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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

WANG XIAONING, YU LING, SHI TAO, and ADDITIONAL PRESENTLY UNNAMED AND TO BE IDENTIFIED INDIVIDUALS,

Plaintiff,

v.

YAHOO!, INC., a Delaware Corporation, YAHOO! HOLDINGS (HONG KONG), LTD., a Foreign Subsidiary of Yahoo!, ALIBABA.COM, INC. a Delaware Corporation, AND OTHER PRESENTLY UNNAMED AND TO BE IDENTIFIED INDIVIDUAL EMPLOYEES OF SAID CORPORATIONS,

Defendant.

Case No. C07-02151 CW

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT YAHOO!, INC.'S MOTION FOR AN EARLY CASE MANAGEMENT CONFERENCE AND ORDER

Date: July 26, 2007
Time: TBD
Location: Courtroom 2

Judge: Hon. Claudia Wilken

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FOREIGN LAW

I. INTRODUCTION

Plaintiffs want this Court to treat this case as if it were run of the mill. It is not, and the case management order Yahoo! proposes makes sense and should be granted.

Plaintiffs assert that Yahoo! can be held liable for aiding and abetting human rights abuses allegedly committed by the Chinese government, against its own citizens, on its own soil. Plaintiffs do not allege that Yahoo! engaged in a single act of abuse, intended such acts to occur, or even initiated any contact with the government. Rather, plaintiffs seek to hold Yahoo! liable solely because one of its indirect Chinese subsidiaries, acting pursuant to Chinese law, provided information to the Chinese government in response to the Chinese equivalent of a subpoena. Based on this theory of liability—and the sparsest of factual allegations—plaintiffs seek immediate discovery and the normal pre-trial schedule.

There is no basis for proceeding in this manner. "The price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings . . . ." *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999). Plaintiffs fail this basic test, and the caution embodied in Yahoo!'s case management proposal is required given the myriad policy concerns this case implicates.

To be clear, plaintiffs ask this Court to hold that companies have a legal duty to disobey local law in certain countries where they do business and, in particular, to refuse requests for information from the PRC. *See* Mot. at 4 n.3. Such an unprecedented ruling would dramatically impact foreign policy; impede law enforcement efforts around the world; be a direct affront to the Chinese government; and radically expand the scope of the ATS and the other sources of law on which plaintiffs rely. Before this Court takes such a dramatic step, or even recognizes that it has subject matter jurisdiction to hear plaintiffs' claims, it should proceed with "great caution" and solicit the views of the political branches. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

Great caution is also warranted because plaintiffs' complaint and their proposed means of proving their case are so speculative. For example:

- Most of plaintiffs' amended complaint is alleged based on "information and belief," or facts plaintiffs *hope* to discover—*not* facts they know. Plaintiffs rely on "information and

belief" not to allege facts uniquely known to *defendants*, but rather to describe what allegedly happened to *plaintiffs themselves*. Such pleadings are insufficient and improper.

- Other than citing hearsay sources, plaintiffs cannot explain how it is they will prove their case. This proof issue is a real one, and time should not be wasted litigating a case that cannot be proven.
- Finally, this case is so unusual that plaintiffs' counsel cannot communicate with two of the three plaintiffs. Indeed, given this lack of access, it is unclear whether counsel even have the appropriate authority to prosecute this case on these two plaintiffs' behalf.

In light of these unique circumstances—and given that at least two of the defendants and two of the plaintiffs have no business being named as parties in this case—Yahoo! proposed a case management order that would allow the Court and parties to address this case in a logical, expeditious manner. The purpose of this proposal was not to delay, but to make sure that (a) the proper parties were identified at the outset; and (b) plaintiffs' theories were properly tested before an expensive and politically sensitive discovery process began.

Plaintiffs oppose this proposal, arguing that this case deserves no special treatment under *Sosa* or otherwise; that they are entitled to discovery right away; that Yahoo!'s real purpose is delay; that Yahoo! broke a deal it made regarding the schedule; and that Yahoo!'s request is not lawful. Each of plaintiffs' arguments is without merit, as we explain below.

II. ***SOSA* REQUIRES A CAUTIOUS, COLLABORATIVE APPROACH.**

Plaintiffs make various arguments why—despite *Sosa*—this Court need not proceed with caution or take the time to solicit and receive the views of the political branches before defendants file their motions to dismiss on substantive grounds. Plaintiffs' arguments fail.

A. Plaintiffs' Claims Are Not Exempt from *Sosa.*

Plaintiffs first argue that *Sosa*'s requirement of vigilant door-keeping does not apply to their claims, because they have alleged violations of norms against "torture" and "long-term arbitrary detention" that "have been fully recognized and accepted by Congress and by the courts as appropriate foundations for ATCA and TVPA lawsuits." Opp. at 6. They assert that *Sosa* made "crystal clear that the weighing of political and foreign policy concerns was not appropriate

in [this] special category of cases." *Id*. Plaintiffs are wrong for at least three reasons.

First, even assuming plaintiffs were right about the "acceptance" of all the theories under which they sue—and they are not—plaintiffs do not raise only torture and detention claims. They have also sued for "cruel, inhuman or degrading punishment" for exercising "free speech and free association" rights and "forced labor." Am. Compl. ¶¶ 75-78, 90-91. They also sue on several California tort law theories and under California's unfair competition statute. *See id.* at 22-26. Unless plaintiffs are willing to abandon these claims, this Court must proceed with great caution and solicit the views of the political branches before announcing that plaintiffs have to a right to sue private parties based on the acts of the Chinese government, and based on these far from "definite" and "accepted" sources of law. *Sosa*, 542 U.S. at 732.

Second, plaintiffs' torture and detention claims are far from sufficiently established, given they are made against corporate defendants and on an aiding-and-abetting theory. As *Sosa* noted, one crucial consideration when determining whether a norm is "sufficiently definite to support a cause of action" is "whether international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 & n.20 (all emphases added unless otherwise indicated). Even assuming plaintiffs have alleged cognizable torture and detention claims—and they have not—such claims apply only to state actors. They do not apply to private actors such as corporations. *See, e.g.*, *Bowoto v. Chevron*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, at *7-37 (N.D. Cal. Aug. 21, 2006). They especially do not apply on the indirect, aiding and abetting theory of liability plaintiffs espouse, which, contrary to *Sosa*, would open the doors to waves of ATS litigation of this sort. *See, e.g.*, Curtis A. Bradley et al., Sosa, *Customary International Law and the Continuing Relevance of* Erie, 120 HARV. L. REV. 870, 924-29 (2007).

Third, the only thing *Sosa* makes "crystal clear" is that weighing foreign policy is essential even assuming the norms at issue are "sufficiently definite to support a cause of action." *Id*. *Sosa* went out of its way to note that the requirement that a norm be sufficiently definite and "clearly defined" was "*not meant to be the only principle* limiting the availability of relief in the federal courts for violations of customary international law." *Id*. at 733 n.21. Other limiting

principles included, *inter alia*, "a policy of case-specific deference to the political branches." *Id*.

