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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE DOE I, JANE DOE II, HELENE PETIT, MARTIN LARSSON, LEESHAI LEMISH, and ROLAND ODAR Plaintiffs, v. LIU QI, and DOES 1-5, inclusive Defendants.	**No. C 02 0672 CW EMC** **PLAINTIFFS' POST-HEARING MEMORANDUM IN RESPONSE TO COURT'S INQUIRIES**

In light of the Court's request for authority on issues relating to the act of state doctrine and superior responsibility at the October 30, 2002, hearing in this default proceeding, Plaintiffs hereby submit a post-hearing memorandum, and respectfully request that the Court consider the authority and arguments herein.

I. EVEN IF HUMAN RIGHTS ABUSES CONSTITUTE *DE FACTO* GOVERNMENT POLICY, THEY ARE NOT "ACTS OF STATE"

Even if the Court deems that the act of state doctrine may properly be addressed despite Defendant's default,[1] Plaintiffs note in further response to a request for authority by the Court that the Ninth Circuit and other courts have made clear that widespread or systematic violations of human rights by a foreign government -- even where clearly carried out as *de facto* government policy -- cannot be considered "acts of state" where the violations are not or could not be acknowledged as "official" state policy.

The Philippine government's abuses at issue in the *Marcos* cases clearly were widespread and systematic, reflecting a government practice or policy of terrorizing and eliminating perceived government opponents. *See Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1469 (9th Cir. 1994) (stating that "up to 10,000 people" were allegedly tortured, summarily executed or disappeared by Philippine military intelligence personnel during President Marcos' tenure). Yet, in *Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493 (9th Cir. 1992), the Ninth Circuit noted that it had earlier held that the allegations against Marcos "are not nonjusticiable 'acts of state[,]'" and that: "In so holding, we implicitly rejected the possibility that the acts set out in [the plaintiff's] complaint were *public acts of the sovereign*." *Id.* at 498, n. 10 (emphasis added).[2]

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[1] As Plaintiffs note in their Supplemental Memorandum of Points and Authorities in Support of Default Judgment at 8, n. 8, the act of state doctrine is an affirmative defense that must be pleaded and proved by Defendant. *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). As a non-jurisdictional defense, it is waived by Defendant's default. *Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493, 495 n.2 (9th Cir. 1992).

[2] Although the Ninth Circuit in its recent *Doe v. Unocal* decision examined the *Sabbatino* factors in determining that the act of state doctrine was not applicable to the forced labor and other abuses alleged in that case, it is noteworthy that the court did not address whether the governmental acts alleged constituted "public acts of the sovereign." *Unocal*, -- F.3d. --, 2002 WL 31063976 at *20-21. The court appears to have overlooked this threshold determination, and its decision

Similarly, in *Kadic v. Karadzic,* 70 F.3d 232 (2d. Cir. 1996), the Second Circuit noted that the act of state doctrine would be inapplicable to claims against Bosnian Serb leader Radovan Karadzic for his implementation of a deliberate and massive campaign of "ethnic cleansing." Indicating its view that the doctrine could apply only to conduct that represents official government policy, the court noted: "[T]he appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the *officially approved policy* of a state." *Id.* at 250 (emphasis added).

Forti v. Suarez Mason, 672 F.Supp. 1531 (N.D. Cal. 1988), is particularly instructive. The defendant in *Forti* argued that the abuses at issue in that case were taken pursuant to a state of siege declared by the government, and that he was "acting under policies promulgated by the junta." *Id.* at 1544. In rejecting the application of the act of state doctrine, the court reasoned, "Indeed, since violations of the law of nations virtually all involve acts practiced, encouraged or condoned by states, defendant's argument would in effect preclude litigation under §1350 for 'tort[s] … committed in violation of the law of nations.'" *Id.*

Similarly, in *Sarei v. Rio Tinto*, 2002 WL 1906814 (C.D. Cal. 2002), the court found that the act of state doctrine was inapplicable to plaintiffs' claims alleging torture, rape, pillage, war crimes and crimes against humanity, as such acts could not be deemed "official acts of state." *Id.* at *56.[3] The court noted that a finding that the acts involved were the "official acts of a foreign sovereign," was a "threshold" to application of the act of state doctrine, and that with respect to the torture, rape, and illegitimate warfare claims, "the predicate . . . "ha[d] not been met." *Id.* at *54, *56.

