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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE DOE I, JANE DOE II, HELENE PETIT, MARTIN LARSSON, LEESHAI LEMISH, and ROLAND ODAR

Plaintiffs,

v.

LIU QI, and DOES 1-5, inclusive

Defendants.

No. **C 02 0672 CW EMC**

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE CHEN'S REPORT AND RECOMMENDATION

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"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

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INTRODUCTION

In enacting the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, Congress expressed its intent that the federal judiciary be empowered to hold foreign officials who violate fundamental international human rights accountable for their actions. While Magistrate Judge Chen has appropriately recognized that Defendant Liu Qi is not entitled to sovereign immunity for ordering and condoning the torture and arbitrary detention of Falun Gong practitioners, and that the act of state doctrine does not bar adjudication of Plaintiffs' claims, several aspects of Judge Chen's recommendations, if adopted by this Court, would seriously undercut the efficacy of the TVPA and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350

Judge Chen correctly recognizes that Plaintiffs are entitled to default judgment on many of their claims, and Plaintiffs urge the Court to adopt those recommendations not challenged here. Notwithstanding, Judge Chen's recommendations err in critical respects. His report:

- improperly recommends that the act of state doctrine is applicable to this case and requires that Plaintiffs' remedy be limited to a declaratory judgment;
- improperly disregards central claims of Plaintiffs by recommending that the Court decline to enter default judgment for crimes against humanity and interference with the freedom of religion or belief; and
- disregards binding Ninth Circuit precedent and international authority in concluding that Plaintiffs have failed to establish entitlement to default judgment for arbitrary detention.

Plaintiffs therefore move the Court to make a *de novo* determination of Plaintiffs' Motion for Default Judgment, and carefully consider the issues raised in these objections. Plaintiffs respectfully request that the Court enter default judgment against Defendant Liu on all Plaintiffs'

claims.

I. FOR THE PURPOSES OF SOVEREIGN IMMUNITY THE SCOPE OF DEFENDANT LIU'S AUTHORITY IS DETERMINED BY REFERENCE TO BOTH INTERNATIONAL AND DOMESTIC CHINESES LAW

In *Chuidian v. Philippine Nat'l Bank*, F. 2d 1095, 1106-07 (9th Cir. 1990), the Ninth Circuit held that a foreign government official is not entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605, for acts committed outside the scope of his or her lawful authority. In cases where an official's conduct is alleged to have violated international human rights norms – and indeed, where jurisdiction is premised on sufficient allegations of violations of such norms, as under the ATCA and TVPA –a court necessarily must look to international law, as well as the law of the official's country ("domestic" law), to determine whether the official's conduct was *ultra vires*.

A fundamental precept underlying not only the ATCA and TVPA, but also international tribunals from Nuremberg to the recent United Nations criminal tribunals, established with U.S. support, is that individuals may be held responsible for committing violations of customary norms of international human rights law. Judge Chen fails to recognize this basic tenet in recommending that the scope of an official's authority for purposes of the FSIA may in this case be determined solely by reference to domestic law. Rep. at 24. Judge Chen's proposal that the court need only look to foreign domestic law is grievously in error as, if adopted, it could give officials of barbaric regimes safe harbor in the United States after committing atrocities in violation of international law, and would require this Court to do what the act of state doctrine is specifically intended to prevent – entangle United States courts in decisions as to whether a foreign sovereign has violated its own laws.

In *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation),* 25 F.3d 1467 (9th Cir. 1994), the only Ninth Circuit case addressing the "scope of authority" issue in the

context of human rights claims, the court looked to both international and domestic law to determine whether torture and killings ordered and condoned by Philippine President Ferdinand Marcos were outside the scope of his authority. The court noted that the plaintiffs alleged "violations of international law *and* the constitution and law of the Philippines," and concluded that the defendant's human rights abuses were "clearly acts outside of his authority as President." 25 F.3d at 1471, n.4; 1472; *see also Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493, 497-98 (9th Cir. 1992) ("Congress intended FSIA to be consistent with international law").

In *Chuidian*, upon which Judge Chen principally relies, the defendant, a Philippine government official, was not accused of violating international prohibitions against torture and other human rights abuses, but rather of having exceeded the scope of his authority by preventing the Philippine National Bank from paying a letter of credit. In that limited context, it was entirely logical for the court to consult only domestic law in determining whether defendant's actions were *ultra vires*. The court's decision in this limited respect, however, has no bearing on whether, in a case where international law violations are alleged, a court should *only* look to domestic law as the measure of an official's authority. Other cases relied upon by Judge Chen, all involving the narrow context of private or commercial conduct, are similarly inapposite. See Rep. at 24, n. 15.

Judge Chen's recommendation on this issue, if adopted would create a perverse incentive for the most repressive governments to "legalize" conduct domestically which is otherwise universally condemned under *international* law.[1] By simply acknowledging the torture or elimination of "undesirables" as official policy or law, a rogue State could ensure safe passage for

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[1] Curiously, in footnote 21, Judge Chen also hints that an official who acts pursuant to a publicly announced government policy, rather than merely domestic law, may also be immune under the FSIA. Rep. at 29. Plaintiffs address the unsupported and dangerous nature of such a holding in the

its leaders and henchmen in the United States. Under this reasoning, Nazi officials may have been immune for certain acts in furtherance of the Holocaust authorized by German law. Such a result is plainly contrary to the intent of the TVPA and international law, which generally require that abuses be committed under actual or apparent authority of a foreign government to constitute a violation of international.[2]

Resort solely to domestic law in determining whether an official's abuses of internationally recognized human rights also would result in the absurd outcome that officials from one country could be held liable for the same abuses for which an official from another country would be immune. Officials from different nations could commit identical abuses, but an official from a state that has legalized the conduct would be immune while others would not.