In fact, in *Doe v. Qi*, 349 F. Supp. 2d 1258 (N. D. Cal. 2004), this Court rejected the precise argument made by plaintiffs' counsel here. In *Qi*, plaintiffs "argue[d] that where a court is presented with a claim based on international norms" of "definite content and acceptance among civilized nations," it was "no longer . . . suitable or appropriate to weigh the proposed standard against potential political or foreign policy consequences." *Id*. at 1290. This Court disagreed, holding that plaintiffs "misread *Sosa*." *Id*. According to this Court, *Sosa* required "a high degree of specificity and clarity in finding an enforceable common law claim under the ATCA. However, [*Sosa*] *in no way intimated* that once that standard is met, that no consideration may be given to similar concerns in determining whether such a case may proceed." *Id*. *Qi* also expressly rejected the argument—repeated by plaintiffs here, *see* Opp. 7, 15-17—that this policy of case-specific deference does not apply to claims under the TVPA or to the other sources of law on which they base their complaint. As this Court noted, *Qi*, 349 F. Supp. 2d at 1291 n.22:

> nothing in *Sosa* suggests that case-specific considerations of deference to political branches should be limited only to common law claims under the ATCA. The basis for such deference . . . is rooted in overarching considerations of separation of powers and the dangers of judicial interference with foreign relations committed to the political branches. These concerns obtain whether an international law claim is based on statute or common law premised on a clear norm of customary international law.

B. <u>The United States Government Has Not Endorsed This Lawsuit.</u>

Plaintiffs repeatedly suggest their lawsuit raises no foreign policy concerns and that soliciting the State Department's views is unnecessary, because the United States has "single[d] out China for special criticism for their arbitrary detention and torture practices." Opp. at 8.

These arguments are misguided as well. *First*, plaintiffs neglect to mention that while the United States has been critical of human rights abuses in China, it has consistently encouraged American companies to do business there. The real question this Court needs to ask the executive branch is not whether it thinks China has a good or bad record on human rights (we know the answer to that question), but rather whether this lawsuit—and the theory of liability plaintiffs have espoused—will negatively impact the United States' foreign policy agenda, including its ability (a) to promote human-rights reform through diplomatic channels, and (b) to promote such

reform by encouraging American investment in China. If this Court rules that American companies doing business in China may not respond to Chinese law enforcement requests for information made in accord with valid legal process, then American companies will either be far more hesitant to invest, or they will risk serious sanction by the Chinese government when they refuse to abide by local law. Indeed, plaintiffs' own sources recognize that companies like Yahoo! are "obliged to abide by laws in countries where [they] do[] business." Human Rights Watch Letter at 2 ¶ 3 (quoted in Am. Compl. ¶ 24), www.hrw.org/press/2002/08/yahoo-ltr073002.htm. Plaintiffs obscure this fact, *cf.* Opp. at 10, because they now want to deny it.

Second, in making arguments about the State Department's positions, plaintiffs fail to mention that the United States has frequently recognized that lawsuits challenging human rights abuses abroad can impede U.S. foreign policy, even if a component of U.S. policy is to criticize the very abuses being challenged. The United States generally has made the judgment that there are more effective means of promoting and protecting human rights than private litigation.[1] Indeed, as plaintiffs' counsel well know from *Qi*, although the State Department has condemned human-rights abuses in China, it also believes lawsuits of this sort are not the answer and actually harm its mission. *See* 349 F. Supp. 2d at 1296.[2] Indeed, the United States has expressed its direct opposition to lawsuits of this sort that proceed on an aiding-and-abetting theory of liability.[3]

C. Plaintiffs' Choice Not To Sue the PRC Does Not Exempt this Case from *Sosa*.

Plaintiffs further suggest that soliciting a statement of interest would be inappropriate in this case because the Chinese government and its officials are not defendants. *See* Opp. at 13.

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[1] *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964) ("[t]he dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law"); *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005) (State Department asserted that despite officially condemning the actions of the Colombian military, adjudicating the legality of those actions would threaten U.S. interests, including the U.S. government's "approach to encouraging the protection of human rights in Colombia").

[2] *See also* Statement of Interest of the United States, *Doe v. Qi*, Case No. C02 0672 CW (EMC), Tab A at 2-3, 7 (filed Jan. 16, 2004) (attached as Ex. A) (condemning human rights abuses by PRC, but urging that diplomatic means are far more effective than litigation).

[3] *See* Mot. Ex. A at 12-27 (Br. of the US. as Amicus Curiae, *The Presbyterian Church of Sudan v. Talisman*, U.S. Court of Appeal for the Second Circuit, Case No. 07-0016 (filed May 15, 2007)).

That the plaintiffs made the tactical choice not to sue the PRC—the only alleged direct tortfeasor in this case—is irrelevant to the *Sosa* analysis. The claims in this case directly implicate the propriety of actions taken by the Chinese government. Indeed, in a public interview, plaintiffs' lead counsel admitted as much:

> The U.S. Government outlaws these kinds of behaviors [against people] who are in favor of free press and free speech. *So when Yahoo! says that the people involved are just abiding by Chinese law, that may be the case, but the laws are unlawful in terms of U.S. and international law and U.S. law requires just the opposite*. . . .
>
> Foreign governments have the right to request information from Yahoo! pursuant to court orders . . . . China is using it to persecute people for the communication of ideas. And that's not something the United States government or a United States corporation should go along with.[4]

Plaintiffs could scarcely more directly challenge the ability of the Chinese government to pass laws prohibiting certain forms of speech, its ability to investigate those who commit these crimes, or its ability to incarcerate, try, and penalize those who break the law. Granted, plaintiffs make torture claims as well, which are discussed above, but their complaint is far broader. It alleges that detaining plaintiffs for engaging in acts of political "speech" amounts to "arbitrary arrest" and "prolonged detention" in violation of international law. Am. Compl. ¶¶ 83-88.

The Act of State doctrine counsels against U.S. courts passing judgment on the acts of foreign governments, and it is widely recognized that courts may dismiss a case on this ground even if the foreign government is not a named defendant. *See, e.g.*, *Sarei v. Rio Tinto*, __ F.3d __, 2007 WL 1079901, at *11 (9th Cir. Apr. 12, 2007) ("certain acts of [the Papua New Guinea government] are at issue, even if [it] is not a named defendant"). Similarly, *Sosa*'s policy of case-specific deference and the political question doctrine apply whenever a case threatens to interfere with foreign relations. It does not matter whether a foreign state is named as a defendant, as litigation can threaten foreign policy when it is premised on the notion that a corporation aided and abetted the government's alleged misconduct. Unsurprisingly, courts regularly request and give credence to the views of U.S. government even in cases, such as this one, where the foreign state, who is the alleged tortfeasor, has not been sued. *See, e.g.*, *id*. at *2-3; *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).

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[4] *Morton Sklar on Yahoo! human rights lawsuit* (Apr. 21, 2007), http://www.brightcove.com/title.jsp?title=769385554&channel=27638673 (audio webcast at 06:23-8:16).

D. Plaintiffs' Remaining Arguments Are Without Merit.

Plaintiffs suggest that soliciting the views of the political branches would "not be appropriate," Opp. at 11, and go so far as to claim that soliciting those views would be "an unauthorized and uncalled for reliance on the political process[] that is antithetical to the principle of the rule of law." Opp. 12. *Sosa* is directly contrary. It makes clear that courts must consider the potential foreign relations consequences of adjudicating ATS cases in deciding (1) whether to recognize the particular international law claims asserted; (2) whether to allow plaintiff to sue the particular defendants named; and (3) whether, even if such a claim exists, deference to the political branches requires dismissing the case. *See* 542 U.S. at 724-28, 732 n.20, 733 n.21.

