JOSHUA SONDHEIMER (SBN 152000)
MATTHEW J. EISENBRANDT (SBN 217335)
The Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
Tel: (415) 544-0444
Fax: (415) 544-0456
Email: jsond@cja.org

PAUL HOFFMAN (SBN 71244)
Schonbrun DeSimone Seplow
Harris & Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
Tel: (310) 396-0731
Fax: (310) 396-7040
Hoffpaul@ix.netcom.com

Counsel for All Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| JANE DOE I, JANE DOE II, HELENE PETIT, MARTIN LARSSON, LEESHAI LEMISH, and ROLAND ODAR<br><br>Plaintiffs,<br><br>v.<br><br>LIU QI, and DOES 1-5, inclusive<br><br>Defendants. | Civil Action No. **C 02 0672 CW EMC**<br><br>**SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT**<br><br>Date: September 4, 2002<br>Time: 10:30 a.m.<br>Place: Courtroom C, 15th Floor |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Federal Cases

Federal Regulations



Legislative Materials

Articles



Other Authorities

Convention Against Torture and Other Cruel, Inuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85..... 25, 28

G.A. Res. 1994/188, U.N. GAOR, 49th Sess., A/RES/49/188 (1995)..... 41

General Comment 22[48] to the International Covenant on Civil and Political Rights, Report of the U.N. Human Rights Committee, U.N. Doc. A/48/40, pt. I (1993)..... passim

Human Rights Watch, Dangerous Meditation: China's Campaign Against Falungong (2001) .... 39, 43, 44

Information Office of the State Council of the People's Republic of China, The Progress of Human Rights in China..... 7

International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171..... passim

Memorandum for the United States as Amicus Curiae, 19 I.L.M. 585 (May 1980)..... 15

Office of the United Nations High Commessioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 17, 2002)..... 37

Phillip T. Reeker, Daily Press Briefing, U.S. Department of State (August 20, 2001)..... 13

Press Release, U.S. Commission on International Religious Freedom, Commission Nominates Nine Countries for State Dept Designation As Worst Religious-Freedom Violator (Aug. 16, 2001)..... 44

Restatement(Third) on the Foreign Relations Law of the United States § 702..... 4, 27

Rome Statute on the International Criminal Court, opened for signature July 17, 1998, U.N. Doc. A/CONF.183/9 (1998)..... 34

Statute of the International Tribunal for Rwanda, U.N.SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (1994)..... 36

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, Report of the Secretary General, U.N.S.C. Res. 827, U.N. Doc. S/Res/827 (1993)..... 36

Third Periodic Reports of States Parties Due in 1997: China, U.N. Committee Against Torture, 24th Sess., U.N. Doc. CAT/C/39/Add.2 at ¶ 155 (2000)..... 6, 7

United States Commission on International Religious Freedom, Country Report - China..... 15

Plaintiffs submit this supplemental memorandum of points and authorities in response to the Court's order of May 3, 2002, and in further support of Plaintiff's Motion for Default Judgment. The memorandum is arranged generally to correspond with the Court's questions.

## I. THIS CASE IS NOT BARRED BY THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA") applies to foreign state officials only to the extent that the conduct at issue in a particular case was carried out within the scope of that official's legal authority. *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990).[1] Plaintiffs here allege that Defendant Liu's actions violated customary norms of international law, and were unauthorized by Chinese law. Accordingly, Plaintiffs have sufficiently alleged that Defendant's actions were committed outside the scope of his official authority, and the FSIA does not apply.[2]

### A. The FSIA Does Not Apply to Officials Who Violate Customary Norms of International Law

Sovereign immunity, as codified in the FSIA, "will not shield an official who acts beyond the scope of his authority." *Chuidian*, at 1106. The Ninth Circuit, and several other courts, have examined the applicability of the FSIA to claims that foreign officials violated human rights norms of customary international law. In each of these cases – including one against a sitting official of a recognized government – courts have held that such acts were beyond the scope of the official's authority, and that the official was not entitled to immunity under the FSIA. *See, e.g.*, *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1471 (9th Cir. 1994) ("*Hilao*") (alleged acts of torture, execution, and disappearance were "clearly outside of [former Philippine president Ferdinand Marcos'] authority as President").[3]

The United States Supreme Court also has suggested that claims against individual defendants for violations of "the law of nations" under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, would not be subject to immunity. In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 423, 438 (1989), the Court held that the FSIA was the sole basis for jurisdiction over a foreign nation. However, the Court stressed that: "The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants *other* than

foreign states." *Id.* at 438 (emphasis added). As foreign government officials were, at least at the time of the Court's decision, the most common defendants "other than foreign states" in actions under the ATCA, particularly in light of the "state action" requirement for many international law violations, it is apparent that the Court was referring, at least in part, to foreign officials.

At least one decision has explicitly found the FSIA inapplicable to a sitting official of a recognized foreign government accused of violations of customary human rights norms. In *Cabiri*, the plaintiff brought a claim for torture against the sitting Deputy Chief of National Security for the African nation of Ghana. The court, conducting its analysis of the FSIA under to the Ninth Circuit's ruling in *Chuidian*, held that acts of torture "fall beyond the scope of [the defendant's] authority." *Cabiri*, 921 F. Supp. at 1198. Accordingly, the defendant was not shielded from the plaintiffs' claims by the FSIA.

### B. To Demonstrate Non-Applicability of the FSIA, Plaintiffs Need Only Demonstrate the Existence of a Customary Norm of International Law and Allege a Violation of That Norm.

In light of the above, in the context of allegations that a foreign official has violated "the law of nations," the scope of a defendant's authority must be defined by international rather than domestic law. Since the establishment of the Nuremberg Tribunals following World War II, it has remained a fundamental precept of international law that individual actors cannot escape responsibility for violating customary international law by claiming that their acts were authorized by domestic law or policy. *See* Charter of the International Military Tribunal, Aug. 8, 1945, art. 8, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 284 ("IMT Charter") ("The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.")

No nation may legitimately authorize its officials to commit human rights abuses proscribed by customary international law. *See* RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702, reporters' notes 1 ("RESTATEMENT (THIRD)") (violations of customary international law prohibited "if the violations are state policy"); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("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.").

U.S. court decisions demonstrate that acts by a foreign official in violation of customary international law cannot be within the scope of authority granted by a foreign state. *Trajano*, 978 F.2d at 498 n.10 (noting that earlier holding rejecting application of act of state doctrine "implicitly rejected the possibility that the [human rights abuses] set out in Trajano's complaint were public acts of the sovereign"); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination is "clearly contrary to the precepts of humanity as recognized in both national and international law" and so cannot be part of official's "discretionary" authority).

The court in *Xuncax* noted without reference to any provisions of the laws of Guatemala that the acts alleged against defendant "exceeded anything that might be considered to have been lawfully within the scope of [the defendant's] official authority." *Xuncax*, 886 F.Supp. at 176. Similarly, in *Cabiri*, the court found that acts of torture were beyond the scope of the defendant's authority, citing to the Ninth Circuit's statement in *Siderman* that "no state claims a sovereign right to torture its own citizens." *Cabiri*, 921 F. Supp. at 1198.

In light of the above, it would be inappropriate to refer to Chinese law to determine whether Defendant in this case acted within the scope of his authority. Nothing in the FSIA suggests that Congress intended to abrogate the Nuremberg principles by permitting foreign officials to hide behind a cloak of immunity if their governments officially authorized acts of torture and persecution. To establish that a defendant exceeded the scope of his authority, Plaintiffs need only establish that a norm of customary international law exists prohibiting Defendant's alleged conduct, and assert that Defendant carried out such conduct.

### C. Defendant's Alleged Conduct Was Beyond the Scope of His Official Authority

#### 1. Facts Alleged By Plaintiffs Must Be Taken As True

In analyzing whether a case is barred under the FSIA, a court must accept the unchallenged allegations of the complaint as true. *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1468 (9th Cir. 1995); *Hilao*, 25 F.3d at 1470-71. In *Hilao*, the Ninth Circuit accepted as true the allegations in plaintiffs' complaint in finding that abuses by ex-President Marcos and his subordinates were not official acts and were outside the scope of the defendant's authority. 25 F.3d at 1471-72. Here, Plaintiffs allege that Defendant's actions were contrary to international and Chinese law. Complaint ¶¶ 1, 3, 34, 37. Accordingly, for purposes of analyzing whether the FSIA bars Plaintiffs' claims, the Court should take the allegations in the Complaint as true. Plaintiffs' allegations establish that Defendant's acts were taken "without official mandate." *Hilao*,

25 F.3d at 1471.

### 2. Defendant's Alleged Conduct Was Outside the Scope of His Authority Because It Would Violate Customary International Law

Plaintiffs allege that Defendant is liable, directly and indirectly as a superior official, for acts of torture, cruel, inhuman or degrading treatment, arbitrary detention, crimes against humanity and severe interference with freedom of religion or belief. As set forth in detail further below, and in attached affidavits of scholars on international law and religious freedom, norms of customary international law prohibit each of these violations. *See infra* at section IV**.** Accordingly, Defendant's alleged conduct was beyond the scope of any authority a sovereign is allowed to confer. *Trajano*, 978 F.2d at 498 n.10; *Xuncax*, 886 F. Supp. at 175-76. As such, he is not entitled to immunity under the FSIA. *Id.*

### 3. Even if Reference to Chinese Law Was Appropriate, Defendant's Alleged Conduct Was Not Authorized by Chinese Law

Even if this Court concludes that reference to Chinese law is necessary or appropriate in determining whether Defendant acted within the scope of his authority in this case, Defendant still has no claim to sovereign immunity. Chinese law clearly prohibited the conduct alleged by Plaintiffs, and obliged Defendant Liu to take measures to prevent the alleged abuses.

As detailed in the attached Affidavit of Professor Robert C. Berring ("Berring Aff."), the Chinese constitution and criminal procedure laws specifically prohibit arbitrary detention, Berring Aff. 9-12, and physical abuse and torture of detainees, *id*. ¶¶ 3-8.[4] Moreover, laws utilized by the Chinese government to implement its crackdown on Falun Gong – to the extent reference has been made to law – do not authorize physical abuse, or detention without due process. Berring Aff. ¶¶ 22-24. Defendant's alleged conduct, was not authorized by domestic law. *Id*. ¶ 25.

