

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WANG XIAONING, et al.,  
Plaintiffs,  
v.  
YAHOO!, INC., et al.,  
Defendants.

No. C 07-2151 CW  
ORDER DENYING  
DEFENDANT YAHOO!'S  
MOTION FOR AN EARLY  
CASE MANAGEMENT  
CONFERENCE AND ORDER

Defendant Yahoo!, Inc. requests that the Court enter an early case management order that bifurcates certain issues and stays discovery, and solicit the views of the executive branch concerning this case and any foreign policy issues it may raise.<sup>1</sup> Plaintiffs oppose the motion and argue that an early case management order, especially the one Defendant Yahoo! proposes, is not appropriate. They further argue that a statement of interest by the government is not necessary in this case. The matter was submitted on the papers. Having considered all of the papers filed by the parties,

<sup>1</sup>Alibaba.com, Inc. joined Defendant Yahoo! in this motion. Plaintiff's second amended complaint, however, included no claims against Alibaba.com as a Defendant. Thus, Alibaba.com is no longer a party to this case.

1 and good cause not appearing, the Court denies Defendant Yahoo!'s  
2 motion for an early case management conference and case management  
3 order. The Court will, however, solicit the State Department's  
4 views regarding this case.

5 BACKGROUND

6 On April 18, 2007, Plaintiffs Wang Xiaoning, Shi Tao and Yu  
7 Ling filed this complaint. Plaintiffs Wang and Shi are citizens of  
8 the People's Republic of China and are currently imprisoned in  
9 China. Yu, also a citizen of the People's Republic of China, is  
10 Wang's wife. Plaintiffs allege that Defendants willfully provided  
11 Chinese officials with access to private email records, copies of  
12 email messages, and other identifying information about Plaintiffs  
13 and the nature and content of their electronic communications.  
14 These emails contained pro-democracy literature. As a result of  
15 Defendants turning over this information, officials in the Chinese  
16 government subjected Plaintiffs to torture, cruel and inhumane  
17 treatment, arbitrary arrest and prolonged detention for exercising  
18 their right of freedom of speech. Plaintiffs accuse Defendants of  
19 knowingly and willfully aiding and abetting in the commission of  
20 torture and other major abuses violating international law that  
21 caused Plaintiffs' severe physical and mental suffering.

22 In addition to seeking to hold Defendants liable under the  
23 Alien Tort Statute (ATS), the Torture Victims Protection Act (TVPA)  
24 and the Communications Privacy Act (CPA), Plaintiffs seek to hold  
25 Defendants liable under California law. Plaintiffs bring causes of  
26 action for battery, assault, false imprisonment, intentional  
27 infliction of emotional distress, negligence and unfair business  
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1 practices. Plaintiffs seek compensatory and punitive damages, as  
2 well as declaratory and injunctive relief. In particular, Yu seeks  
3 compensation for property government officials seized in  
4 conjunction with her husband's arbitrary arrest and prolonged  
5 detention.

6 On June 19, 2007, the Court approved the parties' stipulated  
7 request for an order enlarging time for Defendants to respond to  
8 the complaint and extending initial deadlines. Pursuant to the  
9 Court's order, the initial case management conference was to be  
10 held on September 18, 2007. Defendant Yahoo! filed this motion two  
11 days after the Court granted the parties relief from the Court's  
12 April 18, 2007 Order Setting the Initial Case Management Conference  
13 and ADR Deadlines. Under Defendant Yahoo!'s proposed early case  
14 management order, all deadlines, except the date the parties are to  
15 meet and discuss early settlement and ADR, set forth in the Court's  
16 June 19, 2007 order would be superseded by the early case  
17 management order.

18 While Defendant Yahoo!'s motion was pending, the Court  
19 approved another stipulated request, allowing Plaintiffs to file a  
20 second amended complaint and continuing the case management  
21 conference to October 9, 2007. The stipulation provides that it,  
22 and the alterations to the schedule, do not moot Defendant Yahoo!'s  
23 motion for an early case management conference and order.

#### 24 DISCUSSION

25 Defendant Yahoo! proposes that this case be managed in two  
26 phases and that merits discovery should begin only if Plaintiffs'  
27 case survives these two phases. The first phase would resolve  
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1 whether the Court has jurisdiction over Defendant Yahoo! Hong Kong  
2 and whether Plaintiffs can prosecute this case, in light of the  
3 fact that two of the Plaintiffs are in prison and it is difficult,  
4 if not impossible, for them to communicate with their attorneys.  
5 The second phase would begin only after the first phase is  
6 completed and after the Court obtains a statement of interest from  
7 the executive branch.

8 Under Defendant Yahoo!'s proposal, the second phase would  
9 resolve the varied legal issues presented by Plaintiffs' claims  
10 asserted under federal, international and California law, including  
11 whether this case is justiciable, whether it violates the act-of-  
12 State doctrine and whether it should be dismissed under the  
13 doctrine of international comity. Additional issues to be resolved  
14 during the second phase would be whether Plaintiffs' aiding and  
15 abetting theory of liability exists under the ATS and TVPA, whether  
16 some of Plaintiffs' claims are time-barred and whether Plaintiffs'  
17 state law claims are subject to a special motion to strike pursuant  
18 to the anti-SLAPP statute. See Cal. Civ. Pro. § 425.16.