Plaintiffs further contend that "the prevailing trend has been to insulate court cases from political influences, and to substantially reduce opportunities for the intrusion of political and foreign policy considerations into the adjudicatory process." Opp. 17. It is not clear what "trend" plaintiffs reference, but refusing to solicit or take account of the views of the political branches is nothing more than a violation of *Sosa*'s command. It would also be inconsistent with the practice of many courts, including this one, adjudicating these sorts of cases. *See, e.g.*, *Rio Tinto*, 2007 WL 1079901, at *7; *Apartheid Litig.*, 346 F. Supp. 2d at 554; *Qi*, 349 F. Supp. 2d at 1296-1303.

Plaintiffs' also argue that *Sosa*'s "case-specific deference to the political branches" is limited to situations where a "special mechanism" has been established to permit resolution of the claims elsewhere. Opp. at 7. This argument, too, is without merit. As this Court recognized in *Qi*, such deference applies broadly, whenever "the dangers of judicial interference with foreign relations committed to the political branches" are implicated. 349 F. Supp. 2d at 1291 n.22.

Finally, plaintiffs' assertion that a statement of interest might not be dispositive, *see* Opp. 14-19, does not mean one should not be solicited. This Court used such a statement to narrow plaintiffs' claims in *Qi*, 349 F. Supp. 2d at 1301-03, even if it did not dismiss the case outright.

For all these reasons, the Court should grant Yahoo!'s motion, which will allow this Court and the parties to brief motions to dismiss *after* the views of government have been obtained, assuming plaintiffs' claims even survive Phase I.

III. PLAINTIFFS ARE NOT ENTITLED TO IMMEDIATE DISCOVERY.

Plaintiffs also resist Yahoo!'s case management proposal, arguing they are entitled to "discovery" and "fact gathering," right away. Opp. at 1-3. Plaintiffs fail to mention that "the price of entry, *even to discovery*, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome." *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999); *DeShazier v. Williams*, Case No. CV F 06-0591, 2006 U.S. Dist. LEXIS 64906, *18 (E.D. Cal. Aug. 29, 2006) (same).

In addition to the defects in plaintiffs' legal theories discussed above, their complaint fails even the most basic pleading standards set forth in Rules 8 and 11 of the Federal Rules of Civil Procedure ("Rule"). The primary defect—and proof that this case is anything but a normal one—comes in the very first sentence of the complaint: Plaintiffs "allege upon personal knowledge *and belief* as to *their own circumstances* . . . that substantial evidentiary support exists *or will exist after a reasonable opportunity* for further investigation and discovery." Am. Compl. at 1:1-5.

Rule 8 does not require detailed factual pleading, but it *does* require pleading facts sufficient to state a claim. Plaintiffs' "belief" that some evidence will turn up in discovery is insufficient. Pleadings based on "information and belief" are allowed, but *only* when the information is "peculiarly within the knowledge of *defendants*." *Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir. 1972); *accord* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1224 (1990); 2-8 MOORE'S FEDERAL PRACTICE, CIVIL § 8.04(4) (2007). Plaintiffs' own "circumstances" should be uniquely within their own "knowledge." There can be no legitimate reason for plaintiffs to have pled what happened to them based on "*belief*," unless defendants' concerns about plaintiffs' inability to prosecute this case, provide competent testimony, or even communicate with their counsel are all real.

Plaintiffs, moreover, have an affirmative obligation under Rule 11(b)(3) "specifically [to] identify" any factual allegations that lack evidentiary support at the time of filing. The complaint fails to do so. Instead, it states generally that some or all of its allegations may or may not have evidentiary support, and puts the burden on defendants to sort through the claims for themselves. Such vague, ambiguous pleadings do not adequately put defendants on notice of the allegations

against which they must defend. At a minimum, defendants will require a more definite statement, pursuant to Rule 12(e), before they can fully respond to plaintiffs' claims. Only after such issues are addressed in Phase I should merits issues be addressed in Phase II.[5]

In addition to requiring a more definite statement, this Court should also require plaintiffs to make a factual proffer before allowing this case to proceed. Plaintiffs seek expensive, burdensome discovery from defendants, but refuse even to positively allege *their own injuries*. Defendants should not be forced to defend themselves, at considerable expense, against phantom allegations that even plaintiffs acknowledge may have no basis in evidence. *See, e.g.*, *DeShazier*, 2006 U.S. Dist. LEXIS 64906, at *18 ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."); *In re Sinaltrainal Litigation*, 474 F. Supp. 2d 1273, 1275 (S.D. Fl. 2006) (noting in ATS cases "there is . . . a risk that vague, conclusory, and attenuated allegations will allow individuals (and often the interest groups that finance or otherwise support their litigation) to engage in unwarranted international 'fishing expeditions' [and] abuse the judicial process in order to pursue political agendas").

That plaintiffs make their allegations on "belief" as to their own circumstances raises a final concern: counsels' authority to represent plaintiffs. In plaintiffs' responsive brief to our motion to shorten time, counsel assert only that they have contact with plaintiff Yu Ling and the mother of Shi Tao, whom they assert is his legal representative. The brief further implies that communications with plaintiffs Wang and Shi are exclusively through members of their families. Under both the ATS and the TVPA, plaintiffs Wang and Shi must sue on their own behalf, *see Xuncax v. Gramajo*, 886 F. Supp. 162, 192 (D. Mass. 1995), yet even now plaintiffs suggest they may add Shi's mother as a plaintiff, *see* Opp. at 4, even though she lacks standing, as this Court held in *Qi*, 349 F. Supp. 2d at 1313. Indeed, under federal and California law, every action must be prosecuted by the real party in interest or a representative of that party authorized by law—such as a guardian, executor, or party authorized by statute to bring suit—unless that real party lacks capacity to bring suit. *See* FED. R. CIV. P. 17; CAL. CIV. PROC. CODE § 367. Plaintiffs'

[5] Plaintiffs have suggested they might again amend their complaint. Because amendment will not remove the difficult threshold issues the complaint raises, phasing of this case still makes sense.

counsel have said they represent Shi and Wang, but have not provided us with evidence that they are prosecuting this suit with plaintiffs' express authority or through legally executed and binding powers of attorney. The law requires such documentation.[6]

Unless defendants' are provided such evidence, it will be prudent to bring a motion to dismiss the case on the basis that the suit is unauthorized—at least by Wang and Shi. *See Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319 (1927); *Meredith v. Ionian Trader*, 279 F. 2d 471, 474 (2d Cir. 1960); *United States v. Wolf*, 352 F. Supp. 2d 1195, 1199 (W.D. Okla. 2004); *Abeles v. State Bar of Cal*., 9 Cal. 3d 603, 610 (Cal. 1973). These representation issues are not idle concerns. Counsel are aware of at least one ATS case in which plaintiffs' counsel prosecuted the case for six years. After the case settled and judgment was entered, several plaintiffs filed motions to vacate the judgment and start the case all over again, on the theory that counsel lacked authority to settle their claims. The court denied plaintiffs' motion, in large because plaintiffs had executed valid powers of attorney on which defendants relied. Proceeding here without such safeguards exposes defendants and the Court to a number of risks, ranging from wasting resources to treading on sensitive foreign policy grounds for no reason.