China has been vocal in the international community about its opposition to the use of torture and cruel, inhuman or degrading treatment. In its most recent report to the United Nations Committee Against Torture, the Chinese government made several strong statements about the prohibition of these abuses. The report states, "No form of physical violence is tolerated or condoned in the treatment of detained and arrested persons." *Third Periodic Reports of States Parties Due in 1997: China*, U.N. Committee Against Torture, 24th Sess., U.N. Doc. CAT/C/39/Add.2 at ¶ 155 (2000).[5] The report also provides, "Torture and other cruel, inhuman or degrading treatment or punishment are strictly prohibited." *Id.* ¶ 158. Furthermore, "It is strictly forbidden to use torture in a prison. No one is ever permitted to torture prisoners under any

circumstances or for whatever reason." ¶ 29. [6]

Moreover, Defendant has responsibility under Chinese law to prevent police and other security forces under his authority from violating the rights of citizens and visitors in Beijing. Complaint ¶ 34; Berring Aff. ¶ 15-21. Defendant's authorization or toleration of physical abuses and arbitrary detention of Falun Gong practitioners was beyond the scope of his authority under Chinese, as well as international, law.

### D. The Exception from Immunity Under 28 U.S.C. § 1605(a)(7) Does Not Apply In This Case

Section (a)(7) of the FSIA does not give Plaintiffs jurisdiction in this case. Initially, as demonstrated above, a foreign government official who acts outside the scope of his or her authority by committing human rights abuses in violation of customary international law does not qualify as an "agency or instrumentality of a foreign state" for purposes of the FSIA. 28 U.S.C. § 1603(b). *See also Cabiri*, 921 F. Supp. at 1198. The FSIA is inapplicable in this situation.

Moreover, section (a)(7) provides an exception to immunity for acts of torture and other abuses only where the alleged violations were committed by a designated "state sponsor of terrorism", and where the victims were American citizens when the acts took place.[7] Section 1605(a)(7) states that:

> [T]he court shall decline to hear a claim under this paragraph--
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) at the time the act occurred . . .; and
> (B) . . .
> (ii) neither the claimant nor the victim was a national of the United States . . . when the act upon which the claim is based occurred.

28 U.S.C. § 1605(a)(7)(A). Seven nations have been designated as "state sponsors of terrorism" under the authority listed in this provision -- Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. 61 Fed. Reg. 43462 (Aug. 23, 1996); United States Department of State, Patterns of Global Terrorism (2001). China is not among them. As China has not been designated as a state sponsor of terrorism, section (a)(7) does not apply in this case.

## II. THE ACT OF STATE DOCTRINE DOES NOT RENDER THIS CASE NON-JUSTICIABLE

Plaintiffs' claims are not non-justiciable under the act of state doctrine.[8] The human rights abuses ordered or condoned by Defendant do not constitute official, public action by the Chinese government. Even if the abuses are considered "official" action, application of the act of state doctrine is not warranted here

because the conduct at issue contravenes universally recognized human rights norms, and adjudication of the case will not interfere with U.S. foreign policy. The State Department's views on this issue, if any, are not binding.[9]

**A. The Act of State Doctrine**

The act of state doctrine calls for courts to refrain "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its territory," when prudential factors call for judicial abstention. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). In contrast to the jurisdictional nature of foreign sovereign immunity under the FSIA, the act of state doctrine "is not a jurisdictional limit on courts." *Siderman*, 965 F.2d at 707 (*quoting Liu*, 892 F.2d at 1431). Rather, the doctrine "reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress." *Id.* at 717.

The Supreme Court has emphasized that the doctrine does not call for judicial abstention merely because a case may call for the acts of a foreign nation or its officials to be judged. As the Court has noted:

> Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments . . . ."

*W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

The act of state doctrine may only be invoked to bar adjudication of a plaintiff's claim when the nature of the claims or defenses will require the court to declare invalid a foreign sovereign's "official" or "public" acts. *Kirkpatrick*, 493 U.S. at 405-06 ("official action"); *Sabbatino*, 376 U.S. at 401 ("public acts"); *see also NCGUB*, 176 F.R.D. at 350, n.25

However, a finding that an "official" act of a sovereign nation may be at issue is simply a threshold inquiry. The Supreme Court in *Sabbatino* emphasized that the doctrine should not be applied formalistically, and articulated three factors to be considered in determining whether application of the doctrine is called for in a particular case. *Sabbatino*, 376 U.S. at 428. Under this balancing approach, a court should take into account that:

> [1] [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. [2] It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the

> weaker the justification for exclusivity in the political branches. [3] The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered.

*Sabbatino*, 376 U.S. at 428.. The Ninth Circuit has also addressed an additional factor, examining whether the foreign state was acting in the "public interest." *Liu*, 892 F.2d at 1432; *see also* *NCGUB*, 176 F.R.D. at 354.

**B. Defendant's Actions Do Not Constitute "Official" Acts**

Courts have uniformly found that actions taken by government officials in violation of norms of customary international law are not "official" acts for purposes of the act of state doctrine.[10] [11] *See* *Forti I*, 672 F. Supp. at 1546 (torture, murder and arbitrary detention); *Filartiga*, 630 F.2d at 889 (torture); *Karadzic*, 70 F.3d at 250 (torture; cruel, inhuman and degrading treatment; genocide; war crimes; crimes against humanity and others); *Sharon*, 599 F. Supp. at 538 (massacres of noncombatants).

Plaintiffs in this case allege that Defendant committed violations of fundamental human rights protected as a matter customary international law. Allegations of violations of "fundamental human rights lying at the very heart of the individual's existence," such as those at issue here cannot be the "public official" acts of a sovereign. *Forti I*, 672 F. Supp. at 1545. Similarly, actions taken by government officers that are not "part of the officially approved policy of the state," *Kadic*, 70 F.3d at 251, or that are not "within an official mandate," *NCGUB*, 176 F.R.D. at 352, are not "official" acts and do not implicate the act of state doctrine.

The party raising the act of state defense bears the burden of showing a "statute, decree, order or resolution" authorizing the challenged acts as official acts. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976). Defendant certainly has posited no such orders or laws authorizing the abuses alleged here, nor do any such laws or orders exist to Plaintiffs' knowledge. See Berring Aff. ¶¶3-24. Defendant's alleged conduct is not "official" action for purposes of the act of state doctrine.

As the court noted in *Karadzic*, it would be "a rare case in which the act of state doctrine precluded suit under section 1350." 70 F.3d at 250. This case is no exception.

**C. Even if Defendant's Acts Are Deemed "Official," Abstention is Unwarranted Under the *Sabbatino* Factors**

Even if Defendant's actions are deemed to have been "official," the prudential considerations underlying the act of state doctrine weigh strongly against its invocation in this case.

**1. Defendant's Actions Have Been Universally Condemned As Violations of**

**International Law**

Application of the act of state doctrine is generally called for only "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles . . ." *Sabbatino*, 376 U.S. at 428. As set out fully *infra*, and in the attached Affidavit of International Law Scholars and Affidavit of Professor Paust, the nations of the world have reached consensus that each of the abuses alleged against Defendant violate specific and obligatory norms of international law. Thus, there is no absence of "agreed principles." *Id.*

**2. Adjudication is Consistent with U.S. Foreign Policy**

Both because defendant is accused of engaging in activities outside the scope of official policy, and because the United States has uniformly and unambiguously condemned the Chinese government for abuses against Falun Gong practitioners, adjudication of this suit will not interfere with United States foreign policy.

As the Ninth Circuit stated in *Hilao*, "A lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts." 25 F.3d at 1472. Defendant's alleged conduct clearly falls outside the scope of his lawful authority, as discussed above. Adjudication of this suit, therefore, does not require the court to pass on the validity of sovereign acts of a foreign government.

Moreover, in light of the United States' consistent condemnation of the Chinese government's repression against the Falun Gong, this is not "the sort of case that 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 NCGUB*, 176 F.R.D. at 354 (noting, in examining the foreign policy factor, that "the coordinate branches of government have already denounced the foreign state's human rights abuses and imposed sanctions").

The U.S. State Department has repeatedly criticized China for abuses against Falun Gong members, and has consistently demanded that the Chinese government stop its abusive policies. A State Department spokesman last year declared:

> As we have said and noted many times before, China is a signatory to the International Covenant on Civil and Political Rights, which includes provisions on the freedom of expression. We have raised with China on many occasions our concerns about the crackdown on the Falun Gong and reports of torture and mistreatment of detained and imprisoned practitioners, and we are going to continue to raise those issues. . . . And we will continue to call upon China to end its crackdown on the Falun Gong and to respect the fundamental rights of citizens.

Phillip T. Reeker, Daily Press Briefing, U.S. Department of State (August 20, 2001).[12] In remarks to the U.N. Commission on Human Rights, the head of the U.S. delegation urged the Commission to, "speak[] out"

and thereby "serve the cause of human rights and fundamental freedoms. It should not be silent when the Chinese authorities . . . brutally repress Falun Gong practitioners exercising rights to freedom of belief and expression." Ambassador Shirin Tahir-Kheli, Remarks to the 57th Session of the U.N. Commission on Human Rights (March 30, 2001).[13]

In addition, the State Department has extensively documented abuses against Falun Gong practitioners in its Human Rights Country Reports. The State Department has used strong language to condemn the crackdown, stating that, "Since mid-1999, the Government has waged a severe political, propaganda and police campaign against the Falun Gong spiritual movement." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – CHINA (2000).[14] Moreover, the Department has labeled the campaign "harsh and comprehensive." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – CHINA (2001).[15]

The State Department also has specifically noted the detention of foreigners. The 2001 Human Rights Report details the events during which Plaintiffs Petit, Larsson, Lemish and Odar were arrested. The report states, "In November more than 30 foreigners and citizens resident abroad were detained in Beijing as they demonstrated in support of the FLG. They were expelled from the country; some credibly reported being mistreated while in custody." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – CHINA (2001).