Finally, Judge Chen's recommendation that domestic law should be the sole measure of an official's authority in a human rights case runs specifically contrary to the concerns underlying the act of state doctrine. Adopting Judge Chen's view would require United States courts to determine the legality of foreign official's actions under that nation's laws. This poses a greater intrusion on foreign sovereignty, about which Judge Chen expresses concern in other aspects of his decision, than the prospect of a judgment against a foreign official for acts contrary to customary international law.

II. DEFENDANT LIU'S CONDUCT IS NOT PROTECTED BY THE ACT OF STATE DOCTRINE[3]

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act of state context in section II(C) *infra*. The same reasoning applies in the sovereign immunity context.

[2] Under §1605(a)(7) of the FSIA, immunity is denied to those states that sponsor terrorism for claims of torture and extrajudicial killing. The text of section 1605(a)(7) does not require courts to determine whether the domestic laws of those states permit torture and extrajudicial killing. *See Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 12 (D.D.C. 1998) ("[T]he state sponsored terrorism exception to foreign sovereign immunity . . . creates no new responsibilities or obligations; it only creates a forum for the enforcement of pre-existing universally recognized rights under federal common law and international law.").

[3] Plaintiffs continue to maintain that Judge Chen should not have considered the act of state

A. HUMAN RIGHTS ABUSES DISAVOWED, DENOUNCED, AND DENIED BY A FOREIGN GOVERNMENT ARE NOT "ACTS OF STATE"

The Supreme Court has ruled that government conduct must be "public and governmental" acts of the sovereign to be considered "acts of state" that may trigger application of the act of state doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) (rejecting application of doctrine where moving party was unable to show any "statute, decree, order or resolution" which legally authorized the government acts at issue). Because the Chinese government expressly denies that it condones torture and arbitrary detention of Falun Gong practitioners and accepts that such practices would be contrary to domestic and international law, the "threshold" requirement for application of the doctrine has not been met. *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116, 1189 (C.D. Cal. 2002).

The Ninth Circuit and other courts have made clear that conduct rejected by a government as its official policy or practice, even where carried out pursuant to covert government policy, cannot be considered "acts of state." The Philippine government's abuses at issue in the *Marcos* cases were widespread and systematic, reflecting a government policy of terrorizing and eliminating perceived government opponents. *See Hilao*, 25 F.3d at 1469 (stating that "up to 10,000 people" were allegedly tortured, summarily executed or disappeared by Philippine military intelligence personnel during President Marcos' tenure). This policy was not publicly announced, and the government continually denied that such abuses were occurring. Amnesty International,

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doctrine. The Ninth Circuit has held that a district court errs when it raises the act of state doctrine *sua sponte* before a defendant has entered an appearance. *Siderman v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992). The Ninth Circuit in *Siderman*, relying on *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), *cert. dismissed,* 497 U.S. 1058 (1990), found that the district court should not have dismissed plaintiffs' expropriation claims on act of state grounds in a default case because the defendant had not yet appeared and offered any evidence on the issue, and therefore had not met its burden. "The burden of proving acts of state rests on the party asserting the applicability of the doctrine." *Id.* (*citing Liu*, 892 F.2d at 1432). See also *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988). Defendant Liu's failure to respond in this case waives the act of state defense. See *Trajano*, 978 F.2d at 495 n.2 (assertion of statute of limitations "is an affirmative defense which was waived by virtue of [defendant's] default."); *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1996) (declining to address doctrine where not asserted by defendant below); *Filartiga v. Peña-Irala*, 630 F.2d 876, 889 (1980) (same). Accordingly, the Court should decline to consider the applicability of the doctrine.

Human Rights Violations in the Philippines (1982) at 1. Yet, in *Trajano,* the Ninth Circuit noted that it had earlier held that the allegations against Marcos "are not nonjusticiable 'acts of state[,]'" and that, "In so holding, we implicitly rejected the possibility that the acts set out in [the plaintiff's] complaint were *public acts of the sovereign*." 978 F.2d at 498, n. 10 (emphasis added).

Similarly, in *Chuidian,* the Ninth Circuit the Ninth Circuit refused to recognize acts unauthorized by law as "sovereign acts" in assessing the scope of an official's duties under the FSIA. As the court noted, "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and *not sovereign actions*." *Chuidian* at 1106 (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)) (emphasis added).[4]

Relying on a mischaracterization of *dicta* in *Filartiga* and *Kadic,* Judge Chen suggests that a two-part test must be met before the act of state doctrine may be found inapplicable to governmental conduct: (1) the conduct must have violated the foreign nation's domestic law; *and* (2) the conduct must have been "wholly unratified" by that nation's government.[5] Rep. at 36. He then further suggests that actions are not "wholly unratified" if they are taken pursuant to unacknowledged and covert government policy, even if such conduct violates the nation's own laws. This Court must not adopt Judge Chen's novel and dangerous standard. Judge Chen's views flatly contradict the Supreme Court and Ninth Circuit precedent cited above. The Ninth Circuit has never identified the standard posited by Judge Chen, and, in fact, has specifically ruled that conduct that violates fundamental human rights norms cannot be categorized as acts of state.