IV. YAHOO!'S PURPOSE IS NOT DELAY.

A. The Purpose of Phase I

Yahoo!'s purpose in filing this motion—like Alibaba.com, Inc.'s in joining it—is first, in

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[6] In California, a plaintiff may grant a general power of attorney with broad powers to sue on his or her behalf. *See* CAL. PROB. CODE §§ 4263(a)(1), 4459. But it must be dated, signed "either (1) by the principal or (2) in the principal's name by another adult in the principal's presence and at the principal's direction," and "acknowledged before a notary public or [] signed by at least two witnesses." *Id*. §§ 4121, 4122; *Estate of Rabinowitz*, 7 Cal. Rptr. 3d 722, 723 (2003). In China, a party may appoint an agent to represent her in a civil action only by submitting to the People's Court a power of attorney, bearing her signature or seal, that specifies the subject matter and the limits of authority granted. An agent must have special authority to recognize, withdraw, or modify claims; to become involved in mediation; to file a counterclaim or to lodge an appeal on behalf of the principal. *See* Zhong hua ren min gong he guo min shi su song fa [1991Civil Procedure Law (P.R.C.)] at Art. 59. A carte blanche power of attorney, which fails to name the powers granted, precludes an agent any of the above. *See* Zui gao ren min fa yuan guan yu shi yong <zong hua ren min gong he guo min shi su song fa> ruo gan went i de yi jian, (Opinions of the Supreme People's Court on Certain Issues Concerning Application of PRC Civil Procedure Law 2002), SUP. PEOPLE'S CT. GAZ., Art. 69. Other than general assurances, plaintiffs' counsel have not confirmed they obtained such documents, nor produced them to defendants.

Phase I, to define who the proper parties are to this suit, if anyone. Plaintiffs pled no facts to suggest that YHKL is subject to this Court's jurisdiction. Nor do any exist. YHKL should be dismissed from this case without delay. Plaintiffs seek to keep it in the case indefinitely and subject it to various forms of discovery. Merely naming YHKL as a defendant was not enough. Plaintiffs need a good faith basis to subject YHKL to suit. Plaintiffs have none.

Plaintiffs similarly have been unable to identify a single fact that connects Alibaba.com, Inc. to the allegations made in the case. Indeed, defendants' moving papers highlighted how the amended complaint, on its face, refutes plaintiffs' conclusory and undifferentiated allegation that "defendants" disclosed information about them to the Chinese government. In response, plaintiffs are silent. Their opposition brief never mentions Alibaba.com, Inc., let alone articulates any basis for suing it. Alibaba.com, Inc., like every other Alibaba entity, had no connection to Yahoo! China when the alleged disclosures were made regarding plaintiffs, and it does not and did not maintain Yahoo! China user information, the subject matter of the alleged disclosures. This Court should allow Alibaba.com, Inc. to brief this single issue before it is forced to spend time and money briefing various issues in this case, such as the scope of international law and whether this Court should decline to hear this case on grounds such as international comity, the act of state doctrine, or the scope of the various federal statutes and California law.

Plaintiffs Yu and Shi equally have no place in this case, and their claims should be dismissed in Phase I. Yu lacks standing to bring claims on behalf of her husband, *see Qi*, 349 F. Supp. 2d at 1313, and her own claims, which she brings under California law, are paper thin and have no merit. Plaintiffs' counsel know so little about Shi that they do not even allege that he suffered from specific acts of torture or forced labor. Instead, they say that, because his prison is notoriously abusive, one can merely assume he was abused. *See* Am. Compl. ¶¶ 57, 64. Even if that surmise is plausible, cases may not proceed in American courts based on such speculation.

Finally, Phase I should be used to test questions like whether plaintiffs can prove their case given the fact of their incarceration, and whether their counsel have the authority or ability to prosecute the case. Plaintiffs should also be forced to state their claims more definitively so that whatever defendants, if any, remain in Phase II, know what allegations they are actually

defending against. To get around these pleading and proof problems, plaintiffs suggest they might add new plaintiffs to the case and that their representatives will testify for them. *See* Opp. at 4. But plaintiffs have yet to amend their complaint to include such plaintiffs or clarify their claims, and the witnesses plaintiffs presently propose (Shi's mother and Wang's wife) lack sufficient personal knowledge to give competent testimony. *See* Fed. R. Evid. 602. Plaintiffs further suggest that State Department reports provide the necessary proof. *See* Opp. at 18. Again, they are wrong. This Court has recognized such reports do not provide "specific and direct evidence substantiating the particular abuses allegedly suffered by . . . individual Plaintiffs." *Qi*, 349 F. Supp. 2d at 1311 n.39.

B. The Purpose of Phase II

As Phase I unfolds, defendants will ask the Court to solicit the views of the Department of State, Department of Justice, and perhaps foreign governments regarding the impact of this case on foreign policy and global law enforcement efforts. Taken to its logical conclusion, plaintiffs' theory of the case could mean that a judge in Amsterdam could require any company with a connection to the Netherlands not to respond to American law enforcement requests in marijuana prosecutions, because laws prohibiting the use of the drug violate an international norm the Dutch court recognizes. More likely, if plaintiffs' case is allowed to proceed, corporations could fear complying with American requests for information or assistance in terrorism cases, on the theory that some court in the United States or abroad could rule that aiding and abetting the United States' "War on Terror" violates international norms. Indeed, such a lawsuit was recently filed against a Boeing subsidiary, on the theory that it assisted the CIA in a so-called "extraordinary rendition" of terrorism suspects, which led to the suspects' apprehension and alleged torture. *See* Scott Shane, *Suit Over C.I.A. Program*, N.Y. TIMES, May 31, 2007.

Before this Court receives any briefing—or much less makes any rulings (which will no doubt be cited in other cases)—it should have the views of the political branches regarding this case. There is no reason to force defendants to brief the merits issues in this case in the blind and without the benefit of these views, especially when resolution of the Phase I issues may dispose of the case entirely and will keep the parties busy and productive in the coming months.

C. The Question of Prejudice

Plaintiffs will not be prejudiced by the delay for Phase II to begin. As one can see from the allegations in the complaint, plaintiffs cannot meaningfully participate in the prosecution of this case and may not be able to do so until they are released from prison several years from now. Plaintiffs have identified no real prejudice if Yahoo!'s motion is granted. First, the notion that discovery of defendants will shed light on plaintiffs' condition or the alleged mistreatment they suffered at the hand of the PRC—the very basis of all their claims—is a non-starter. Defendants have no access to such proof; only plaintiffs and the PRC do.

Second, plaintiffs' counsel have argued in our "meet and confer" conferences and suggested in their recent brief, *see* Opp. at 21, that any delay in this case, even of a few weeks, will mean plaintiffs will have to remain in prison longer. To be clear, no schedule in this case, no court order, and no action defendants could undertake could guarantee or even likely affect plaintiffs' condition except in a negative way. The U.S. government has long urged the release of political prisoners in China, but with only limited success and only by pursuing careful diplomatic channels.[7] Moreover, as this Court has recognized, it would "risk enormous implications for our foreign relations" to issue an injunction requiring the Chinese government to take any action, much less to release two prisoners it considers (even if wrongly) threats to its national security. *Qi*, 349 F. Supp. 2d at 1301.

The only real prejudice here would be if plaintiffs' case were allowed to proceed before this Court determines who the proper parties are, whether plaintiffs' counsel have the ability to prosecute the case, whether this case is justiciable, and whether plaintiffs have even stated a

[7] *See, e.g.*, Bill Nichols, *China prisoners' supporters look to Bush*, USA TODAY (Apr. 18, 2006) ("Human rights activists say prisoner releases have declined since Hu [Jintao] became China's leader in 2002.")' Library of Congress, Congressional Research Service Report for Congress, *China-U.S. Relations: Current Issues and Implications for U.S. Policy*, at CRS-20 (Kerry Dumbough, ed. updated January 20, 2006), http://fpc.state.gov/documents/organization/61492.pdf. ("The PRC government periodically has acceded to this White House pressure and released early from prison political dissidents. . . . On March 4, 2004, for instance, the PRC released on medical parole one of its best-known political prisoners . . . . The same day, the U.S. government announced that it would not introduce a resolution criticizing China's human rights record at the 61st Session of the U.N. Commission on Human Rights . . . .").

claim. To force defendants to expend a great deal of money defending this speculative case and to respond to discovery, where producing such discovery might violate Chinese law, makes no sense until these threshold questions are answered.