Since 1999, the United States Commission on International Religious Freedom has designated China as a country of particular concern. *See, e.g.*, REPORT OF THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, 25 (May 2002).[16] This designation is given by the President annually when he determines that a country "has engaged in or tolerated particularly severe violations of religious freedom." 22 U.S.C. § 6442(a)(2). Particularly serious violations means "systematic, ongoing, egregious violations of religious freedom, including violations such as (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons." 22 U.S.C. § 6402(11). As a result of this designation, China is subject to "multiple, broad-based sanctions." The Secretary of State has already restricted exports of crime control and detection instruments and equipment. UNITED STATES COMMISSION ON

INTERNATIONAL RELIGIOUS FREEDOM, COUNTRY REPORT – CHINA.[17]

In light of the above, adjudication of this case is entirely consistent with Executive policy regarding China's abuses against Falun Gong members.

Moreover, the State Department has taken the position that enforcing customary human rights norms under the ATCA does not contravene U.S. foreign policy. In *Filartiga*, the first human rights case under the ATCA, the State Department submitted an amicus brief in support of the plaintiffs. *See Memorandum for the United States as Amicus Curiae*, 19 I.L.M. 585 (May 1980). In the brief, the government asserts that when an international consensus exists concerning protection of a right under international law, "there is little danger that judicial enforcement will impair our foreign policy." *Id.* at 604.

Indeed, the U.S. government confirmed its support for accountability through civil litigation when it enacted the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note) ("TVPA"). Congress passed the law to "mak[e] sure that torturers and death squads will no longer have a safe haven in the United States." S. REP. NO. 249 (1991).[18] In light of the foregoing, adjudication of this lawsuit will have minimal impact on U.S. foreign policy.

**3. Although the Same Government Remains in Existence, Foreign Relations Will Not Be Upset**

The Chinese government in power at the time of the abuses at issue remains in power. However, because this case is consistent with United States foreign policy concerning China's abuses against the Falun Gong, it is of little consequence that Defendant is still active in the government.

**4. Defendant's Actions Were Not in the Public Interest**

In analyzing the act of state doctrine in the Ninth Circuit, courts must also inquire into whether the acts sought to be protected were undertaken in the public interest. *Liu*, 892 F.2d at 1432. As such, the act of state doctrine looks at the purpose behind the action of a state official. *International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981). When that purpose is to repress a spiritual movement because it is perceived as a political threat, or to interfere with the private right to hold a religion or belief, the acts cannot be considered in the public interest. *NCGUB*, 176 F.R.D. at 354. The public interest was not served in any way by Defendant's activities.

In light of the above, even should the court determine that Defendant's challenged acts were "official" acts of the Chinese government, the balance of factors strongly weighs against judicial abstention under the act of state doctrine.

### D. Federal Courts Have Rejected the Act of State Doctrine For Claims Against a Sitting Official of a Recognized Foreign Government

Federal courts have rarely confronted the act of state issue in cases involving sitting officials. [19] In *Sharon*, a district court held that the act of state doctrine did not bar adjudication of a libel claim by current Israeli Prime Minister Ariel Sharon against *Time* magazine for allegations in a news article about Sharon's involvement in massacres at Palestinian refugee camps while he was Israel's Minister of Defense. *Time* argued that the act of state doctrine precluded adjudication of the libel claim, as it called for the court to adjudicate the question of Sharon's responsibility. The court rejected the defense, stating, "The actions of an official acting outside the scope of his authority as an agent of the state are simply not acts of state." 599 F.Supp. at 544. Although Mr. Sharon was no longer serving as Defense Minister at the time of the suit, he was still an acting minister in the Israeli government.

Other cases have addressed and rejected the act of state defense for sitting officials of recognized governments. In *Jungquist v. Nahyan*, a U.S. citizen suffered brain damage in a boating accident with the son of the crown prince of Abu-Dhabi, one of the United Arab Emirates ("UAE"). 940 F.Supp. 312 (D.D.C. 1996), *rev'd on other grounds*, 115 F.3d 1020 (D.C. Cir. 1997). The plaintiff sued the son of the Crown Prince, who held several important positions in the Abu Dhabi government. Other defendants included the Crown Prince himself and the medical attaché of the UAE embassy in the United States. The defendants asserted the act of state doctrine, but the court summarily rejected the argument because the defendants had acted in their individual, rather than sovereign capacities, and because the actions occurred, in part, outside the UAE. *Id.* at 319.

The act of state defense was also denied in *Letelier* when asserted by the Chilean government for its role in the murder of a political opponent in Washington, D.C. The court found that application of the doctrine in the context of a murder committed at the behest of a foreign government would "totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the Act 'through the back door, under the guise of the act of state doctrine.'" 488 F.Supp. at 674.

The court's decision in *Letelier* strongly suggests that where the FSIA imposes no jurisdictional bar to a claim, the purposes of the FSIA would be defeated by application of the act of state doctrine. As noted above, the FSIA does not bar a plaintiff's claim accusing a defendant of acts outside the scope of his authority. This principle has been applied both to former officials, see *Hilao*, 25 F.3d at 1472, and to sitting

officials, *Cabiri*, 921 F. Supp. at 1198, of recognized foreign governments. The act of state doctrine should not be applied to bar Plaintiffs' claims here.

## III. CONGRESS DID NOT EXCEED CONSTITUTIONAL LIMITS ON ITS POWER TO GRANT FEDERAL COURTS JURISDICTION IN ALLOWING COURTS TO HEAR CASES BETWEEN ALIENS FOR ACTS COMMITTED OUTSIDE THE UNITED STATES UNDER THE ATCA AND TVPA

The Court has asked Plaintiffs to address the question: "Is there a constitutional limit to Congress' power to grant federal courts jurisdiction to hear international cases absent some substantial connection to the United States?" Plaintiffs' review suggests that limits on Congress' powers to grant jurisdiction to the federal courts in international cases are as broad as its legislative authority over matters implicating foreign affairs and international law, and are certainly not exceeded by the ATCA and TVPA as enacted or as applied in this case.

### A. Congress Has Broad Powers to Grant Federal Jurisdiction Over "Foreign Suits"

Congress' power to grant federal courts subject matter jurisdiction in international cases is bordered, chiefly, by the extent of its various powers under Article I of the Constitution,[20] and by the extent of the judicial power under Article III.[21] *See Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 491-97 (1983) (finding that Congress' grant of federal jurisdiction under the FSIA for cases between alien and foreign sovereign under Article I powers "is within the bounds of Article III"). As Congress' various powers and the scope of Article III jurisdiction are subject to definition and interpretation in various contexts, the precise "limits" of Congress' power to grant jurisdiction to the courts over matters involving international law and foreign affairs may be incapable of specific identification. *See, e.g.*, *Verlinden*, 461 U.S. at 494 (noting that the court need not now "decide the precise boundaries of Article III jurisdiction"). However, wherever the outer limits may be, they are clearly broad.

In *Verlinden*, a Dutch plaintiff brought suit against an instrumentality of the Republic of Nigeria in a commercial dispute whose only nexus to the U.S. was the use of a U.S. bank to establish an unconfirmed letter of credit, contrary to the requirements of the contract, which called for establishment of a confirmed letter of credit in the Netherlands. The Supreme Court ruled that Congress' grant of federal jurisdiction over actions by a foreign plaintiff against a foreign state under the FSIA on a non-federal cause of action was both within Congress' power and within the bounds of Article III. *Id. at* 491-97.

Similarly, courts have recognized that the Due Process Clause imposes no limits on Congressional

authority to grant federal courts personal jurisdiction over foreign states, thus permitting jurisdiction over foreign states for acts of terrorism committed against U.S. nationals under the FSIA's state-sponsored terrorism exception for acts committed abroad by a foreign nation even where the foreign government lacks any contacts with the U.S. *Price v. Socialist People's Libyan Arab Jamahiriya*, --- F.3d. ---, 2002 WL 1393591 at *12-17 (D.C. Cir. 2002); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 15-16 (D.D.C. 1998). The court in *Price* acknowledged that section 1605(a)(7) "allows personal jurisdiction to be maintained over defendants in circumstances that do not appear to satisfy the 'minimum contacts' requirement of the Due Process Clause." *Id.* at *6.

Although a *court's* exercise of personal jurisdiction ordinarily must comport with the "minimum contacts" requirements of the Due Process Clause, the Due Process Clause does not impose any limitation on *congressional* power to confer subject matter jurisdiction. The Constitution itself imposes no nexus requirement or limitation with respect to Congress' powers to grant federal subject matter jurisdiction. As the Supreme Court has stated:

> [T]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

*Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Personal jurisdiction in this case, as in numerous other ATCA and TVPA actions, is proper based on the well-established principle that personal service against a defendant physically present in the district satisfies the requirements of Due Process. *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). As the court noted in *Filartiga*, that Congress may provide for federal jurisdiction over an action for a tort committed outside the United States is not unusual: "Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred." 630 F.2d at 885.

### B. The Ninth Circuit Has Ruled That Congress Had Power to Grant Subject Matter Jurisdiction Under the ATCA

Whatever the outer limits on Congress' authority to grant federal subject matter jurisdiction in international cases, the Ninth Circuit has twice affirmed that Congress acted well within constitutional limits in granting federal courts jurisdiction to hear "foreign disputes" under the ATCA. In *Trajano*, the Ninth Circuit explicitly ruled that "Congress had power through the "Arising Under" Clause of Article III of the Constitution to enact the Alien Tort Statute . . . ." 978 F.2d at 501-03. Similarly, in *Hilao*, the Ninth Circuit

rejected the defendant's challenge that the assertion of federal jurisdiction over "an action between aliens regarding injuries occurring in a foreign nation" violates Article III. 25 F.3d at 1474-75. All other courts that have addressed Congress' power to enact the ATCA, or the power of the court to exercise jurisdiction within the confines of Article III, have affirmed the statute's constitutionality. *See Filartiga*, 630 F.2d at 885-89; *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997).

