U.S. courts.

CONCLUSION

Based on the above described substantive and procedural errors in the decision below, Amicus supports the Appellants' request that the decision be reversed, and the complaint reinstated for consideration on the merits.

Respectfully submitted this 28th day of January, 2004 on behalf of the World Organization Against Torture USA and the other human rights organizations Cited in this brief and accompanying motion by:

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CERTIFICATE OF SERVICE

Under penalty of perjury, it is hereby certified that service of the foregoing **MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WORLD ORGANZIATION AGAINST TORTURE USA IN SUPPORT OF THE PETITIONER** has been made on the parties listed below by depositing a copy thereof for delivery by the United States postal service, postage prepaid, addressed to:

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Signed and certified to this 28th day of January, 2004 in Washington, D.C. by:

_____
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World Organization Against Torture USA

CERTIFICATE OF COMPLIANCE

This amicus submission complies with all Federal and Local Rule requirements as set out in the Federal Rule of Appellate Procedure 29, as well as the typeface-volume limitation requirements of Rule 32(a)(7)(B). The text portion of this amicus brief contains 5,525 words, including all headings, footnotes, and quotations, and is composed in Times Roman typeface using a 14 point font.

Signed and Certified to this 28th day of January, 2004 by:

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