In short, defendants do not propose any delay at all. They propose that the Court and the parties march through this case, but do so in a meaningful and sensible fashion.

V. PLAINTIFFS KNEW YAHOO! WOULD BE FILING THIS MOTION.

Plaintiffs contend they were surprised by Yahoo!'s motion and they would not have agreed to the stipulated schedule the Court ordered had they known Yahoo! would file this brief. *See* Opp. at 2; Decl. of Morton Sklar *passim*. Plaintiffs' argument is erroneous. In our very first conversation with plaintiffs' counsel, we raised the issue of filing this motion, bifurcating the case, and plaintiffs' and their counsel's ability to prosecute it. Indeed, in the joint stipulation providing for a brief continuance, which plaintiffs' counsel signed, Yahoo! expressly "reserve[d] [its] right to seek further enlargement of time and propose a modified case management plan." Joint Stip. Request For Order Enlarging Time To Respond To Compl. & Extending Initial Deadlines ¶ 3 (filed June 18, 2007). As the accompanying declaration made clear:

> [T]he case raises a numerous issues that will require extensive motion practice and briefing. Given the nature of the case, we will also request that the Court seek the views of the U.S. government and perhaps other authorities regarding the impact of this case on foreign and other government policies. . . .
>
> I have discussed the scheduling and other issues presented in this Joint Stipulation with Joseph Cyr, counsel for Alibaba.com, Inc., and Morton Sklar, counsel for plaintiffs, *including my proposal to have an early case management conference in this case and to request a schedule to address sequentially certain threshold matters, such as the question whether YHKL is subject to jurisdiction in this case. . . . Defendants anticipate promptly filing a motion to address case management issues.*

Decl. Of Daniel Petrocelli ¶¶ 7, 9 (filed June 18, 2007). Though we quoted both these sources in our motion, *see* Mot. at 11, plaintiffs offered no response to them.

VI. THE COURT HAS THE POWER TO GRANT THE RELIEF REQUESTED.

Finally, plaintiffs suggest the Court lacks the authority under the Local Rules or otherwise to grant the relief Yahoo! seeks. *See* Opp. at 5:3-24. Plaintiffs are mistaken. It is a "well-settled principal that a district court has broad discretion to manage its own calendar," *United States v. Batiste*, 868 F.2d 1089, 1092 (9th Cir. 1989), and "has broad discretion to stay proceedings as an

incident to its power to control its own docket," *Clinton v. Jones*, 520 U.S. 681, 706 (1997). This power is construed broadly, enabling the court to "manage cases so that disposition is expedited, wasteful pretrial activities are discouraged, the quality of the trial is improved, and settlement is facilitated." *Allen v. Bayer Corp.*, 460 F.3d 1217, 1227 (9th Cir. 2006).

Rule 16 recognizes the need to adopt special procedures "for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." *Id.* Such decisions are entrusted to the court's discretion. For example, one district court found it appropriate to stay proceedings while awaiting an advisory opinion from administrative agencies. *Citicasters Co. v. Country Club Communs.*, 44 U.S.P.Q.2D (BNA) 1223 (C.D. Cal. 1997). Discovery can also be delayed or denied pursuant to Rule 26(c), upon a showing of good cause. *See* Fed. R. Civ. P. 26(c); *Telemac Corp. v. Teledigital, Inc.*, 450 F. Supp. 2d 1107, 1110-11 (N.D. Cal. 2006) (Wilken, J.) (patent case). It is also within the court's power to change case management conference dates. Local Rule 16-2 specifically allows a party to "seek relief from an obligation imposed by FRCivP 16 or 26 or the Order Setting Initial Case Management Conference."[7]

VII. CONCLUSION

For the foregoing reasons, Yahoo!'s motion should be granted.

Dated: July 12, 2007

DANIEL M. PETROCELLI
MATTHEW T. KLINE
O'MELVENY & MYERS LLP

By: _____
Daniel M. Petrocelli
Attorneys for Defendant
YAHOO!, INC.

CC1:766529.5

[7] Indeed, in an unpublished appeal from a Northern District of California case, the Ninth Circuit held it was squarely within the court's inherent power to change the date of a case management conference. *See Freeman v. Employment Stds. Admin.*, 71 Fed. Appx. 638 (9th Cir. July 24, 2003) (unpublished, decided without oral argument). Citing *Batiste*, 868 F. 2d at 1091, the court held that plaintiff's "contention that it was improper for the district court to change the case management conference date is unavailing" because "a district court has broad discretion to manage its own calendar." *Freeman*, 71 Fed. Appx. at 638.

EXHIBIT A

DANIEL MERON
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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANE DOE I, et al., Plaintiffs, v. LIU QI, et al., Defendants.	No. C 02 0672 CW (EMC) No. C 02 0695 CW (EMC) STATEMENT OF INTEREST OF THE UNITED STATES
PLAINTIFF A, et al., Plaintiffs, v. XIA DEREN, et al., Defendants.	

By letter dated November 7, 2003, this Court solicited "the State Department's position regarding Magistrate Judge Chen's Report and Recommendation and Plaintiffs' objections" related to the above-captioned cases. See Letter from U.S.

District Judge Claudia Wilken to William Howard Taft, IV of November 7, 2003. Pursuant to 28 U.S.C. §§ 516-517, the Attorney General, on behalf of the Department of State, hereby submits the following.

Attached hereto as Exhibit A is a letter, dated January 14, 2004, from William H. Taft, IV, Legal Adviser, U.S. Department of State, to Peter D. Keisler, Assistant Attorney General, in response to the Court's request for the Department of State's position.[1]/

Respectfully submitted,

DANIEL MERON
Acting Assistant Attorney General
KEVIN V. RYAN
United States Attorney

Alexander K. Haas

VINCENT M. GARVEY
Deputy Branch Director
ALEXANDER K. HAAS
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Attorneys for the United States

Dated: January 16, 2004

[1] The brief for the United States in support of the petition for certiorari in Sosa v. Alvarez-Machain, a case referenced in the attached letter from the Legal Adviser, was filed on September 25, 2003. It can be found at the Solicitor General's website. See website of the Office of Solicitor General, at http://www.usdoj.gov/osg/briefs/2003/0responses/2003-0339.resp.html (last visited Jan.16, 2004).

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

January 14, 2004

Honorable Peter D. Keisler
Assistant Attorney General
Civil Division
United States Department of Justice
Washington, D.C. 20530

Re: *Jane Doe I, et al. v. Liu Qi, et al.*, C-02-0672 CW; *Plaintiff A, et al. v. Xia Deren, et al.*, C-01-0695 CW

Dear Mr. Keisler:

By letter dated November 7, U.S. District Court Judge Claudia Wilken invited the Department of State to submit its views, by January 16, 2004, regarding the June 11 Report and Recommendation of U.S. Magistrate Judge Edward Chen and the July 24/25 objections of plaintiffs thereto in the above-captioned cases. (By way of background, I am enclosing a copy of the United States' statement of interest filed by your predecessor with Judge Chen on September 27, 2002 that attached a copy of my September 25, 2002 letter in response to Judge Chen.) I am writing now to ask that you please file a copy of this letter with Judge Wilken, in response to her November 7 letter, in whatever manner you deem most appropriate.