In concluding that Congress had authority to enact the ATCA as part of the First Judiciary Act of 1789, the Ninth Circuit in *Trajano* looked to the broad scope of Congress' power to confer Article III jurisdiction where foreign citizens and international law are involved. The court noted that there is "ample indication that the 'Arising Under' Clause was meant to extend the judicial power of the federal courts . . . to 'all cases which concern foreigners.'" 978 F.2d at 502 (*quoting* 9 THE PAPERS OF JAMES MADISON, 368, 370, R. Rutland & W. Rachal eds., 1975). The court added that "it is also well settled that the law of nations is part of federal common law." *Id.* Thus, "Congress had power through the 'Arising Under' Clause of Article III of the Constitution to enact the Alien Tort Statute," since claims under the ATCA call for the application of the "Laws of the United States." *Id.* at 502-03. As the Supreme Court noted in *Verlinden*, "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." 461 U.S. at 492.

Congress' authority to enact the ATCA also is derived from its powers under Article I to enact legislation in matters that concern foreign affairs and violations of international law. Under Article I, section 8, Congress has authority to "define and punish . . . Offences against the Law of Nations," U.S. CONST., art. I, § 8, cl. 9. Congress referred to the "Offenses" Clause as authority for its enactment of both the TVPA and the FSIA. *See* S. REP. NO. 102-249 at 5-6 (1991) (TVPA); H.R. REP. NO. 94-1487 at 12 (1976), S. REP. NO. 94-1310 at 12 (1976) (FSIA). There can be no doubt that the Offenses Clause provides Congress with powers to provide for both civil as well as criminal sanctions for acts committed in violation of the "Law of Nations." *See Amerada Hess*, 488 U.S. at 436; *Verlinden*, 461 U.S. at 493 n.19 (noting Congress' reliance on the Offenses Clause in enacting FSIA, and upholding FSIA's constitutionality); *Eastman Kodak*, 978 F.Supp. at 1090 (noting that the ATCA "presumably is based upon Congress' power under Article I, section 8 to 'define and punish ... Offenses against the Law of Nations'").[22]

Similarly, "by reason of its authority over foreign commerce and foreign relations," the Supreme

Court has recognized Congress' power to provide federal jurisdiction over matters implicating foreign affairs. *Verlinden*, 461 U.S. at 493. It is generally acknowledged that the ATCA reflected a desire to provide a federal forum for the resolution of torts committed in violation of the law of nations -- which might otherwise be brought in state courts -- in light of the implications such suits might have on foreign relations.[23] As the court noted in *Forti I*:

> It would appear that Congress intended § 1350 to provide concurrent federal jurisdiction over alien tort claims alleging treaty or customary international law violations in order to facilitate federal oversight of matters involving foreign relations and international law.

672 F. Supp. at 1540 n.6 (*citing Sabbatino*, 376 U.S. at 427 n.25). The Supreme Court has recognized the ATCA as one of several statutes within the First Judiciary Act "indicating a desire to give maters of international significance to the jurisdiction of federal institutions." *Sabbatino*, 376 U.S. at 427 n.25.

For the reasons above, Congress did not exceed the scope of its authority in providing federal subject matter jurisdiction under the ATCA for actions by non-citizens for torts committed in violation of customary international law, or in providing a cause of action under the TVPA for acts of official torture and extrajudicial killing committed abroad. This Court is accordingly bound, as the Ninth Circuit noted in *Trajano*, "by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury." *Trajano*, 978 F.2d at 500.

## IV. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS, AND PLAINTIFFS ARE ENTITLED TO DEFAULT JUDGMENT

Given that Plaintiffs provide specific allegations that Defendant is responsible for torts committed in violation of norms of customary international law, and Plaintiffs Jane Does I and II sufficiently allege torture, this Court has jurisdiction over Plaintiffs and their claims under the ATCA and TVPA, and Plaintiffs are entitled to judgment by default.

The ATCA provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. It is well-established that the ATCA provides both federal jurisdiction and a cause of action for claims meeting the statute's requirements. *Hilao*, 25 F.3d 1472-76. As all Plaintiffs are aliens[24] and sue in tort, they clearly meet the first two elements of an ATCA claim. Plaintiffs Jane Does I and II also allege claims for torture under the TVPA, over which claims the Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Conduct violates the "law of nations" if it contravenes norms of customary international law that are "specific, universal and obligatory." *Hilao*, 25 F.3d at 1475.[25] All plaintiffs in this case, including the four non-Chinese Plaintiffs, allege violations of international norms prohibiting cruel, inhuman or degrading treatment, arbitrary detention, crimes against humanity, and interference with freedom of religion and belief. As set out below, each of these violations has attained the status of customary international law. Additionally, Plaintiffs Jane Does I and II allege violations of the customary international norm prohibiting torture. In assessing whether Plaintiffs' factual allegations are sufficient to support a default judgment on their international law claims, the unchallenged allegations in Plaintiffs' complaint must be accepted as true. *See Hilao*, 25 F.3d at 1470; *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990).

As the court noted in *Filartiga*, the Supreme Court has declared that courts may ascertain contemporary norms of customary international law by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filartiga*, 630 F.2d at 880 (*quoting United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61 (1820)). Plaintiffs have attached the following affidavits to assist the Court in ascertaining these norms:

- Affidavit of International Law Scholars on the Status of Torture, Cruel, Inhuman or Degrading Treatment, Crimes Against Humanity, and Arbitrary Detention Under International Law ("Affidavit of International Law Scholars," or "IL Aff.");
- Affidavit of International Law Professors and Religious Freedom Experts Regarding the Right to Freedom of Religion or Belief ("Aff. FRB");
- Affidavit of Professor Jordan J. Paust ("Paust Aff."); and
- Affidavit of Paul Marshall ("Marshall Aff.").

### A. Abuses Alleged By Plaintiffs Jane Doe I and II Rise to the Level of Torture Under Customary International Law

United States courts have consistently recognized that torture is a violation of customary international law, and therefore actionable as a tort in violation of the "law of nations" under the ATCA. *See, e.g.*, *Hilao*, 25 F.3d at 1475; *Forti I*, 672 F.Supp. at 1542; *Filartiga*, 630 F.2d at 876. As the Ninth Circuit has stated, "[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law." *Siderman*, 965 F.2d at 717. *See also* IL Aff. ¶¶ 4-16; Paust Aff. ¶ 5.

The TVPA defines torture as:

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

28 U.S.C. § 1350 Note.[26]

United States courts and international authorities recognize that severe beatings may constitute torture under international law. *See Mehinovic*, 1344-47; IL Aff. ¶¶10, 22-23.

The abuse alleged by Plaintiffs Jane Doe I and II rises to the level of torture. Taking as true the facts alleged in the complaint, Jane Doe I was repeatedly beaten over a period of 20 days during interrogation sessions that lasted several hours each day. Complaint ¶ 14. She was subjected to electric shock through needles placed in her body. *Id.* On another occasion, guards allowed another prisoner to repeatedly hit her in the head, and she had to be dragged out of the cell. *Id.* After she lost her appetite as a result of this treatment, the police forcibly inserted a tube through her nose and into her stomach, causing her to cough up blood, and causing extreme pain. *Id.* ¶ 15.

Jane Doe II alleges she was subjected to severe beatings and other abuses while held in the custody of Beijing police. During her arrest, she was struck on the ears such that she temporarily lost her hearing. *Id.* ¶ 18. On the first night of her detention, she was beaten for an hour. *Id.* ¶ 19. The police hit her head against the floor and kicked her so hard in the head and chest that she lost consciousness. *Id.* This beating left bruises all over her body. *Id.* On another night, she was tied down to a bed during an interrogation by police. *Id.* ¶ 21. When she refused to answer their questions, a hard plastic tube was inserted through her nose, which caused her intense pain. *Id.* A guard also allowed another prisoner to beat her severely. *Id.* ¶ 24.

These allegations meet all of the definitional elements of torture. Both Plaintiffs were abused by police forces, or by persons the police allowed to commit the abuses. Thus the acts were carried out under color of official authority. Both Plaintiffs' allegations are sufficient to permit a conclusion that they suffered severe pain. Moreover, both Plaintiffs specifically allege that these abuses caused them to suffer severe physical and mental pain and suffering. *Id.* ¶¶ 15, 20, 21, 41. As the complaint notes, other prisoners cried upon seeing Jane Doe I's condition after guards set another prisoner loose on her. The beatings took place either or both in the context of interrogation or to punish and discriminate against them for their practice of

Falun Gong.

In light of the above, the allegations of plaintiffs Jane Does I and II state a claim for torture.

**B. Abuses Alleged By Plaintiffs Constitute Cruel, Inhuman, or Degrading Treatment Under Customary International Law**

U.S. courts have widely recognized that the prohibition against cruel, inhuman or degrading treatment has attained the status of customary international law, and thus found it actionable under the ATCA. *See Xuncax*, 886 F.2d at 187; *Mehinovic*, 198 F. Supp.2d at 1348; *Abebe-Jiri v. Negewo*, 1993 WL 814304, *4 (N.D. Ga. Aug. 20, 1993), *aff'd sub nom. Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Jama v. INS*, 22 F.Supp.2d 353, 363 (D.N.J. 1998). *Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1361 (S.D. Fla. 2001); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *6 (S.D.N.Y. Feb. 28, 2002); *Paul v. Avril*, 901 F. Supp 330 (S.D. Fla. 1994).

In 1988, Judge Jensen of the Northern District of California determined that cruel, inhuman, or degrading treatment had not been sufficiently defined to allow it to be recognized as part of customary international law. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711-12 (N.D. Cal. 1988) ("*Forti II*"). However, in the years since the *Forti II* decision, most other courts confronting the issue have rejected *Forti II* and concluded that the prohibition is sufficiently definable to be cognizable as a violation of customary international law. *See supra*. This court also should decline to follow the outmoded analysis of *Forti II*. *See Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n. 13 (9th Cir. 1977) (*stare decisis* does not compel one district judge to follow the decision of another judge in the same district).