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[4] In fact, such abuses pursuant to a covert policy cannot be acts of state because "there is no discretion to commit, or to have one's officers or agents commit, an illegal act." *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980). As the *Letelier* court found, "Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law." *Id.*

[5] Judge Chen's citation to these cases is misplaced, as they do not even imply that human rights abuses which are illegal under domestic law can be acts of state if done pursuant to an unofficial and covert government policy. Neither court conducted any detailed analysis of the issue, nor did they craft a two-part test for the application of the doctrine. They did not apply the act of state doctrine, nor did they support its application to governments with repressive policies. *See Filartiga*, 630 F.2d at 889; *Kadic,* 70 F.3d at 250.

B. CONDUCT THAT IS "WHOLLY UNRATIFIED" MEANS CONDUCT DISAVOWED BY THE STATE

"Ratify" means "to approve or confirm; esp., to give official sanction to." WEBSTER'S NEW WORLD DICTIONARY 1114 (3d ed. 1991). Actions that violate a nation's laws are not "ratified" when they are taken pursuant to an unofficial and covert policy or practice of the national government. Although Judge Chen suggests that conduct is not "wholly unratified," as used in *Filartiga* and *Kadic*, if it is "consistent with and pursuant to the unofficial policy of the national government," Rep. at 36, that characterization is unsupported by those cases. The *Filartiga* decision, which is quoted by the *Kadic* court, says:

> We note *in passing*, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.

630 F.2d at 889-90 (citations omitted) (emphasis added). In the context of the *Filartiga* case, the phrase "wholly unratified" can only accurately be understood to mean that the Paraguayan government *disavowed* that it practiced torture. It cannot be read, as Judge Chen reads it, to suggest that the Paraguayan government rejected torture of suspected dissidents as a state practice or policy, since it is beyond dispute that the commission of such abuses was condoned as *de facto* state policy by the Paraguayan dictatorship in the 1970s.

The kidnapping, torture and murder at issue in *Filartiga* were committed during the 35-year dictatorship of Alfredo Stroessner by the Inspector General of Police of Paraguay's capital, Asuncion. 630 F.2d at 878. The systematic practice of torture by police during the Stroessner regime was widely known and criticized by international observers. *See, e.g.,* Amnesty International USA, *Death Under Torture & Disappearance of Political Prisoners in Paraguay* (1977), at 7. The practice persisted, despite its illegality under Paraguay's Constitution and domestic law. *Id*. Judge Chen, with no citation to the court's opinion or to any other facts about

Paraguay, nevertheless states that that the abuses at issue in *Filartiga* were not pursuant to a governmental policy.[6] The *Filartiga* court *rejected* the act of state doctrine despite the fact that the abuses at issue in that case were committed pursuant to an unofficial and covert policy of human rights violations similar to that of the Chinese government in the instant case.

Similarly, in *Kadic*, the Second Circuit refused to apply the act of state doctrine to plaintiffs' human rights claims against the president of the notorious Bosnian-Serb republic of Bosnia-Herzegovina. As in *Filartiga*, it is beyond dispute that it was the *de facto*, albeit illegal and unofficial, policy and practice of the Bosnian-Serb Republic to perpetrate widespread killing, rape, torture, and other abuses in pursuit of its notorious campaign of "ethnic cleansing." The massive and brutal ethnic cleansing campaign in Bosnia attracted worldwide attention and sparked an international intervention. The State Department extensively documented these abuses and concluded on several occasions that "ethnic cleansing" was in fact the policy of the Bosnian-Serb government.[7] Yet, Judge Chen asserts that the abuses at issue in *Kadic* were not the policy of the Bosnian-Serb government. Rep. at 35-6.

In suggesting that the act of state doctrine would *not* apply to defendant Karadzic had the

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[6] Specifically, Judge Chen concludes, "Unlike the facts in *Kadic* and *Filartiga*, Defendants' acts, though apparently violative of the state's domestic law, are not 'wholly unratified by that nation's government.'" Rep. at 35-6. Again, much of Judge Chen's reasoning is based on the notion that "wholly unratified by that nation's government" means "against the policy of the government." If "wholly unratified" is more correctly interpreted to mean "illegal under the laws of that nation or contrary to the publicly declared policy of a nation," then Plaintiffs would agree that the abuses at issue in *Filartiga* (and in *Kadic*) were indeed "wholly unratified."

[7] "[P]ro-Karadzic Bosnian Serbs pursued ethnic cleansing as a matter of policy…" U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 807. "Bosnian Serb armed militia (BSA) declared their support for Karadzic. Backed by the Serbian authorities in Belgrade, the BSA began a brutal campaign of terror – in which acts of genocide took place – to establish an ethically pure state linking Serb-occupied territory in Croatia with Serbia/Montenegro to form 'greater Serbia.'" *Id*. at 806. "Many human rights violations committed by the BSA occurred as part of specific policies to expel Muslims and Croats from areas the Serbs desired for themselves." *Id*. at 809. "The policy of driving out innocent civilians of a different ethnic or religious group

issue been presented, the *Kadic* court noted that Karadzic "has not had the temerity to assert in this Court that the acts he allegedly committed are the *officially* approved policy of a state." 70 F.3d at 250 (emphasis added). Under Judge Chen's proposed test, the Second Circuit would have been required to apply the act of state doctrine, as Karadzic's conduct was carried out as state policy, even though it was officially disavowed.

"That 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." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992). Nonetheless, human rights abuses are rampant in many countries around the world. Indeed, "violations of the law of nations virtually all involve acts practiced, encouraged or condoned by states…" *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546 (N.D.Cal. 1987). Applying the act of state doctrine to individuals who act pursuant to unofficial and covert policies condoning massive human rights abuses "would in effect preclude litigation under §1350 for 'tort[s] … committed in violation of the law of nations'" by officials of the world's most repressive regimes. *Id*.