As you know, the United States Supreme Court has recently granted certiorari in *Sosa v. Alvarez-Machain*, 2003 WL 22070605 (Dec. 1, 2003), which implicates issues that would appear to be central to the District Court's disposition of the above-captioned cases. On December 9, the U.S. Court of Appeals for the Ninth Circuit in *Doe v. Unocal*, Nos. 00-56603 and 00-57197 (copy attached) ordered a suspension of further proceedings in that case pending the Supreme Court's decision in *Sosa*.

In light of the above, it would seem appropriate for Judge Wilken similarly to postpone the *Liu* and *Xia* litigation. If, however, Judge Wilken intends to dispose of the above-captioned cases before the Supreme Court decides, we would appreciate an opportunity to submit additional substantive comments in response to her November 7 request.

Thank you for your assistance.

Sincerely,

William H. Taft, IV

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE I, individually & as Administrator of the Estate of his deceased child Baby Doe I, & on behalf of all others similarly situated; JANE DOE, I, on behalf of herself, as Administratrix of the Estate of her deceased child Baby Doe I & on behalf of all others similarly situated; JOHN DOE II; JOHN DOE III; JOHN DOE IV; JOHN DOE V; JANE DOE II; JANE DOE III; JOHN DOE VI; JOHN DOE VII; JOHN DOE VIII; JOHN DOE IX; JOHN DOE X; JOHN DOE XI, on behalf of themselves & all others similarly situated & Louisa Benson on behalf of herself & the general public,

Plaintiffs - Appellants,

v.

UNOCAL CORPORATION, a California Corporation; TOTAL S.A., a Foreign Corporation; JOHN IMLE, an individual; ROGER C. BEACH, an individual,

Defendants - Appellees.

Nos. 00-56603
00-57197

D.C. No. CV-96-06959-RSWL

JOHN ROE III; JOHN ROE VII; JOHN ROE VIII; JOHN ROE X,

Plaintiffs - Appellants,

v.

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA,

Defendants - Appellees.

Nos. 00-56628
00-57195

D.C. No. CV-96-06112-RSWL

ORDER

SCHROEDER, Chief Judge:

This case is withdrawn from submission pending issuance of the Supreme Court's decision in Sosa v. Alvarez-Machain, 2003 WL 22070605 (Dec. 1, 2003).

ROBERT D. McCALLUM, JR.
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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANE DOE I, et al., Plaintiffs, v. LIU QI, et al., Defendants.	No. C 02 0672 CW (EMC) No. C 02 0695 CW (EMC) STATEMENT OF INTEREST OF THE UNITED STATES
PLAINTIFF A, et al., Plaintiffs, v. XIA DEREN, et al., Defendants.	

By letter dated May 3, 2002, and by order dated August 5, 2002, this Court "solicit[ed] the Department of State's opinion on a number of issues" related to the above-captioned cases, including whether the cases are barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1605-07, or are nonjusticiable

under the act of state doctrine. See Letter from U.S. Magistrate Judge Edward M. Chen to William Howard Taft, IV of May 3, 2002; Court's Aug. 5, 2002 Order. Pursuant to 28 U.S.C. §§ 516-617, the Attorney General, on behalf of the Department of State, hereby submits the following.

Attached hereto as Exhibit A is a 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, which explains the Department of State's views on the issues raised by the Court.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

Alison N. Barkoff

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Attorneys for the United States

Dated: September 26, 2002

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CERTIFICATE OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by the United States Department of Justice, Civil Division, Federal Programs Branch. My business address is 901 E Street, N.W., Washington, D.C. 20004.

On September 26, 2002, I served STATEMENT OF INTEREST OF THE UNITED STATES on the persons named below, by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence in placed for collection and mailing, it is deposited in the ordinary course of business within the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: September 26, 2002. Place of mailing: Washington, D.C. Persons to whom mailed:

Joshua Sondheimer
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Attorney for plaintiffs in Doe v. Liu Qi

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Attorneys for plaintiffs in Plaintiff A v. Xia Deren

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 26, 2002, at Washington, D.C.

Alison N. Barkoff
Alison N. Barkoff

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

September 25, 2002

Honorable Robert D. McCallum
Assistant Attorney General
Civil Division
United States Department of Justice
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Re: *Doe, et al. v. Liu Qi, et al.*, and *Plaintiff A, et al. v. Xia Deren*, Civil Nos. C 02-0672 CW (EMC) and C 02-0695 CW (EMC) (N.D. Cal.)

Dear Mr. McCallum:

By letter dated May 3, U.S. Magistrate Judge Edward M. Chen of the Northern District of California solicited the Department of State's views on several issues in connection with the above-captioned case. Encl 1. Magistrate Chen asked that we respond before July 5, either by letter or statement of interest pursuant to 28 U.S.C. § 517. On June 25, the Department of Justice sought and received an extension of time to August 9. On July 25, the District Court consolidated proceedings in the *Plaintiff A v. Xia Deren* case with *Liu*, and referred that case also to Magistrate Judge Chen. On August 5, Magistrate Chen vacated the previous briefing schedule, and invited the State Department to provide its views on either or both of these cases by September 27. We ask that you please file a copy of this response to these requests with Magistrate Chen in whatever manner you deem most appropriate under the circumstances.

In *Liu*, the gravamen of plaintiffs' complaint is that the defendant, as Mayor of Beijing, People's Republic of China ("PRC"), either knew or should have known about various human rights abuses that were allegedly perpetrated against adherents to the Falun Gong movement in Beijing, and that he was under a duty under both Chinese and

international law to prevent such actions.[1] The complaint alleges that Defendant Liu "planned, instigated, ordered, authorized, or incited police and other [PRC] security forces to commit the abuses suffered by Plaintiffs, and had command or superior responsibility over, controlled, or aided and abetted such forces in their commission of such abuses. The acts alleged herein...were carried out in the context of a nationwide crackdown against Falun Gong practitioners." Compl., ¶ 2.

In *Liu*, all but one of the plaintiffs are aliens; four apparently reside in the United States. Federal subject matter jurisdiction is alleged to lie under customary international law, the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350, note, the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and 28 U.S.C. § 1331. Id., ¶ 3.

As noted in Magistrate Chen's May 3 letter, a default was entered in favor of the plaintiffs on March 12. Plaintiffs subsequently moved for judgment by default. In reviewing that motion, the Court has asked for the Department's views on two questions: (1) whether the case is barred under the Foreign Sovereign Immunities Act ("FSIA"), and (2) whether the Court should find the case "nonjusticiable" under the Act of State doctrine. We address these issues in turn.

Before turning to the questions posed by the Court, we would note Magistrate Chen's subsequent invitation to provide the Department's views in the *Xia* case. From our review of that complaint, we conclude, as did Magistrate Chen in his August 5 order, that the relevant issues involved in both cases are "similar, if not identical." In these circumstances, we see no need to comment separately on the *Xia* case; the views as expressed below regarding *Liu* may be taken to apply *mutatis mutandis* to *Xia*. At the same time, we note that the complaint in *Xia* is unambiguous in asserting that the defendant was acting in his official capacity.

We also stress our deep concern about the human rights abuses that have been alleged in these complaints. The United States has repeatedly made these concerns known to the Government of the PRC and has called upon it to respect

[1] We note that the Complaint caption refers to "Liu Qi, and Does 1-5, inclusive," but we have not found specific reference in the complaint to any defendants other than Mr. Liu.

the rights of all its citizens, including Falun Gong practitioners. Our critical views regarding the PRC Government's abuse and mistreatment of practitioners of the Falun Gong movement are a matter of public record and are clearly set forth in the Department's annual human rights reports, the most recent version of which may be found at http://www.state.gov/drl/rls/hrrpt/2001/eap/8289.htm.