The norm against cruel, inhuman or degrading treatment is widely acknowledged as a norm that is sufficiently universal, specific, and obligatory to be recognized as customary international law. Paust Aff. ¶ 5; IL Aff. ¶ 17-25. The prohibition is recognized by the RESTATEMENT (THIRD): "A state violates international law if, as a matter of state policy, it practices, encourages, or condones ... torture or other cruel, inhuman, or degrading treatment or punishment . . . ." RESTATEMENT (THIRD) § 702(d).

As post-*Forti* decisions by U.S. courts have recognized, a norm of international law may be considered "specific" and "universal" as long as certain conduct is clearly prohibited by the norm. As the court noted in *Xuncax*:

> It is not necessary that every aspect of what might comprise a standard such as "cruel, inhuman or degrading treatment" be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute "torture" or "arbitrary detention" in order to recognize certain conduct as actionable misconduct under that rubric.

886 F.2d at 187. In *Xuncax*, the court noted that where conduct is proscribed by the Constitution and by a cognizable principle of international law, the requirements of universality and specificity are met. *Id.* Accordingly, *Xuncax* and other courts have recognized that conduct that would amount to a violation of the Constitution is actionable under the ATCA as a customary norm of international law. *Id.; see also*, *Mehinovic*, 198 F.Supp.2d at 1348; *Abebe-Jiri*, 1993 WL 814304 at *4; *Cabello*, 157 F.Supp.2d at 1361.

This conclusion is consistent with the ratifications by the United States, and reservations entered by the United States Senate to, international conventions that prohibit cruel, inhuman, or degrading treatment. As explained more fully in the affidavit of International Law Scholars, see IL Aff. ¶ 20, the Convention Against Torture prohibits torture as well as "other acts of cruel, inhuman or degrading treatment or punishment." Convention Against Torture, art. 16. The International Covenant on Civil and Political Rights similarly prohibits "torture or other cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 7 ("ICCPR"). The United States Senate entered a reservation upon its ratification of the Convention Against Torture in 1990, accepting obligations under the Convention with respect to cruel, inhuman, or degrading treatment to the extent such conduct would violate relevant provisions of the Constitution. The reservation provides:

> [T]he United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

CONG. REC. S17486-01 (daily ed., Oct. 27, 1990). The Senate added a similar reservation to the ICCPR upon its ratification in 1992. *See* CONG. REC. S4783 (daily ed., April 2, 1992). Congress has recognized the prohibition against torture or cruel, inhuman, or degrading treatment or punishment as an "internationally recognized human right[]" in other legislation. *See, e.g.* 22 U.S.C. §262d(a); *see also* IL Aff. ¶ 27.

The abuses suffered by Plaintiffs would certainly violate the U.S. Constitution. Federal officials violate the Eighth Amendment when they cause prisoners or other detainees "unnecessary and wanton infliction of pain." *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) (*quoting Whitley v. Albers*, 475 U.S. 312, 319 (1986)). This determination turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 7 (*quoting Whitley*, 475 U.S. at 320).

The Supreme Court has laid out several factors to assist in determining whether treatment is "unnecessary and wanton." These factors include the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any

efforts made to temper the severity of a forceful response. *Id.* The extent of injury suffered by an inmate is one factor, but an injury does not have to be severe for an Eighth Amendment violation. *Id.* at 7-8.

Similarly, the abuses as alleged would allow Plaintiffs to bring claims for violations of the Fourth or Fourteenth Amendments, to the extent applicable. *See* Robinson v. Solano County, 278 F3d 1007, 1013-15 (9th Cir. 2002) (en banc) (pointing gun at arrestee actionable as excessive force under section 1983); *Robins v. Harum*, 773 F.2d 1004, 1008-10 (9th Cir. 1985) (affirming jury finding that "manhandling" by officers was "unreasonable" under the circumstances).

These factors demonstrate that Plaintiffs have sufficiently stated claims that their constitutional rights would have been violated had this treatment occurred in the United States. Taking as true the allegations of the Complaint, each of the non-Chinese plaintiffs alleges that he or she was intentionally physically assaulted by members of the Beijing police or security forces while in police custody:

- Plaintiff Helen Petit was physically assaulted while in jail. She was thrown down a flight of stairs and sexually attacked when a guard attempted to force his hands into her vagina while she was being held down by several guards. Complaint ¶26.
- Plaintiff Larsson was hit, pushed, had his hair pulled, and was placed in a chokehold by police when he resisted having his photograph taken. *Id.* ¶27.
- Plaintiff Leeshai Lemish was taken to an interrogation room and hit across the face, pinched over the nose, kneed in the crotch, and threatened with further beatings by a police officer. *Id.* ¶28.
- Plaintiff Roland Odar was hit several times in the face and knocked to the floor of a police van when already under police custody. Officers repeatedly kicked and hit him all over his body as he lay on the floor of the van. He also had to witness the beating of another Falun Gong practitioner. *Id.* ¶29.

These beatings were inflicted against the non-Chinese Plaintiffs while they already were in police custody, and there is no indication that force was necessary. In Plaintiff Larsson's case, even assuming that some force was privileged in order to obtain a photograph, the facts alleged are sufficient to conclude that the force used was unreasonable. The facts alleged by Plaintiffs Petit, Larsson, Lemish, and Odar, therefore would be sufficient to state a claim for a constitutional violation for the "unnecessary and wanton infliction of pain" or unreasonable use of force by state officials. *See, e.g.*, Gaut v. Sunn, 810 F. 2d 923, 924 (1987) (prisoner who was hit, kicked, choked, and thrown against a wall by guards when he shuffled his feet during prison shakedown stated a section 1983 claim).

Moreover, the conduct alleged by Plaintiffs would constitute violations of the international norm prohibiting cruel, inhuman, or degrading treatment. Plaintiffs' allegations indicate that the abuses were deliberate, and had no apparent legitimate purpose other than to intimidate and humiliate the victims, or

obtain information, or to punish them for their beliefs. The beatings allegedly inflicted by the Chinese police exceeded many of the actions which have been deemed to violate the international prohibition on cruel, inhuman or degrading treatment. *See* IL Aff. ¶ 21, 23-25. All of the Plaintiffs describe intentional, unprovoked, and excessive physical abuse by officials, including, in Plaintiff Petit's case, a sexual assault.

Furthermore, police in the United States violate due process when they hold prisoners incommunicado. *Halvorsen v. Baird*, 146 F.3d 680, 689-90 (9th Cir. 1998). A period as short as six hours without access to a telephone or attorney constitutes a due process violation. *Id.* at 690. The non-Chinese plaintiffs were all held overnight for periods of approximately 24 hours without being permitted to communicate with anyone outside police facilities. Such incommunicado detention, if perpetrated in the United States, violates the Constitution, as well as international law. *See* IL Aff. ¶ 23.

For the same reasons as above, the facts alleged by Plaintiffs Jane Does I and II, in addition to stating a claim for torture, also clearly allege facts sufficient to state a claim for cruel, inhuman or degrading treatment. In addition to the facts noted in the section above, they allege other conduct violative of this norm, including abusive force—feeding, being stripped naked in detention, intentional denial of access to toilet facilities, repeated interrogation, and detention in psychiatric facilities. Complaint ¶¶ 13-24.

Plaintiffs allege abuses that would violate their Fifth, Eighth and/or Fourteenth Amendment rights in the United States, and that clearly would be found to violate the prohibition on cruel, inhuman, or degrading treatment as recognized by the United States and as applied by international tribunals and other authorities. Their claims are therefore actionable under the ATCA.

### C. Abuses Alleged By Plaintiffs Constitute Arbitrary Detention Under Customary International Law

Arbitrary detention is a violation of customary international law and is actionable under the ATCA. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Forti I*, 672 F.Supp. at 1541; *Abebe-Jiri*, 1993 WL 814304 at *4; *Xuncax*, 886 F.2d at 184; *see also* IL Aff. PP 40-45.

Detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person." *Martinez*, 141 F.3d at 1384 (*quoting* RESTATEMENT (THIRD) § 702 cmt. h) "Detention is [also] arbitrary if 'it is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.'" *Id.*

Plaintiffs have alleged facts sufficient to state claims for arbitrary detention in violation of customary

international law. Initially, according to the Complaint, none of the Plaintiffs was ever notified of any charges, charged with any crime, or allowed to speak with attorneys, families, or consular officials. Complaint ¶¶ 26-29. Plaintiff Jane Doe I was held without charge for twenty days, with no opportunity to see family or counsel. Complaint ¶ 13. Plaintiff Jane Doe II was originally detained for at least several days. She was detained again by Beijing police for 11 days and then taken to another prison for 15 more days. *Id.* ¶¶ 17-23. Plaintiffs Petit, Larsson, Lemish and Odar were all held for approximately one day.

Under the standard recognized by the Ninth Circuit in *Martinez*, Plaintiffs' allegations are sufficient to state a claim for arbitrary detention in violation of international law. As alleged, there is nothing that indicates Plaintiffs were detained "pursuant to law." Further, Plaintiffs' detentions were incompatible with principles of justice or human dignity, as they were denied opportunities to speak with their families, attorneys, or consulates, and their allegations support the conclusion that they were detained for the improper purpose of preventing them from maintaining their beliefs.

As noted in the attached Affidavit of International Law Scholars, the prohibition against arbitrary detention "is not limited by a temporal component." IL Aff. ¶ 44. The Ninth Circuit in *Martinez* did not identify a temporal requirement in its definition of arbitrary detention. 141 F.3d at 1384. The fact that an individual is held for one day does not make that arrest any less "arbitrary". *See Paul*, 901 F. Supp. at 333-35 (detention for approximately one and one-half days before being forcibly detained, and another for less than 12 hours, constituted arbitrary detention).

While Chinese law may authorize investigative detention for up to 24 hours, Berring Aff. ¶¶ 10-12, this is not does not necessarily mean that an investigative detention for less than 24 hours is justified under the circumstances. While such provisions are common in domestic law, periods of detention for less than 24 hours nevertheless have been found to constitute arbitrary detention where committed in the absence of lawful authority. IL Aff. ¶ 44-45. For example, in *Litwa v. Poland*, the European Court of Human Rights noted that a relatively brief detention can be arbitrary even if the detention may have been "lawful" under domestic law:

> 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 v. Poland*, 33 E.H.R.R. 1267, ¶ 78 (2000).