C. WHETHER GOVERNMENTAL CONDUCT IS AUTHORIZED BY LAW FOR PURPOSES OF THE ACT OF STATE DOCTRINE MUST BE DETERMINED BY REFERENCE TO BOTH INTERNATIONAL AND DOMESTIC LAW, AND VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS NORMS CAN NEVER BE ACTS OF STATE

For the same reasons that the scope of an officer's authority cannot be determined solely by domestic law for FSIA purposes, *see* section I *supra*, in human rights cases the determination of whether government conduct is authorized by law, such as to constitute an "act of state," cannot be measured solely by the domestic law of a foreign state. Courts analyzing the act of state doctrine in the human rights context have uniformly held that the international consensus prohibiting fundamental human rights abuses such as torture, summary killing, arbitrary detention, and crimes against humanity, removes such acts from the possibility of being considered "acts of state." *See*

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from their homes, so-called ethnic cleansing, was practiced by Serbian forces in Bosnia on a scale that dwarfs anything seen in Europe since Nazi times." *Id*. at 719.

Filartiga, 630 F.2d at 889-90; *Flatow,* 999 F.Supp. at 24 ("An act which is acknowledged to be within a state's discretion, although it violates federal and international law, can still be a valid act for the purposes of the Act of State doctrine, such as assisting an intrafamilial kidnapping by issuing a travel visa. Political assassinations ordered by foreign states outside their territory, however, are not valid acts of state which bar consideration of the case.") (citations omitted); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, 345 (S.D.N.Y. 2003) ("*jus cogens* violations are considered violations of peremptory norms, from which no derogation is permitted. Acts of state to the contrary are invalid."). S*ee also Forti*, 672 F.Supp. at 1544 (refusing to apply the act of state doctrine to alleged torture even though the defendant argued that the abuses were taken pursuant to "policies promulgated by the junta.").

As the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, provides at section 443, comment c:

> A claim arising out of an alleged violation of fundamental human rights – for instance, a claim on behalf of a victim of torture or genocide – would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.

The above cases demonstrate that the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431 (1964) did not, as Judge Chen suggests, foreclose the possibility of consulting international law when it held that "the act of state doctrine is applicable even if international law has been violated." *Sabbatino* involved the expropriation of foreign property, an issue whose legality under international law was in great doubt at the time. The courts in the above cases distinguished *Sabbatino* and found that certain human rights violations are so universally abhorred that they cannot be recognized as official acts of state. This narrow distinction for human rights cases does not necessarily imply that other violations of international law, in such areas as trade or the environment, fall outside the ambit of acts of state.[8] However, in the context of claims

[8] In *Sarei,* the court found that the act of state doctrine was inapplicable to the plaintiffs' claims alleging torture, rape, pillage, war crimes and crimes against humanity. Such acts could not be deemed "official acts of state" because they were not "acts of *legitimate* warfare." 224 F.Supp.2d at 1189. The court based this holding on other cases that look to international, rather than domestic, standards. At the same time, the court found that conduct implicated in the plaintiffs'

such as torture and crimes against humanity, Judge Chen reads *Sabbatino* much more broadly than necessary and runs afoul of numerous decisions cited above that have held the act of state doctrine inapplicable to governmental conduct in violation of fundamental human rights norms.

Moreover, analysis of domestic Chinese law is far more intrusive to the sovereignty of the Chinese government than would be an analysis of international law, and violates precisely the international comity and respect for foreign nations that the act of state doctrine is designed to avoid. The doctrine was created so that United States' courts would not "sit in judgment on the acts of the government of another." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1887). By limiting the inquiry to whether or not the internal laws of the state are violated, courts would be forced to determine, as Judge Chen has here, whether a foreign government has run afoul of its own laws. By more properly referring to customary international law – to which all countries, by definition, agree – the Court would not have to make this invasive determination and would allow officials from different countries to be judged by the same standards.

D. THE *SABBATINO* FACTORS WEIGH AGAINST APPLICATION OF THE ACT OF STATE DOCTRINE TO DEFENDANT LIU'S ACTIONS

Even if the Court determines that the act of state doctrine should be analyzed in this case, the balancing test outlined in *Sabbatino* and *Liu*, indicates that judicial abstention is not necessary or required in this case.

1. The Strong International Law Consensus Against Defendant Liu's Acts Must Be Properly Weighed In The *Sabbatino* Analysis

Analysis of the *Sabbatino* and *Liu* factors requires a "balancing approach," *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400, 409 (1990), that Judge Chen does not conduct. The Supreme Court's decision in *Sabbatino* turned on a consideration of all three factors the court enumerated, and its conclusion was limited to the

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claims for environmental degradation and racial discrimination were official acts of state, because, unlike physical human rights abuses, they involved such quintessentially governmental acts as conferring a mining contract on the defendant company and permitting that company to exercise eminent domain powers. *Id*. at 1188.

holding that "the (Judicial Branch) will not examine the validity of a taking of property within its own territory by a foreign sovereign government." 376 U.S. at 428.