With respect to the FSIA, Magistrate Chen asked specifically whether the exception to immunity under 28 U.S.C. § 1605(a)(7) applies to the case against *Liu*. In our considered opinion, the exception under 28 U.S.C. § 1605(a)(7) does not apply by its terms, since the Peoples' Republic of China has never been designated as a state sponsor of terrorism within the meaning of subsection (A) of that provision. Nor, in our view, does the "tort" exception under 28 U.S.C. § 1605(a)(5) apply since none of the acts in question occurred in the United States. It does not appear to us that any other exception of the FSIA would be relevant to the facts alleged in the complaint. Therefore, if the FSIA is the appropriate legal framework for determining the issue, the action would have to be dismissed. See 28 U.S.C. §§ 1330, 1604 (immunity unless there is exception under 28 U.S.C. §§ 1605-1607).

Whether the FSIA applies to this case presents a number of issues for the Court to determine. We understand that, since *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), the practice in the 9th Circuit has been to evaluate claims brought against individual foreign government officials in United States federal courts according to whether the allegations giving rise to the suit were performed in an official capacity. Where the conduct is found to be official, the courts have deemed the action to be, in effect, a claim against the foreign state, and have applied the analytical framework of the FSIA. Other jurisdictions have also adopted this approach. See, e.g., *Byrd v. Corporacion Forestal Y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996).[2]

The following considerations may be relevant given this framework. As noted above, the only named defendant in *Liu* is Beijing's Mayor, Mr. Liu Qi. The allegations of

[2] The Executive Branch has not specifically endorsed the approach of *Chuidian*, but recognizes that it is controlling law in the 9th Circuit in which these cases arise.

the complaint are directed solely towards actions he allegedly took, or failed to take, as a senior official of the Chinese Government, in implementation of official policy. What is at issue, in the words of the complaint, is the "Chinese government's crackdown on Falun Gong," and more particularly the "[a]buses being committed by police and security forces in Beijing against the Falun Gong." Compl., ¶¶ 31, 32. The acts and omissions attributed to Mayor Liu are characterized as part of this "widespread governmental crackdown"; the duties he is said to have violated derived from his official position. The complaint specifically alleges that "[a]s the Mayor of the City of Beijing, Defendant Liu held and holds the power not only to formulate all important provincial policies and policy decisions, but also to supervise, direct and lead the executive branch of the city government, which includes the operation of the Public Security Bureau of Beijing, under which the police operate, and other security forces." Id., ¶ 34.[3]

It is noteworthy in this regard that the 9th Circuit has previously held that the FSIA is not rendered inapplicable because of alleged violations of customary international law by the officials of a foreign state defendant. *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). See also *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989)(FSIA is exclusive basis for suit against foreign state notwithstanding alleged violations of international law by its officials). Because suits against current officials may well constitute the "practical equivalent" of suits against the sovereign, and because denial of immunity in such circumstances would allow "litigants to accomplish indirectly what the [FSIA] barred them from doing directly," *Chuidian*, *supra* at 1101-02, we believe the courts should be especially careful before concluding that the FSIA is inapplicable to a suit against a current official relating to the implementation of government programs. Cf., *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993)("the intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment and torture of

[3] As is described more fully below, this is one of a series of suits in U.S. courts against Chinese officials for actions allegedly taken against Falun Gong practitioners. This pattern may reinforce the inference from the complaint that, at bottom, this suit is directed at PRC government policies rather than past conduct of a specific official.

Nelson) ... boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood ... as peculiarly sovereign in nature"). Otherwise, plaintiffs could evade the FSIA altogether by the simple expedient of naming a high level foreign official as a defendant rather than a foreign state.

We acknowledge 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. See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162 (D.Mass. 1995); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Cabello Barreuto v. Fernández Larios*, 205 F.Supp.2d 1325 (N.D.Fla. 2002). The principal aim of the TVPA was to codify the decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), by providing an explicit statutory basis for suits against former officials of foreign governments over whom U.S. courts have obtained personal jurisdiction, for acts of torture and extrajudicial killing committed in an official capacity. The Senate Report on the TVPA states that "[b]ecause all states are officially opposed to torture and extrajudicial killing ... the FSIA should normally provide no defense to an action taken under the TVPA against a *former* official" (emphasis supplied).[4]

At the same time, the TVPA was not intended to override otherwise existing immunities from U.S. jurisdiction, as courts have recognized in suits brought under these statutes against *current* or *sitting* foreign governmental officials.[5] See, e.g., *Saltany v. Reagan*, 702

[4] As this sentence indicates, Congress anticipated that, although it would not normally be so, in some cases involving officials who had left office, exercise of jurisdiction under the TVPA would still be inappropriate. See, e.g., S. Rep. No. 102-249, at *8 ("To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to the state, which would require that the state admit some knowledge or authorization of relevant acts.")(internal quotation marks omitted). The cases before Magistrate Chen do not pose the question of how *Chiudian* should be applied to such former officials.

[5] Dealing with sitting officials is a component of the President's power over the nation's foreign relations. See, e.g., *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936) (describing "the very delicate, plenary and exclusive power of the President as the sole

F. Supp. 319 (D.D.C. 1988); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001). These cases are consistent with relevant international authority, such as the decisions of the International Court of Justice in the *Yerodia* case (*Case Concerning the Arrest Warrant of 11 April 2000 - Democratic Republic of the Congo v. Belgium*, Judgment of Feb. 14, 2002) and the European Court of Human Rights in *Al-Adsani v. The United Kingdom* (No. 35763/97, Judgment of Nov. 21, 2001).

In response to Magistrate Chen's second set of questions ("Should the Court find the case nonjusticiable under the Act of State doctrine? What effect will adjudication of this suit have in the foreign policy of the United States?"), we respectfully offer the following observations for the Court's consideration.

Litigation in U.S. courts challenging the legality of a foreign government's actions, or inactions, taken within its own territory, can present sensitive dimensions, as recognized in a number of decisions of the U.S. Supreme Court. See, e.g., *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, Int'l*, 493 U.S. 400, 405 (1990)). Cf., *Baker v. Carr*, 362 U.S. 186 (1962). The Court has recognized that the judiciary should approach such litigation with the utmost care and circumspection.

We note that *Liu* is only one of several recent cases brought in U.S. federal courts by Falun Gong adherents against high-level PRC officials--typically, under the ATS and the TVPA. The case just added to these proceedings, *Plaintiff A et al. v. Xia Deren*, is but the most recent example. See also, e.g., *Peng, et al. v. Zhao*, No. 01 Civil 6535 (DLC) (SDNY) (default judgment in nominal amount of $1 entered, December 26, 2001; defendant Zhao Zhifei was said to be the Department Head of the Public Security

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organ of the federal government in the field of international relations"). If Congress intended to alter the balance of power between the Executive and Legislative Branches in the area of foreign policy, Congress would be required to adopt a clear statement of that intent. "[T]he 'clear statement' rule," which "was originally articulated to guide interpretation of statutes that significantly alter the federal-state balance," should also be applied to "statutes that significantly alter the balance between Congress and the President." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C.Cir. 1991).