For the reasons above, Plaintiffs' allegations are sufficient to state claims for arbitrary detention in

violation of international law.

### D. Abuses Alleged By Plaintiffs Constitute Crimes Against Humanity Under Customary International Law

The prohibition against crimes against humanity also is well established as customary international law. *See* Quinn v. Robinson, 783 F.2d 776, 799-800 (9th Cir. 1986); *In re Extradition of Demjanjuk*, 612 F.Supp. 544, 566-68 (N.D. Ohio 1985); *Wiwa*, 2002 WL 319887 at *9; *Cabello*, 157 F.Supp.2d at 1360 (*citing Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994)); *Mehinovic*, 198 F.Supp.2d at 1352. *See also* IL Aff. ¶¶ 32-35.

The most recent codification of the prohibition on crimes against humanity is found in the Rome Statute on the International Criminal Court, opened for signature July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (1998) ("Rome Statute").[27] *See also* Wiwa, 2002 WL 319887 at *9. Article 7 of the Rome Statute defines crimes against humanity as:

> [A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

Rome Statute, art. 7.

Defendant's actions or omissions, and those of his subordinates, as alleged, constitute crimes against humanity with regard to each plaintiff. Article 7 of the Rome Statute defines "attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

It is widely acknowledged that the Chinese government has engaged since 1999 in widespread and systematic persecution of members of Falun Gong. As detailed in attached affidavits, this campaign of

persecution has included arrest and detention without trial, cruel and humiliating treatment, confiscation of property, torture, and murder. Affidavit of Paul Marshall ("Marshall Aff.") ¶ 9; Affidavit of International Law Professors and Religious Freedom Experts Regarding the Right to Freedom of Religion or Belief ¶¶ 28-30 ("FRB Aff.").

Specific instances described by the State Department include: harsh prison terms for nonviolent dissenters of government policies towards the Falun Gong, *Id.*; torture by electric shock and the shackling of hands and feet, *Id.*; confinement of practitioners in mental hospitals, *Id.*; use of excessive force in detaining peaceful protesters, *Id.*; the death of more than 200 practitioners while in police custody with many of their bodies bearing signs of severe beatings and torture, *Id.*; and the cremation of the bodies before relatives examine them, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – CHINA (2000).

Plaintiffs' Complaint sufficiently alleges that the Chinese government's crackdown on Falun Gong practitioners has involved a "severe campaign of repression and human rights abuses." Complaint ¶ 31. The Complaint notes that this campaign has included the multiple commission of acts directed against civilians that are identified as predicate acts under the Rome Statute's definition of crimes against humanity, including torture, arbitrary detention, religious persecution, enforced disappearance, and murder. *Id.*

Religious persecution is well established as a crime against humanity. *See* Paust Aff. ¶¶ 8-9. Article 7(h) of the Rome Statute prohibits widespread or systematic "[p]ersecution against any identifiable group or collectivity on . . . religious . . . or other grounds." This provision is supported by a long history of defining persecution on religious grounds as a crime against humanity whether or not such persecution is in violation of the domestic laws of the country involved.[28]

The sections above also identify Plaintiffs' allegations that police over whom Defendant had superior responsibility carried out other predicate acts of crimes against humanity, including arbitrary detention, torture, and "other inhumane acts" that caused "great suffering" or "serious injury."

Defendant may be held liable for crimes against humanity if he knew or should have known that his acts or omissions would contribute to a widespread or systematic attack against civilians. *See Prosecutor v. Kordic*, Case No. IT-95-14/2, Judgment (Trial Chamber III, Feb. 26, 2001), ¶ 185 (defendant must have "actual or constructive knowledge" of a widespread or systematic attack). [29] Plaintiffs' complaint alleges that at all times Defendant was or should have been aware of the campaign of persecution against Falun

Gong. Complaint ¶ 62.

In light of the above, Plaintiffs sufficiently allege that the abuses they suffered were committed as part of a widespread or systematic campaign of persecution against practitioners of Falun Gong, and have stated causes of action against Defendant for crimes against humanity.

### E. Abuses Alleged By Plaintiffs Constitute Interference with Freedom of Religion or Belief Under Customary International Law

There is widespread international consensus that the right to freedom of religion or belief is protected by customary international law. That norm is violated by arrest without charges, detention and subjection to torture or cruel, inhuman or degrading treatment or punishment for the peaceful practice of a religion or belief. *See* FRB Aff. ¶ 5.

#### 1. The Norm Protecting the Right to Freedom of Religion or Belief Is Customary International Law

The customary international law protection of the right to freedom of religion or belief is stated emphatically in the Universal Declaration of Human Rights ("UDHR"), widely considered to be an authoritative statement of the customary norms of international human rights law. *See* *Filartiga*, 630 F.2d at 882. Article 18 of the UDHR declares:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 at 71 (1948).

This norm was codified and further defined in the ICCPR, which uses language virtually identical to that of the UDHR. However, the ICCPR also includes a provision that persons also have the right to "adopt a religion or belief of [one's] choice." ICCPR, art. 18. The fundamental character of the right codified in Article 18 is reflected in the fact that it is non-derogable and can never be violated, even in time of public emergency. ICCPR, art. 4(2). *See also* FRB Aff. ¶ 13.

As of June 2002, 148 countries (out of a total of 189 member states of the United Nations) had ratified the ICCPR, including the United States. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (June 17, 2002).[30] The fact that China is not a party to the ICCPR does not

undermine its widespread acceptance as an authoritative interpretation of the substantive provisions of customary international law. More than 75% of the member states of the U.N. are parties to the treaty, representing all regions and religions of the world. Russia, India, Japan, Mongolia, both Koreas, Nepal, Iran, Iraq, Kuwait, Lebanon, Libya and Syria are all countries in the Asia and Near East region who are parties to the ICCPR.

Several other instruments that are considered evidence of customary international law also recognize the right to freedom of religion or belief and, in particular, the right of individuals to profess and practice their religion or belief in community with others. *See* FRB Aff. ¶ 10.

A further indication of the strong international commitment to religious freedom was the creation in 1986 by the U.N. Commission on Human Rights of the Office of the Special Rapporteur on Religious Intolerance, now called the Special Rapporteur on Freedom of Religion or Belief.

In 1998, the U.S. Congress explicitly recognized the international status of the right to freedom of religious belief when it adopted the International Religious Freedom Act, Pub. L. No. 105-292, 112 Stat. 2787 (1998). The Act states, "Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments." 22 U.S.C § 6401(a) (2).

**2. Falun Gong Is A Religion Or Belief Entitled to Protection Under the International Norm**

Paragraph 2 of General Comment 22[48] to the ICCPR[31] expressly states that the terms "religion" and "belief" are to be broadly construed. Moreover, "Article 18 protects theistic, non-theistic and atheistic beliefs . . . . Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics." General Comment 22[48] ¶ 2. *See also* FRB Aff. ¶¶ 15-16 ("Article 18 protects both religious and non-religious forms of belief.") In light of Chinese government ideology, it is relevant to note that the Human Rights Committee has suggested that even where religious belief may be contrary to official ideology, this "shall not result in any impairment of the freedom under article 18 . . . nor in any discrimination against persons who do not accept the official ideology or who oppose it." General Comment 22[48] ¶ 10.

Falun Gong, also known as Falun Dafa, is a practice of meditation and exercises with teachings based on the universal principle of "Truthfulness-Compassion-Tolerance." Falun Gong has roots in traditional Chinese culture, but it is distinct and separate from other practices such as the religions of Buddhism and

Taoism. Although Falun Gong has no clergy or formal places of worship, the movement clearly espouses a set of spiritual beliefs. *See generally* HUMAN RIGHTS WATCH, DANGEROUS MEDITATION: CHINA'S CAMPAIGN AGAINST FALUNGONG (2001) ("DANGEROUS MEDITATION") 8-16. Indeed, the U.S. Commission on International Religious Freedom, considers China's persecution of the Falun Gong a violation of the right to freedom of belief and practice. *See* UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, COMMISSION REPORT ON CHINA at 1 (February 2002).[32]

In light of the above, Falun Gong is a religion or belief which is protected under customary international law as defined in Article 18 of the UDHR and ICCPR. Infringement on that right is therefore actionable under the ATCA as a tort in violation of the law of nations.

### 3. The Customary International Norm Protecting the Private Right to Hold Or Change a Belief Is Specific and Inviolable

Under international law, the protection of the right to hold a belief is not only fundamental but also absolute. Unlike the right to manifest one's beliefs, the right to hold or change a belief "does not permit any limitations whatsoever. . . .These freedoms are protected unconditionally . . . ." General Comment 22[48] ¶ 3. Private freedom of thought, conscience and religion, thus allows for no restrictions. *See* FRB Aff. ¶ 17.

Moreover, a religion or belief may be outlawed only as set forth in Article 20 of the ICCPR. *See* General Comment 22[48] ¶ 7. Article 20 states, "Any propaganda for war … [and] any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Thus, so long as an organization or association does not advocate war or national, racial or religious hatred it may not be declared illegal, and may not be subjected to exceptional restrictions.

Arbitrary detention and infliction of torture or other cruel, inhuman or degrading treatment violates the right to freedom of religion or belief when, as here, the intent of the abuse is to inflict punishment for the personal holding of a religion or belief. The ICCPR prohibits "coercion which would impair [the] freedom to have or to adopt a religion or belief . . ." ICCPR, art. 18(2). The Human Rights Committee has stated, "Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert." General Comment 22[48] ¶ 5. *See also* FRB Aff. ¶¶ 18-19.

As the International Religious Freedom Act declares, detention of persons as a consequence of their religion or beliefs is illegitimate coercion under international law. Such action "constitutes arbitrary and

impermissible detention, and thus violates both the norm protecting freedom of religion or belief and the separate international law norm prohibiting arbitrary detention." FRB Aff. ¶ 19.