A critical factor in the court's application of the act of state doctrine was the uncertain status of expropriation under international law. *Id.* *See also Kadic*, 70 F.3d at 250 ("[W]e think it would be a rare case in which the act of state doctrine precluded suit under section 1350. [*Sabbatino*] was careful to recognize the doctrine 'in the absence of ... unambiguous agreement regarding controlling legal principles,' such as exist in the pending litigation, and applied the doctrine only in a context--expropriation of an alien's property--in which world opinion was sharply divided.") However, where the degree of consensus under international law is strong, as it is here, this factor weighs heavily against application of the doctrine. *See Sharon v. Time*, 599 F.Supp. 538, 552 (S.D.N.Y. 1984) ("[A] court should not refuse to apply established principles of human rights because of a doctrine designed to keep courts out of the business of enforcing property rights in litigation affecting property within a foreign sovereign state. To the contrary, *Sabbatino* suggests--and the most current authority proposes--that the act of state doctrine need not be applied to bar review of the violation of well recognized human rights.") Judge Chen's opinion fails to accord appropriate weight to the fact of international agreement as to the "controlling legal principles" in this case.[9]

2. Entry of Default Judgment For Money Damages Will Not Have a Negative Impact On Foreign Relations

The foreign relations factor in the *Sabbatino* analysis is only implicated where a case is "likely to hinder the Executive Branch in its formulation of foreign policy, or result in differing pronouncements on the same subject." *Liu*, 892 F.2d at 1433. *See also Sabbatino*, 376 U.S. at 432

[9] Although acknowledging that the first factor weighs against application of the doctrine, Judge Chen devotes only three sentences to the issue, whereas he devotes nearly seven pages to the case's impact on foreign relations.

("Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary.") When analyzed in accordance with the *Liu* opinion, this case presents very little likelihood of hindrance of the Executive branch and no possibility of differing pronouncements.[10] Here, the proclamations coming from the Judiciary would be precisely the same as those coming from the Executive: that the Chinese government, including Defendant Liu, has violated domestic and international law by committing human rights abuses against Falun Gong practitioners.[11] Unlike in *Sabbatino*, there is no conflict between the Executive and Judiciary as to whether the torts claimed in the complaint violate international law. The only question is whether the particular acts occurred and whether Defendant Liu may be held responsible. The State Department has not opined on these questions, nor should it.

Judge Chen recommends examining a novel third consideration in the analysis of the foreign policy implications of adjudication, -- namely that differing *methods* of conveying condemnation of Chinese policy by the Executive and Judiciary will disrupt foreign relations. Rep. at 41-42. Although this issue is the central rationale for Judge Chen's recommendation that the act of state doctrine be applied, he cites no legal authority supporting this kind of examination. Consideration of this factor is unwarranted under *Liu* and on the facts. As Judge Chen himself

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[10] Indeed, Defendant Liu is no longer a government official, but a Communist Party officer. *See* Notice of Change in Defendant's Status, ¶2. The State Department does not recognize Communist Party positions as government posts, and only establishes counterpart relationships with Chinese officials based on their positions in government, rather than their roles in the Party. *See* Declaration of Andrew J. Nathan, ¶6. Judge Chen's retort that this change is irrelevant because the Communist Party runs the Chinese Government is inapposite. Rep. at 50. It is inconsistent and illogical to claim Defendant Liu has *de facto* power in analyzing this case's impact on foreign relations when the Executive does not even recognize Communist Party officials as representatives of the state.

[11] Judge Chen admits that the imposition of a judgment finding Defendant liable in this case does not conflict with the message crafted by the State Department to criticize China's abuses of Falun

recognizes, nothing about this case presents the likelihood of interference with the Executives "formulation" of foreign policy, or of "differing pronouncements" on the same subject. *Liu*, 892 F.2d at 1433. Judge Chen's suggestion that this case presents some potential for interference with the Executive's preferred "methods" of conducting foreign policy presumes that litigation initiated by a private party may be considered an instrument of foreign policy, a fundamental misconception. [12]

Further, although the effect on foreign relations may be the "touchstone" of act of state analysis, *International Ass'n of Machinists and Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354 (9th Cir. 1981), it is only so because of a "policy of foreclosing court adjudications involving the *legality* of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill*, 425 U.S. at 697 (emphasis added). By deciding to analyze the applicability of sovereign immunity and the act of state doctrine only through reference to domestic Chinese law, Judge Chen has already entered into the invasive analysis the act of state doctrine is designed to avoid. *See* section I and section III(C) *supra*. Rep. at 29. Any further proceedings or entry of default judgment at this stage would not cause greater affront to the Chinese government.

Finally, while Judge Chen finds the series of Cuban expropriation cases "instructive,"

Gong practitioners. He states that "a declaratory judgment would essentially affirm the views of the State Department." Rep. at 47.

[12] Judge Chen also improperly suggests that the circumstances of the court's exercise of jurisdiction in the case raises the potential to "exacerbate tension," because service of process on Defendant Liu during a visit to the U.S. constitutes the "outer reaches of the jurisdiction of the federal judiciary." Rep. at 41, n. 25. He cites no case law to support the conclusion that this issue can even be taken into account under the act of state doctrine or that in person service of process is somehow less sufficient under the Constitution. The Supreme Court has held that personal service of process on a visitor physically present in a state complies with the requirements of the Constitution. *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). Either this type of service is constitutional or it is not. There are no "outer limits." In fact, the court stated, "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State . . . The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process

regarding the degree of deference owed to the Executive, Rep. at 42, these cases provide no support for the assertion that the Court is obliged to follow the State Department's vague admonitions regarding the foreign policy implications of this private lawsuit. As discussed *supra*, these cases turned on the Supreme Court's concern about issuing pronouncements different from those of the Executive, which was a distinct possibility given the uncertain nature of expropriation under international law. *See Sabbatino*, 376 U.S. at 428-37. Here, there is no conflict about the status of Plaintiffs' claims. Acts such as torture; cruel, inhuman or degrading treatment; crimes against humanity; and arbitrary detention all unquestionably violate international law. Neither the State Department, nor Judge Chen, disputes this. In *Sabbatino*, the court cited the need for "progress toward the goal of establishing the rule of law" as a justification for imposing the act of state doctrine. *Id*. at 437. Here, its imposition would have precisely the opposite effect.