Bureau of Hubei Province); *Jin, et al. v. Ministry of State Security*, et al., No. 02-CV-627 (DDC)(case pending); *Petit, et al. v. Ding*, No. CV 02-00295 (D. HI)(case pending) (defendant Ding Guangen is said to be the Deputy Chief, Falun Gong Control Office, and Minister for Media and Propaganda, Central Committee of the Chinese Communist Party of the PRC). In our judgment, adjudication of these multiple lawsuits, including the cases before Magistrate Chen, is not the best way for the United States to advance the cause of human rights in China.

The United States Government has emphasized many times to the Chinese Government, publicly and privately, our strong opposition to violations of the basic human rights of Falun Gong practitioners in China. We have made clear, on repeated occasions, our absolute and uncompromising abhorrence of human rights violations such as those alleged in the complaint, in particular torture, arbitrary detention, interference with religious freedom, and repression of freedom of opinion and expression. The Executive Branch has many tools at its disposal to promote adherence to human rights in China, and it will continue to apply those tools within the context of our broader foreign policy interests.

We believe, however, that U.S. *courts* should be cautious when asked to sit in judgment on the acts of foreign officials taken within their own countries pursuant to their government's policy.[6] This is especially true when (as in the instant cases) the defendants continue to occupy governmental positions, none of the operative acts are alleged to have taken place in the United States, personal jurisdiction over the defendants has been obtained only by alleged service of process during an official visit, and the substantive jurisdiction of the court is asserted to

[6] As the Department of State testified before the Senate Committee on the Judiciary during its consideration of the TVPA, "From a foreign policy perspective, we are particularly concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes, where allegations may be made against foreign governments or officials who are not torturers but who will be required to defend against expensive and drawn-out legal proceedings. Even when the foreign government declines to defend and a default judgment results, such suits have the potential of creating significant problems for the Executive's management of foreign affairs. ... We believe that inquiry by a U.S. court into the legitimacy of foreign government sanctions is likely to be viewed as highly intrusive and offensive." S. Hrg. 101-1284 on S. 1629 and H.R. 1662 (June 22, 1990) at 28 (Prepared Statement of David P. Stewart).

rest on generalized allegations of violations of norms of customary international law by virtue of the defendants' governmental positions. Such litigation can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy.

We ask the Court in particular to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy. In addressing these cases, the Court should bear in mind a potential future suit by individuals (including foreign nationals) in a foreign court against U.S. officials for alleged violations of customary international law in carrying out their official functions under the Constitution, laws and programs of the United States (e.g., with respect to capital punishment, or for complicity in human rights abuses by conducting foreign relations with foreign regimes accused of those abuses). The Court should bear in mind the potential that the United States Government will intervene on behalf of its interests in such cases.

If the Court finds that the FSIA is not itself a bar to these suits, such practical considerations, when coupled with the potentially serious adverse foreign policy consequences that such litigation can generate, would in our view argue in favor of finding the suits non-justiciable. However, if the Court were to determine that dismissal is not appropriate, we would respectfully urge the Court to fashion its final orders in a manner that would minimize the potential injury to the foreign relations of the United States.

Sincerely,

William H. Taft, IV

Enclosures:
As stated.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102

CHAMBERS OF
EDWARD M. CHEN
UNITED STATES MAGISTRATE JUDGE

MAY 16 2002

May 3, 2002

The Honorable William Howard Taft, IV
Office of the Legal Adviser
United States Department of State
2201 C Street N.W.
Washington, DC 20520

Re: *Jane Doe I, et al. v. Liu Qi, et al.*, C-02-0672 CW (EMC) (Northern District of California)

Dear Mr. Taft:

On February 2, 2002, six individual plaintiffs, each of whom is a Falun Gong practitioner, brought suit against Liu Qi, who has served as the mayor of Beijing of the People's Republic of China since February, 1999. The plaintiffs are citizens of various countries, including the People's Republic of China, France, Sweden, Israel, and the United States. Four currently reside in the United States. The suit contends that each of the plaintiffs was subject to arrest and detention under harsh conditions, including the use of unreasonable force and torture, in connection with China's crackdown on the Falun Gong practitioners. The suit contends that the City of Beijing has been a focal point of the repression and persecution against the Falun Gong and that the defendant Liu knew or should have known that Beijing police and other security forces were engaged in a pattern and practice of severe human rights abuses against Falun Gong practitioners. The complaint asserts that defendant Liu had a duty both under customary international law and Chinese law to prevent police and other security forces under his authority from engaging in abuses. The complaint asserts five causes of action under the Torture Victim Protection Act and Alien Tort Claims Act. Enclosed is a copy of the complaint filed herein.

Defendant Liu was served while passing through San Francisco International Airport, apparently on his way to the Winter Olympics. Having failed to respond to the complaint, the Court entered a default on March 12, 2002. Plaintiffs now move for judgment by default. This motion has been assigned to me by the District Judge in this case for a Report and Recommendation. Enclosed is a copy of the plaintiffs' motion for judgment by default.

Having reviewed the complaint and plaintiffs' motion, the Court has determined that it would be appropriate to solicit the Department of State's opinion on a number of issues. In particular, the Court would appreciate the Department of State's views on the following issues:

1. Is this case barred under the Foreign Sovereign Immunities Act ("FSIA")? Please address, *inter alia*:

   a. Whether the exception from immunity under 28 U.S.C. § 1605(a)(7) applies.

   b. In determining both whether the FSIA applies and whether 28 U.S.C. § 1605(a)(7) applies, what law and facts must be demonstrated to establish defendant Liu was acting within or outside the scope of his authority? Must the court determine defendant's scope of his authority under Chinese law; if so the Court requests translated version of all applicable law material to this determination.

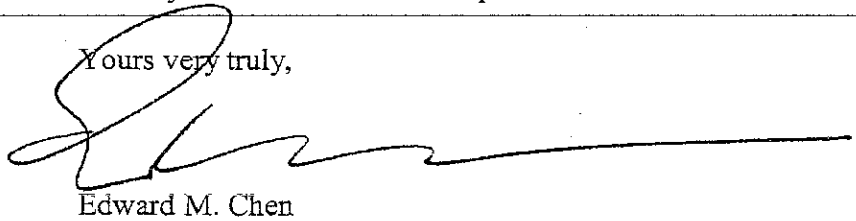
2. Should the Court find the case nonjusticiable under the Act of State doctrine? What effect will adjudication of this suit have in the foreign policy of the United States?

If the Department of State believes a response to some or all of the above questions from the People's Republic of China is appropriate, it may invite the appropriate representative thereof to submit its written views to the Court as well.

The Court would appreciate your consideration of this matter and your communication of the State Department's position regarding these issues. The Court leaves to your discretion whether your response is best submitted in the form of a letter or a Statement of Interest filed pursuant to 28 U.S.C. § 517. A copy should be sent to plaintiffs' counsel. The Court would appreciate a response by July 5, 2002.

Thank you for attention and cooperation.

Yours very truly,



Edward M. Chen
U.S. Magistrate Judge

EMC/ld
Enc.
cc: Joshua Sondheimer, Esq., The Center for Justice & Accountability, 870 Market Street, Suite 684, San Francisco, CA 94102 (*Plaintiffs' counsel)*
Michael S. Sorgen, Esq., Law Offices of Michael Sorgen, 240 Stockton Street, 9th Floor, San Francisco, CA 94108(*Plaintiffs' counsel)*
Terri Marsh, Esq., Law Offices of Terri Marsh, 3133 Connecticut Avenue, NW, Suite 608, Washington, DC 20008 (*Plaintiffs' counsel)*