**4. The Right to Public Manifestation of Belief Is Subject Only to Limited and Carefully Defined Restrictions**

Some minimal restrictions to the right to *manifest* one's religion or beliefs are permitted, but the manner in which authorities may infringe on the right is narrowly proscribed and does not allow for arbitrary detention or physical abuse. Article 18(3) of the ICCPR states the permissible restrictions on the right to publicly manifest beliefs:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others.

*See generally* FRB Aff. ¶¶20-27. Paragraph 8 of General Comment 22[48] makes clear that these limitations are to be strictly construed:

> Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. . . . Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.

The International Religious Freedom Act further supports the conclusion that coercion or physical abuse of any sort is impermissible to suppress public manifestations:

> [V]iolations of the internationally recognized right to freedom of religion and religious belief and practice, includ[e] violations such as . . . any of the following acts if committed on account of an individual's religious belief or practice: *detention*, *interrogation*, imposition of an onerous financial penalty, forced labor, forced mass resettlement, *imprisonment*, forced religious conversion, *beating*, *torture*, mutilation, rape, enslavement, murder, and execution.

22 U.S.C. § 6402(13) (emphasis added). *See also* G.A. Res. 1994/188, U.N. GAOR, 49th Sess., A/RES/49/188 (1995) (condemning acts of violence motivated by religious intolerance and urging states to combat violence in matters relating to freedom of religion or belief).

**5. Plaintiffs' Allegations of Subjection to Physical Abuses and Arbitrary Detention Due to Their Falun Gong Practices State Claims for Violations of Their Rights to Freedom of Religion Or Belief**

In light of the definitions above, the acts allegedly perpetrated against Plaintiffs by police forces under Defendant's authority constitute violations of the right to freedom of religion or belief. As alleged, the police employed impermissible coercion aimed at Plaintiffs' freedom to maintain a religion or belief. Plaintiffs were all arrested while practicing their beliefs through meditation or while protesting the government's treatment of

Falun Gong practitioners. Complaint ¶¶ 13, 18, 26-29. The fact that Falun Gong books were confiscated from one Plaintiff further supports the conclusion that the police sought to prevent Plaintiffs from holding certain beliefs. *Id.* ¶ 17.

Even if these abuses were attempts to curtail Plaintiffs' manifestation of their beliefs, such restrictions can only be employed if they are necessary to protect public safety, order, health, morals or the fundamental rights of others. ICCPR, art. 18(3). None of the actions of Plaintiffs indicate any threat to safety, order, health, morals or the rights of others. All were arrested while either meditating or protesting peacefully.

More importantly, detention, interrogation, imprisonment, beating, and torture are all violations of international law when carried out to restrict manifestations of religion or belief. *See* 22 U.S.C. § 6402(13). Any attempt to impose limitations must be proportional to the threat that the manifestations pose. General Comment 22[48] ¶ 8. *See also* FRB Aff. ¶ 21-22, 24. Arrest without charges or access to counsel and physical abuse is a disproportionate response. *See* FRB Aff. ¶ 31.

Defendant violated the international law prohibition against the infringement on freedom of religion and belief by permitting police under his command to arbitrarily detain and physically abuse Falun Gong practitioners, including Plaintiffs, merely for holding and/or manifesting their beliefs.

### 6. In Addition to the Individual Abuses Suffered By Plaintiffs, the Chinese Government's Persecution of Falun Gong Also Violates Customary International Law

While the physical abuses committed against Plaintiffs provide a sufficient ground on which to find a violation of customary international law, the wider policy of the Chinese government's repressive campaign against the Falun Gong is also contrary to international law. Section 3, *supra*, demonstrates that actions by Chinese officials to impose restrictions on persons' right to hold a belief in Falun Gong are strictly prohibited by international law.

The Chinese government has offered a variety of justifications for its ban on Falun Gong activities, including that a supposed Falun Gong "organization" has not registered with the government, and has "propagated superstition and fallacies, deluded the people, incited and created disturbances, and disrupted social stability." *See, e.g.*, DANGEROUS MEDITATION at 103-05. However, the government's arguments are disingenuous and lack basis in fact. *Id.*

Any attempt to regulate the Falun Gong is limited by the provisions of articles 18 and 20 of the ICCPR. Infringement of practitioners' right to hold a belief is fully prohibited. Restrictions on manifestations of those beliefs must be "necessary" to protect public safety, order, health, morals or the fundamental rights

of others. The necessity requirement means that officials may impose restrictions only when "a specific danger arises threatening the security of persons or things . . ." FRB Aff. ¶ 23. The justifications provided by Chinese officials do not meet this criteria.

Moreover, restrictions must be proportional to the threat to safety or order. Prior to the ban on Falun Gong activities, practitioners' exercise routines were "convivial, low-key, contained," and Falun Gong protests following the "ban" also were peaceful and disciplined. *See* DANGEROUS MEDITATION at 105. Yet, thousands of Falun Gong practitioners have been imprisoned and hundreds have died in police custody. *See* FRB Aff. ¶¶ 28-29 (citing sources); Marshall Aff. ¶¶ 29-34. This response is entirely disproportionate to the "threat" of peaceful, if unauthorized, demonstrations and does not address any specific danger threatening the security of persons or things.

The actions of Chinese authorities to outlaw the Falun Gong also violate international law. Under article 20 of the ICCPR, the activities of groups may only be declared illegal if they promote propaganda for war or advocate hatred amounting to discrimination, hostility or violence. None of the justifications provided by the Chinese government in support of its crackdown on Falun Gong as an "evil cult" include accusations that Falun Gong advocates war or national, racial or religious hatred. *See, e.g.*, DANGEROUS MEDITATION at 86, 103-05.

As noted above, the U.S. Commission on International Religious Freedom, established to help implement the International Religious Freedom Act, considers China's persecution of the Falun Gong a violation of the right to freedom of belief and practice. *See* UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, COMMISSION REPORT ON CHINA at 1 (February 2002).[33] The Commission has examined and condemned China's treatment of the Falun Gong. In all three of its annual reports, from 1999 to 2001, the Commission recommended that China be designated a "country of particular concern", citing persecution of the Falun Gong as one of the most egregious instances of China's violation of religious freedom. Press Release, U.S. Commission on International Religious Freedom, Commission Nominates Nine Countries for State Dept Designation As Worst Religious-Freedom Violator (Aug. 16, 2001).[34] The Commission has found that this policy has led to "[s]ystematic, egregious violations of the right to freedom of religion and belief . . ." COMMISSION REPORT ON CHINA at 10. The conclusion demonstrates that the Chinese crackdown on Falun Gong is a continuing violation of customary international law.

**F. Defendant May Be Held Liable Under the Doctrine of Superior Responsibility**

While Plaintiffs allege that Defendant planned, instigated, and authorized subordinates to carry out the abuses they suffered, Defendant also may be held liable for the acts of his subordinates under the well-established doctrine of superior responsibility. The doctrine of command or superior responsibility provides that a superior may be held responsible for abuses of international law committed by subordinates under his or her authority and control if the superior officer knew or should have known that subordinates under his or her authority and control were committing human rights abuses, and failed to take all reasonable measures to prevent the abuses or punish the persons responsible. *See* *Hilao v. Marcos*, 103 F.3d 767, 776-79 (9th Cir. 1996); *Ford v. Garcia*, 289 F.3d 1283, 1287-94 (11th Cir. 2002); Paust Aff. ¶ 10.

Plaintiffs allege that Defendant had superior authority and effective control over Beijing police forces involved in the abuses against defendant, that he knew or should have known that Beijing police and security forces were engaged in a pattern and practice of abuses against Falun Gong practitioners such as those suffered by Plaintiffs, and that he failed to take all necessary measures to prevent such abuses. Complaint ¶¶ 34-37. These allegations are supported by specific reference to Chinese law and government practice. *Id.* *See also* Berring Aff. ¶¶ 15-21 (citing legal authority and noting Beijing Mayor's de facto authority over local police forces). Accordingly, Plaintiffs allegations are sufficient to state claims against Defendant for the abuses they suffered.

**CONCLUSION**

For all the foregoing reasons, plaintiffs respectfully request that the court enter default judgment against Defendant in an amount to be proven at a later hearing on damages.

Dated: July 3, 2002

Respectfully submitted,

s/Joshua Sondheimer

JOSHUA SONDHEIMER (SBN 152000)
MATTHEW J. EISENBRANDT (SBN 217335)
The Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
Tel: (415) 544-0444
Fax: (415) 544-0456
Email: jsond@cja.org

PAUL HOFFMAN (SBN 71244)
Schonbrun DeSimone Seplow Harris
& Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
Tel: (310) 396-0731
Fax: (310) 396-7040
Email: hoffpaul@ix.netcom.com

TERRI MARSH (Admitted Pro Hac Vice)
3133 Connecticut Ave., N.W., Suite 608
Washington, D.C. 20008
Tel: (202) 369-4977
Email: amira612@aol.com

MICHAEL S. SORGEN (SBN 43107)
TANIA ROSE (SBN 151514)
Law Offices of Michael Sorgen
240 Stockton Street, 9th Floor
San Francisco, CA 94108
Tel: (415) 956-1360
Fax: (415) 956-6342
Email: msorgen@sorgen.net

Attorneys for All Plaintiffs

---

[1] Given the lack of clarity in the language of the statute about whether it applies to individuals, *Chuidian*, 912 F.2d at 1101, the FSIA "should be interpreted narrowly so as to exclude individuals' claims to sovereign immunity for human rights violations." Ved P. Nanda, *Human Rights and Sovereign and Individual Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity) – Some Reflections*, 5 ILSA J. INT'L & COMP. L. 467, 470 (1999). *See also* Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations*, 15 WHITTIER L. REV. 465, 466 (1994) ("The legislative history of section 1603(b) indicates that Congress never adverted to the possibility of a natural person falling within its scope.")

[2] While the Court also has sought the opinion of the U.S. Department of State on the applicability of the FSIA and the Act of State doctrine, Plaintiffs note that the State Department's views, if any, are in no way binding on the Court. The Ninth Circuit has held that upon its enactment, the FSIA became the sole mechanism for determining sovereign immunity:

> The principal change envisioned by the statute was to remove the role of the State Department in determining immunity. Sovereign immunity could be obtained only by the provisions of the Act, and only by the courts interpreting its provisions; "suggestions" from the State Department would no longer constitute binding determinations of immunity.