E. DEFAULT JUDGMENT SHOULD BE GRANTED IN THE FORM OF MONEY DAMAGES

Under international law, victims of fundamental human rights abuses have a right to an effective remedy and to reparation. *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1358-59 (N.D.Ga. 2002). "It is a principle of international law ... that every violation of an international obligation which results in harm creates a duty to make adequate reparation." *Velasquez Rodriguez Case,* Judgment of July 21, 1989, Inter-Am. Ct. H.Rep. (Ser. C) No. 7, ¶25 (1989). *See also* Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation,

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standard of 'traditional notions of fair play and substantial justice.'" *Id*. at 611, 619.

including the means for as full rehabilitation as possible."). Reparation should be designed to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Id*. (*citing Concerning the Chorzow Factory* (F.R.G.v.Pol.), 1928 P.C.I.J. (Ser.A) No. 17, at 47).[13]

Judge Chen posits a false analogy to the establishment of qualified immunity for public officials under U.S. civil rights law in suggesting that imposition of a damage award would interfere with the duties of foreign officials because they could be forced to choose between violating their state's policy or being subjected to damages. Rep. at 46, n. 30. The qualified immunity afforded U.S. public officials would not protect an official who engaged in the conduct alleged in Plaintiffs' complaint. Most importantly, the international law of human rights, which Congress intended to implement through the TVPA and its affirmation of the ATCA, is premised on a foundation of an individual's responsibility to reject participation in fundamental human rights abuses. *See, e.g.,* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704/Add.1 (1993), art. 7(4) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility…").

Judge Chen also improperly suggests that imposition of monetary damages against Defendant "would be similar to the imposition of monetary sanctions" against China. Rep. at 46. Economic sanctions imposed by the United States against the government of China would result in billions of dollars of lost revenue for both countries and represent a major global incident. A default judgment against a single former official presents no such significant consequences.

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[13] The European Convention on the Compensation of Victims of Violent Crimes requires that victims be compensated for at least loss of earnings; medical, hospital and funeral expenses; and,

Even if the Court finds that a damage award against an individual former official would, in fact, impact foreign relations, in light of the international consensus supporting entitlement to reparations for fundamental human rights violations, a court may still award compensatory damages without contradicting the expectation of liability that foreign officials should reasonably have given the right of victims to an effective remedy. This would allow the Court to uphold Plaintiffs' right to an adequate remedy, thereby respecting the congressional intent behind the ATCA and TVPA to implement international law, without significantly interfering with Defendant Liu's expectations.

III. PLAINTIFFS' CLAIMS FOR CRIMES AGAINST HUMANITY, INTERFERENCE WITH FREEDOM OF RELIGION OR BELIEF, AND ARBITRARY DETENTION ARE JUSTICIABLE

A. CLAIMS FOR CRIMES AGAINST HUMANITY AND INTERFERENCE WITH FREEDOM OF RELIGION OR BELIEF CAN BE PROPERLY ADJUDICATED IN A DEFAULT CASE

Numerous courts hearing human rights cases brought under the ATCA and TVPA have granted default judgments and assessed money damages on claims such as crimes against humanity and genocide. *See Mehinovic*, 198 F.Supp.2d 1359-60 (granting default judgment on crimes against humanity and war crimes); *Doe v. Karadzic*, 2001 WL 986545 (S.D.N.Y. 2001) (genocide); *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. 1996) (genocide); *Doe v. Lumintang*, Civil Action No. 00-674 (D.D.C. 2001) (crimes against humanity); *Tachiona v. Mugabe*, 216 F.Supp.2d 262 (S.D.N.Y. 2002) (freedom of thought, freedom of political opinion, freedom to exercise political franchise, freedom of association, racial discrimination). Similarly, there is nothing that bars this Court from entering default judgment on Plaintiffs' claims for crimes against humanity and interference with freedom of religion or belief, and awarding Plaintiffs compensation for their damages.

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for dependants, loss of maintenance. Council of Europe; ETS No. 116; November 24, 1983; art. 4.

The general rule is that well-pled allegations in the complaint regarding liability are deemed true. *Fair Housing of Marin v. Combs,* 285 F.3d 899 (9th Cir. 2002). Plaintiffs have alleged that the abuses committed against them constituted persecution against an identifiable group based on political, cultural, or religious status, and were committed in the context of a widespread or systematic attack against a civilian population. Complaint at 16. Plaintiffs also allege that tens of thousands of people have been detained solely for their participation in Falun Gong, thousands have been victims of beatings and other forms of torture, and at least five thousand practitioners have been detained and sent to labor camps for "re-education" without trial. Complaint at 9. These allegations are deemed true, and are supported by the State Department's own reports. Plaintiffs therefore sufficiently allege Defendant Liu's responsibility for crimes against humanity and interference with the freedom of religion or belief.