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therefore does not establish that human rights abuses that constitute *de facto* state policy necessarily fall within the ambit of the doctrine.

[3] At the same time, the court found that conduct implicated in the plaintiffs' claims for environmental degradation and racial discrimination were official acts of state. After conducting an analysis under *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the court found that these claims were nonjusticiable. *Rio Tinto*, 2002 WL 1906814 at *60.

The Supreme Court has refused to apply the act of state doctrine where the moving party was unable to show any "statute, decree, order or resolution" which officially authorized the government acts at issue. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976). Similarly, the Ninth Circuit has refused to recognize acts unauthorized by law as sovereign acts in assessing the scope of an official's duties under the Foreign Sovereign Immunities Act. As the court noted in *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990): "'Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and *not sovereign actions*.'" *Id.* at 1106 (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)) (emphasis added). As Plaintiffs already have identified, no legislation or official mandate exists in China that would legally permit the physical abuse and arbitrary detention of Falun Gong practitioners.

In light of the above, even if Defendant was acting in accordance with a *de facto* "policy" of physical abuse and arbitrary detention of Falun Gong practitioners, such acts are barred by international and Chinese law and are publicly repudiated by the Chinese government, and thus do not constitute "official" or "public acts of the sovereign." *Trajano*, 978 F.2d at 498, n. 10. Accordingly, the conduct at issue cannot be considered "acts of state."

II. IN *SAREI V. RIO TINTO*, THE COURT REJECTED APPLICATION OF THE ACT OF STATE DOCTRINE DESPITE THE STATE DEPARTMENT'S ASSERTION THAT AJDUDICATION WOULD INTERFERE WITH FOREIGN POLICY

In response to the Court's inquiry, Plaintiffs note that in one recent case, *Sarei v. Rio Tinto*, *supra*, a court has rejected application of the act of state doctrine to claims alleging torture, crimes against humanity and war crimes despite a Statement of Interest filed by the State Department declaring that adjudication of the case would harm foreign relations. In *Rio Tinto*, the State Department warned that adjudication of the lawsuit would be detrimental to U.S. foreign policy because it "would risk a potentially serious adverse impact" on a new and fragile peace process.

2002 WL 1906814 at *56.[4] However, as noted above, the court found that claims alleging torture, rape, pillage, war crimes and crimes against humanity need not be dismissed under the act of state doctrine because they could not be deemed "official acts of state." *Id.*[5]

The Ninth Circuit and other courts also have refused to abide by the admonitions of the State Department in related contexts. In *Chuidian*, the Ninth Circuit rejected the view expressed by the State Department that individuals are not entitled to sovereign immunity under the FSIA, but that they are still entitled to common law sovereign immunity as applied by the State Department. 912 F.2d at 1102-3. The Court rejected the views expressed in the Statement of Interest and held that the FSIA embodied the sole mechanism for determining sovereign immunity. *Id*. at 1102. In *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001), the court rejected the State Department's contention that the concept of personal inviolability for diplomats also protects a head of state and a foreign minister from service of process. The court concluded that the two individual defendants could be served with process in their roles as leaders of a political party, and held that it was not bound by the Executive's opinion on the issue. *Id*. at 305.

III. EVEN UNDER THE STATE DEPARTMENT'S VIEW, THE FOREIGN POLICY IMPLICATIONS OF ADJUDICATION ARE MINIMAL.

In *Sabbatino*, the Supreme Court did not enunciate an "all or nothing" approach to

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[4] The State Department did not distinguish between the claims in the suit in expressing that adjudication of the case risked an adverse impact on foreign policy. *See* Letter of William H. Taft, IV, Legal Adviser, Department of State, dated October 31, 2002, to Hon. Robert McCallum, Assistant Attorney General, Department of Justice, attached hereto at Tab A.