*Chuidian*, 912 F.2d at 1100. As one court has noted, the views of the State Department are usually "no more authoritative than those of private litigants." *In re Papandreou*, 139 F.3d 247, 252 (D.C. Cir. 1998). Deference on sovereign immunity was only proper before the enactment of the FSIA. *Id.* at n.2.

[3] *See also Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493, 498 (9th Cir. 1992) ("*Trajano")* (alleged acts of torture and summary execution "cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a

foreign state within the meaning of the FSIA"); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (alleged acts of torture "fall beyond the scope" of defendant's authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (acts of torture, summary execution, arbitrary detention, disappearance, and cruel, inhuman or degrading treatment "exceeded anything that might be considered to have been lawfully within the scope of Gramajo's official authority").

A court need only look to whether the official has violated norms customary international law. To deny applicability of the FSIA and the Act of State doctrine, a court need not find that the rules violated are *jus cogens* norms. See *Xuncax*, 886 F.Supp. at 175-76 (finding FSIA inapplicable without reference to whether norms violated were *jus cogens*); *Cabiri*, 921 F.Supp. at 1197-98 (same).

[4] Reliable translations of relevant laws, or excerpts therefrom, are attached to Professor Berring's affidavit.

[5] *Available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.39.Add.2. En?OpenDocument

[6] The Chinese Government also publishes white papers on human rights standards. One report declares, "China opposes the practice of forcing confessions and giving credence to them and strictly prohibits the use of cruel punishment in every link of the judicial work. . . ." Information Office of the State Council Of the People's Republic of China, *The Progress of Human Rights in China, at* http://www.china.org.cn/e-white/phumanrights19/p-4.htm (1995).

[7] This provision was adopted under the Antiterrorism and Effective Death Penalty Act of 1996, in response to a rash of terrorist attacks against U.S. citizens. Pub. L. No. 104-132, §221, 110 Stat. 1214 (1996). The background of the legislation demonstrates that section (a)(7) was limited to state sponsors of terrorism as a compromise between victims' groups and a reluctant executive branch. *Price v. Socialist People's Libyan Arab Jamahiriya*, --- F.3d ---, 2002 WL 1393591, *5 (D.C. Cir. June 28, 2002). The executive branch worried that a bill removing immunity for all nations would subject the U.S. government to retaliatory suits in foreign countries. *Id*. As a result, section (a)(7) only applies to countries designated as state sponsors of terrorism.

[8] Like other defenses, the act of state doctrine must be pleaded and proved by the party asserting application of the doctrine. *See Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989), *cert. dismissed* 497 U.S. 1058 (1990) (defendant bears burden of proving defense); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988). Defendant's failure to respond in this case waives the act of state defense. *See also 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.

[9] *See Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1057 n. 6, 1062 (3d Cir. 1988), *aff'd*, 493 U.S. 400, 406 (1990) (noting that six members of the Supreme Court rejected Justice Rehnquist's assertion that a State Department letter was binding as to the applicability of the act of state doctrine); *National Coalition Government of the Union of Burma v. Unocal, Inc., ("NCGUB")*, 176 F.R.D. 329, 354-55 (C.D. Cal. 1997) (viability of *Bernstein* exception, that would require courts to refrain from applying doctrine at suggestion of State Department, is "highly questionable").

[10] Whether a government officer's acts are "official" acts of the sovereign, in the sense of having been undertaken "within an official mandate," *NCGUB*, 176 F.R.D. at 352, should not be confused with the question of whether the acts were carried out "under color of law." While a plaintiff may be required to prove that a defendant's actions were undertaken under color of law to establish that certain acts violated the "law of nations," such "official" action "is not necessarily the governmental and public action contemplated

by the act of state doctrine." *Forti v. Suarez-Mason*, 672 F.2d 1531, 1546 (N.D. Cal. 1987) ("*Forti I*"). As the court noted in *Forti I*, to hold otherwise would effectively preclude litigation under the ATCA, since "violations of the law of nations virtually all involve acts practiced, encouraged or condoned by states." *Id.*

[11] The inquiry into whether a foreign government official's actions constitute "official" acts of a foreign nation is closely related to the inquiry under *Chuidian* into whether the official was acting "beyond the scope" of his authority for purposes of the FSIA. Courts have frequently looked to act of state cases in determining whether defendants acted within their official mandate. *See Hilao*, 25 F.3d at 1471-72 (citing cases analyzing applicability of act of state doctrine in support of the holding that Marcos' actions were not "official acts" for purposes of the FSIA); *Trajano*, 978 F.2d at 498 n. 10 (*citing Trajano v. Marcos*, 878 F.2d 1439 (9th Cir.1989)); *Xuncax*, 886 F.Supp. at 176 (*citing Letelier*, 488 F. Supp. at 673); *Cabiri*, 921 F.Supp. at 1198 (*citing Karadzic*, 70 F.3d at 250). As the court noted in *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984), actions by a public official "acting outside the scope of his authority as an agent of the state are simply not acts of state." This overlap has created a line of reasoning central to both the FSIA and the act of state doctrine: government officials who commit or condone human rights abuses that violate customary international law may not claim their acts are protected by sovereign immunity or that they constitute "acts of state".

[12] *Available at* http://www.state.gov/r/pa/prs/dpb/2001.4576pf.htm.

[13] *Available at* http://www.state.gov/g/drl/rls/rm/2001/1806pf.htm.

[14] *Available at* http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.htm.

[15] *Available at* http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm.

[16] *Available at* http://www.uscirf.gov/reports/02AnnualRpt/2002report.pdf.

[17] *Available at* http://www.uscirf.gov/crptPages/china.php3.

[18] *Available at* 1991 WL 258662.

[19] One ATCA case involving a sitting official did address the Act of State doctrine, but the court's analysis was *dicta*, and the country at issue was not officially recognized by the United States. *Karadzic*, 70 F.3d at 250. In *Karadzic*, the act of state doctrine was not at issue on appeal, but the Second Circuit suggested it would not apply, noting that "the appellee has not had the temerity to assert in this Court that the acts he allegedly committed [genocide, war crimes and torture, among others] are the officially approved policy of a state." *Id.* Although the "state" headed by Karadzic was not formally recognized by the United States, the court articulated a variety of reasons why this distinction was immaterial. *Id.* at 245. *See also Prosecutor v. Tadic*, Case No. IT-94-1, Judgment (Appeals Chamber, July 15, 1999).

[20] These include the power to "define and punish . . . Offences against the Law of Nations," U.S. CONST., art. I, § 8, cl. 9; to "regulate Commerce with foreign Nations," *id.*, art. I, § 8, cl. 3; and to "make all Laws which shall be necessary and proper" to execute the Government's powers, *id.*, art. I, § 8, cl. 18.

[21] Article III, section 2 provides: "The judicial Power [of the United States] shall extend to all Cases … arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

[22] *See generally* Beth Stephens, *Federalism and Foreign Affairs: Congress' Power to 'Define and Punish . . . Offenses Against the Law of Nations,'* WM. & MARY L. REV. 447, 483-525 (2000) (reviewing basis for conclusion that the Offenses Clause allows Congress to impose both civil and criminal liability).

[23] *See, e.g.,* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 692-96 (2002); William S. Dodge, *Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'*, 19 HASTINGS INT'L & COMP. L. REV. 221, 225-37 (1996); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L.461, 476-80 (1989).

[24] Although Plaintiff Lemish is a dual citizen of the United States and Israel, he should be deemed an "alien" for the purposes of the ATCA. Congress enacted the ATCA to provide aliens access to federal courts in the hope of avoiding the impact any "denial of justice" to an alien may have on foreign relations if an alien's claim for a tort under international law could not be effectively adjudicated in state courts. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774,782-83 (D.C. Cir. 1984) (Edwards, J.); *see also* articles at note 23, *supra*. Failing to recognize plaintiff Lemish's foreign citizenship for purposes of jurisdiction would therefore contradict a fundamental purpose of the statute.

[25] Although a *jus cogens* violation satisfies the 'specific, universal and obligatory' standard, it is not necessary to prove a *jus cogens* violation to show a violation of customary international law, and therefore a claim under the ATCA. *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1344 (N.D. Ga. 2002).

[26] The definition under the TVPA very closely parallels the definition contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. ("Convention against Torture").

[27] The Rome Statute's definition of crimes against humanity may be narrower in scope than the customary law definition of crimes against humanity today. *See Mehinovic*, 198 F.Supp.2d at 1353.

[28] *See, e.g.*, IMT Charter, art. 6 (c), 82 U.N.T.S. 280, entered into force Aug. 8, 1945; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(1)(c), December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946); 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, Report of the Secretary General, U.N.S.C. Res. 827, U.N. Doc. S/Res/827 (1993), *reprinted in* 32 I.L.M. 1159, 1170 (1993), art. 5(h) ("ICTY Statute"); Statute for the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., at 1, U.N. Doc. S/Res/955 (1994), art. 3(h) ("ICTR Statute").

[29] *Available at* http://www.un.org/icty/kordic/trialc/judgement/index.htm.

[30] *Available at* http://www.unhchr.ch/pdf/report.pdf.

[31] The Human Rights Committee, which was established to monitor compliance with the ICCPR, has elaborated on the scope of the Covenant's Article 18 in General Comment 22[48]. *See* Report of the U.N. Human Rights Committee, U.N. Doc. A/48/40, pt. I, (1993). General comments "represent one of the few sources of formal (and, arguably, authoritative) interpretations of the various treaty obligations." Coliver and Miller, *International Reporting Procedures, in*, 3 GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 181 (Hannum, ed. 1999).

[32] *Available at* http://www.uscirf.gov/reports/13Feb02/China.pdf.

[33] *Available at* http://www.uscirf.gov/reports/13Feb02/China.pdf.

[34] *Available at* http://www.uscirf.gov/prPages/pr0086.php3.