19 Defendant Yahoo! argues that its proposed schedule will  
20 promote efficiency and, further, that it is warranted under Sosa v.  
21 Alvarez-Machain, 542 U.S. 692, 727-28 (2004). In Sosa, the Supreme  
22 Court instructed that there is a "high bar" to private causes of  
23 action for violating international law; it explained that "the  
24 potential implications for the foreign relations of the United  
25 States of recognizing such causes should make courts particularly  
26 wary of impinging on the discretion of the Legislative and  
27 Executive Branches in managing foreign affairs." Id. at 727.

1 Although it is one thing for American courts to enforce limits on  
2 their own government's power, the Supreme Court found that it is  
3 "quite another to consider suits under rules that would go so far  
4 as to claim a limit on the power of foreign governments over their  
5 own citizens, and to hold that a foreign government or its agents  
6 has transgressed those limits." Id.

7 Plaintiffs respond that the "vigilant doorkeeping" requirement  
8 expounded in Sosa does not apply to their claims of torture, which  
9 are within the "narrow class" of claims allowed to be brought under  
10 the ATS. See id. at 729. As stated in Doe v. Qi, 349 F. Supp. 2d  
11 1258, 1296 (N.D. Cal. 2004), "it is well established that torture  
12 constitutes jus cogens violations."<sup>2</sup> Indeed, in Sosa, the Supreme  
13 Court acknowledged that a "clear mandate" appears in the TVPA  
14 establishing "an unambiguous and modern basis for federal claims of  
15 torture." Sosa, 542 U.S. at 728 (inner quotation omitted). In the  
16 following sentence, however, the Supreme Court stated, "But that  
17 affirmative authority is confined to specific subject matter." Id.  
18 As Defendant Yahoo! points out, Plaintiffs' complaint raises more  
19 than just claims concerning torture.

20 Nonetheless, the Court need not adopt the two-phase schedule  
21 Defendant Yahoo! proposes in order to heed the Supreme Court's  
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23 <sup>2</sup>A jus cogens norm is "'recognized by the international  
24 community of states as a whole as a norm from which no derogation  
25 is permitted and which can be modified only by a subsequent norm of  
26 general international law having the same character.'" Siderman de  
Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992)  
(quoting the Vienna Convention on the Law of Treaties, art. 53,  
May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679).

1 instructions in Sosa. The Supreme Court has also "been clear that  
2 'it is error to suppose that every case or controversy which  
3 touches foreign relations lies beyond judicial cognizance.'" Sarei  
4 v. Rio Tinto, PLC, 487 F.3d 1193, 1206 (9th Cir. 2007) (quoting  
5 Baker v. Carr, 369 U.S. 186, 211 (1962)). Therefore, at this stage  
6 of the litigation, the Court cannot determine that this case lies  
7 beyond judicial cognizance, as Defendant Yahoo!'s proposed early  
8 case management order supposes. The Court can be vigilant to the  
9 concerns the Supreme Court raised in Sosa without imposing  
10 Defendant Yahoo!'s proposed schedule and without issuing an early  
11 case management order or holding a case management conference  
12 earlier than October, 2007, as the parties stipulated. Therefore,  
13 the Court will not adopt Defendant Yahoo!'s proposed two-phase  
14 schedule, nor will the Court stay discovery.

15 As part of its vigilance, the Court will solicit a statement  
16 of interest concerning this case from the Department of State; if  
17 the Department of State believes a response from the People's  
18 Republic of China is appropriate, it may invite the appropriate  
19 representative of the Chinese government to submit its written  
20 views to the Court as well. Plaintiffs' argument that such a  
21 statement is inappropriate because a foreign State and foreign  
22 officials are not defendants in this case is unpersuasive. The  
23 claims in this case directly implicate the propriety of actions  
24 taken by the Chinese government and thus could impact foreign  
25 policy. See Sarei, 487 F.3d at 1209 (noting that, even though the  
26 Papua New Guinea government was not a named defendant, certain of  
27 its acts were at issue). The State Department should be allowed to  
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1 voice its concerns, if any, about this litigation. The Court will  
2 give "serious weight to the Executive Branch's view of the case's  
3 impact on foreign policy." Sosa, 542 U.S. at 733 n.21. However,  
4 although that view is entitled to deference, it does not control  
5 the Court's determination of whether this case is justiciable.  
6 Sarei, 487 F.3d at 1205. Therefore, the Court need not halt  
7 proceedings in this case until the State Department issues a  
8 statement of interest.

9 CONCLUSION

10 For the foregoing reasons, Defendant Yahoo!'s motion for an  
11 early case management conference and order (Docket No. 11) is  
12 DENIED. The case management conference will be held at the same  
13 time as the hearing on Defendants' motion to dismiss; the Court  
14 will vacate the October 9, 2007 date after Defendants notice their  
15 motion to dismiss. The Court will solicit the State Department's  
16 views on the issues raised in this case. The parties are ordered  
17 within ten days from the date of this order to meet and confer and  
18 attempt to agree on the letter the Court should send to the  
19 Department of State soliciting its opinion. If they agree, they  
20 shall file a proposed letter. If they are unable to agree, each  
21 side shall within fifteen days from the date of this order file its  
22 proposed letter and no more than five pages of argument in support  
23 of its proposed letter.

24 IT IS SO ORDERED.

25 7/31/07

26 Dated: \_\_\_\_\_



27 CLAUDIA WILKEN  
28 United States District Judge