Judge Chen provides no supporting authority for the proposition that default judgment is unavailable when adjudication will require "facts beyond that to which the individual plaintiffs may competently testify." Rep. at 56. Judge Chen posits that "there is less reason to [take the allegations as true] when the allegations are broad and implicate conduct and policies of others beyond the defendant's control." Rep. at 56.[14] The case that he cites, *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986), is easily distinguishable. In that case, the court expressed reservations about the merits of the plaintiff's substantive claims based on the complaint and because the defendant's

[14] Judge Chen's refusal in this section to look into "facts beyond that to which the individual plaintiffs may competently testify" is contradicted by his later analysis of the command responsibility issue. There, Judge Chen expresses no reluctance in examining whether Defendant Liu "knew or should have known" that abuses were being committed against Falun Gong practitioners. Rep. at 87. He accepts the allegations that the repression was "widespread, pervasive, and widely reported," and finds that Defendant Liu therefore knew or should have known about the abuses. *Id.* This inquiry exceeds the universe of facts to which Plaintiffs can testify, yet Judge Chen does not refrain from finding command responsibility sufficiently alleged.

failure to appear was likely based on excusable neglect. *Id*. at 1472.[15] Here, Defendant Liu has intentionally refused to respect the jurisdiction of this Court , while non-parties such as the San Francisco Chinese Chamber of Commerce have tried to defend the suit. Moreover, Judge Chen has not expressed any reservations about the merits of Plaintiffs' crimes against humanity claims. In fact, he admits that the Chinese government is engaged in a policy of repression against Falun Gong practitioners. Rep. at 38.

Further, adjudicating Plaintiffs' claim for interference with freedom of religion or belief does not, as Judge Chen asserts, require "an assessment of the PRC's official decision to outlaw the Falun Gong" or imply "a direct challenge to official government policy of the PRC." Rep. at 57-58. Although General Comment 22[48] to Article 18 of the International Covenant on Civil and Political Rights provides that this right is subject to restrictions for public safety, order, health or morals, any restrictions must be proportional to the threat the religious manifestations pose. General Comment 22[48], ¶8. *See also* Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Motion for Default Judgment at 42.

Plaintiffs do not ask the Court to inquire into whether Defendant Liu was justified in restricting the practice of Falun Gong. Plaintiffs assert that the imposition of torture, arbitrary detention, and cruel, inhuman, or degrading treatment violated their rights to express their spiritual beliefs, and that the Chinese government's response is entirely disproportional to any "threat" the Falun Gong may have posed. This Court does not have to inquire into the justifications for the Chinese government's policy. Rather, the Court only has to make a factual determination that the

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[15] Although *Eitel* expresses a strong policy favoring a decision on the merits, the instant case is not a situation where this is a possibility. Defendant Liu has not entered an appearance, nor does he appear inclined to do so. In *Eitel*, the defendant's default was due to excusable neglect and the defendant had even entered an answer and counterclaim. 782 F.2d at 1472. Here, Defendant Liu has made no such effort and has thumbed his nose at the Court's authority. The policy favoring decisions on the merits is null in this case because there is no possibility that one can be reached.

abuses alleged in the complaint occurred.

Finally, inquiry into Plaintiffs' claims for crimes against humanity and freedom of religion or belief does not constitute the "practical equivalence of a suit against the government of China," or "implicate[] core concerns underpinning the act of state doctrine." The claims alleging Defendant Liu's responsibility for crimes against humanity and abuses committed because of religious discrimination do not require adjudication of the "legality" of the Chinese government's policy of restricting Falun Gong practice. Judge Chen already acknowledges that the Chinese government has engaged in an "unofficial policy" of torture and abuse of Falun Gong practitioners. *See* Rep. at 36. Plaintiffs only seek to hold defendant individually responsible for his participation in and failure to prevent these abuses.

B. THE DETENTIONS OF PLAINTIFFS PETIT, LARSSON, LEMISH, AND ODAR WERE WITHOUT JUSTIFICATION AND THEREFORE ARBITRARY

Plaintiffs Petit, Larsson, Lemish and Odar each were forcibly detained without warning, cause, or explanation by Beijing police on November 20, 2001, within moments after beginning a peaceful meditation with other Falun Gong practitioners in Beijing's Tienanmen Square. Each was intentionally assaulted and battered in police custody. Plaintiff Petit also was subjected to a sexual assault. Each was denied any opportunity to contact counsel, family, or their respective embassies. None were charged with any offense or brought before any judicial authority, and each was summarily deported from China some 24 hours later. Complaint, ¶¶ 26-29.

Just one week before Judge Chen issued his report and recommendation in this case, the Ninth Circuit Court of Appeals, sitting *en banc*, ruled that the overnight detention of a Mexican citizen in Mexico before being transported across the border into U.S. custody constituted arbitrary detention under international law because the detention was "not pursuant to law." *Alvarez*

Machain v. United States, 331 F.3d 604, 631 (9th Cir. 2003) (en banc).[16] The Court ruled that the international norm against arbitrary detention "does not include a temporal element," and reaffirmed its earlier ruling, based on section 702, comment h, of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS ("Restatement"), that a detention may be arbitrary not only if it is contrary to law, but "also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* at 621 (*citing Martinez v. City of Los Angeles,* 141 F.3d 1373, 1384 (9th Cir. 1998)).

The *Alvarez c*ourt declined to attach any significance to the relative brevity of plaintiff's overnight stay in a Mexican hotel under guard in finding that the detention was arbitrary, and noted that the length of detention was simply "one factor among many" in determining whether a detention violates the law of nations. *Id.* at 622. The Restatement provides simply, "Detention is arbitrary if it unlawful or unjust." *Id.* § 702, n. 6. Plaintiffs Petit, Larsson, Lemish, and Odar here allege that their detentions were unjust and incompatible with human dignity because they were without justification and based solely on their activities in support of Falun Gong.

Failing to recognize authority cited by Plaintiffs, ignoring the unjust and arbitrary basis of Plaintiffs' detention, and placing undue emphasis on the length of their detentions, Judge Chen recommends that the Court reject Plaintiffs' uncontested claims for arbitrary detention. In support of his recommendation, Chen incorrectly asserts that Plaintiffs presented "no authorities which establish and [sic] that absent proof that the detention was not pursuant to law, a detention of 24 hours can constitute an arbitrary detention." R at 79. Explicitly to the contrary, Plaintiffs in their Supplemental Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Supp. Memo"), and in the Affidavit of International Law Scholars ("IL Aff.")

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[16] Plaintiff Humberto Alvarez-Machain ("Alvarez") was abducted from his office by Mexican nationals who "held him overnight at a motel," and flew him by private plane to the United States "the next day." *Alvarez Machain,* 331 F.3d at 609. The overnight detention of Alvarez was the

submitted therewith, referred to both domestic and international authority recognizing that detentions for less than 24 hours, executed in conformity with national law, may nevertheless be considered arbitrary under the circumstances. *See* Supp. Memo at 33 (and citing to IL Aff., ¶¶ 44-45). These authorities make clear, consistent with *Alvarez Machain* and *Martinez* that it is the arbitrariness of the detention, and not whether a detention technically violated domestic law, that is determinative.

In *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994), the court found that the detention of plaintiffs –members of groups opposed to the ruling military regime – for periods of less than 24 hours constituted arbitrary detention under international law. *See* 901 F. Supp. at 333-35. There, plaintiff Serge Gilles was detained by soldiers "at around 2 p.m." on January 20, 1990, the first day of a "state of emergency" declared by defendant Avril, then Haiti's military ruler. *Id.* Gilles was subjected to beatings, and released "the same day," a detention period of no more than 10 hours. *Id.* at 333-34. Plaintiff Gerald Brun was detained at 12:15 p.m. that same afternoon by Presidential Guardsmen, also subjected to beatings, and – just like Plaintiffs in this case – forcibly deported some time during "the next day." *Id.* at 333. Brun's detention – also like Plaintiffs here – was therefore in the vicinity of 24 hours, and could not have been more than 36 hours.

The *Paul* court found it unnecessary to engage in a study of Haitian criminal procedure – including under its just-announced state of emergency – to conclude that the obviously politically-motivated detentions of the plaintiffs, despite their relatively brief duration, were "arbitrary." *Id.* at 335. However, it is safe to presume that, particularly under the state of emergency, 24-36 hour detentions without charge would not have violated Haitian law.

A variety of international decisions, cited by Plaintiffs in their briefs to Judge Chen, also establish that detentions of less than 24 hours may be arbitrary even if "authorized" by domestic

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sole basis for the Court's holding that Alvarez was arbitrarily detained and the sole period for

law. In *Litwa v. Poland*, App. No. 26629/95, 33 Eur. H.Rep. Rep. 53 (2000), for example, the European Court of Human Rights held that a six hour and thirty minute detention was arbitrary even if the detention may have been "lawful" under domestic law. As the court explained:

> The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. It does not suffice that the deprivation of liberty is executed in conformity with national law but must also be necessary in the circumstances.

Litwa, ¶ 78. *See also Spakmo v. Norway*, Communication No. 631/1995, U.N. Doc. CCPR/C/67/D/631/1995 (1999) (eight-hour detention for disturbing the peace was arbitrary because it was not necessary or reasonable); *Tshionga a Minanga v. Zaire*, Communication No. 366/1989, U.N. Doc. CCPR/C/49/D/366/1989 (1993) (detention of political party leader without warrant or notice of charges for approximately 18 hours was arbitrary); *Loren Laroye Riebe Star v. Mexico*, Case 11.610, Inter-Am. C.H.Rep. Report No. 49/99 ¶ 41 (1999) (detention of three individuals without access to a lawyer or judicial remedies for less than 24 hours, followed by summary removal from Mexico, was arbitrary); *Quinn v. France*, 21 Eur. H.Rep. Rep. 529 (1995) (11-hour detention following issuance of immediate release order held arbitrary).

Like the Haitian plaintiffs in *Paul*, Plaintiffs allege they were detained arbitrarily not because their detentions were prolonged, but because they were arrested without justification and based solely on their religious beliefs. *See* Complaint, ¶¶ 26-33. In this default proceeding, these allegations must be accepted as true.

Plaintiffs' detentions without warrant, cause, notice of charges, access to legal support or family, and subject to physical abuse, were unjust and incompatible with "justice or with the dignity of the human person." Their uncontested claims for arbitrary detention, accordingly, should be granted.

CONCLUSION

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which he was entitled to damages. *Id.* at 623, 636-37.

For the reasons stated above, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Default Judgment.

Dated: July 25, 2003

Respectfully submitted,

/s/Joshua Sondheimer

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that:

On July 25, 2003, I served a true copy of the following document:

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE CHEN'S REPORT AND RECOMMENDATION

on the following persons:

Alison N. Barkoff
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By placing a true copy of said document, enclosed in a sealed envelope, and by placing said envelope, with postage thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said persons.

Executed in San Francisco, California, on July 25, 2003.

I declare under penalty of perjury that the foregoing is true and correct.

/s/Joshua Sondheimer
JOSHUA SONDHEIMER