[5] Although the court went on to dismiss all claims under the political question doctrine, *Rio Tinto* is readily distinguishable on this issue. The *Rio Tinto* court found that the case presented a political question under the fourth and sixth *Baker v. Carr* factors because of the potential for disruption of a fragile peace process in which the United States had pledged to do "all it [could] to help," and because of the risk of "multifarious pronouncements" by the Executive and Judiciary. *Rio Tinto*, 2002 WL 1906814 at *62-63. However, as the State Department has identified no clear Executive policy or objective with which adjudication of this suit would interfere, and in light of the Executive branch's admittedly strong stance against Chinese persecution of Falun Gong practitioners, neither of these factors are implicated in this case.

evaluation of whether adjudication of the legality of official acts of a foreign government might affect U.S. foreign relations. The Court suggested a relative approach, noting only that "the less important the implications of an issue are for our foreign relations, the weaker the justification," for applying the act of state doctrine. 376 U.S. at 428.

Here, the State Department has not articulated any way in which this particular lawsuit will affect U.S-China relations, asserting only that in its view the suit is not the "best" way for the United States to advance the cause of human rights in China. Other concerns of the Department are addressed solely to ATCA/TVPA litigation in general. *See* Letter of William H. Taft, IV, Legal Adviser, Department of State, Hon. Robert McCallum, Assistant Attorney General, Department of Justice, dated September 25, 2002, at 6-8 ("Statement of Interest"). The State Department does not assert that this litigation will seriously impact any particular aspect or objective of U.S. foreign relations with China, such as interfering with its efforts to support a fragile peace process, as in the *Rio Tinto* case. Nor does the Department indicate that adjudication of this suit will rupture relations with China or interfere with substantial national interests.

Neither this suit nor the act of state doctrine calls on the Court to determine whether litigation is or is not the "best" manner in which to advance human rights in China. Accordingly, justification for application of the act of state doctrine under the *Sabbatino* factors is weak.

IV. IF THE COURT DETERMINES THAT THIS LAWSUIT MIGHT INTERFERE WITH SENSITIVE FOREIGN POLICY INTERESTS, THE COURT MAY MITIGATE ANY POSSIBLE INTERFERENCE BY LIMITING ITS JUDGMENT TO DECLARATORY RELIEF

If the Court determines that analysis of the *Sabbatino* factors may call for abstention in this case so long as monetary damages remain an option for relief, Plaintiffs agree that limiting available relief to a declaratory judgment would minimize any potential interference with U.S. foreign relations. Plaintiffs maintain that a determination on this issue need not be made unless Defendant appears in the action, or the State Department tenders a clearer statement of the

lawsuit's impact on important foreign policy interests. However, if the Court believes that official sovereign acts are implicated in this lawsuit, adjudication of a suit limited to declaratory relief would be appropriate in light of the balancing test set out in *Sabbatino*. An order limiting Plaintiffs' claims to declaratory relief also would be consistent with the State Department's suggestion in its Statement of Interest that the Court "fashion its final orders in a manner that would minimize the potential injury to the foreign relations of the United States" if the Court determines that dismissal is not required. Statement of Interest, at 8.

V. THE DEFINITIONS OF COMMAND AND SUPERIOR RESPONSIBILITY ARE WELL-ESTABLISHED IN U.S. AND INTERNATIONAL LAW

The doctrines of command and superior responsibility are well-established in United States and international law.[6] *See In re Yamashita*, 327 U.S. 1 (1946); *Ford v. Garcia*, 289 F.3d 1283, 1288-93 (11th Cir. 2002); *Hilao v. Marcos*, 103 F.3d 767, 777 (9th Cir. 1996); *Prosecutor v. Delalic*, No. IT-96-21-T, ¶ 333, Judgment (Trial Chamber, Int'l Crim. Tribunal Former Yugo., Nov. 16, 1998).[7] In *Ford*, the Eleventh Circuit stated that the essential elements of command responsibility are:

> (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.

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[6] While courts have often used the terms "command" and "superior" responsibility interchangeably, Plaintiffs here utilize the term "command responsibility" to refer to the doctrine as applied to military commanders, and "superior responsibility" to denote the standard applicable to non-military superior officials.

[7] The statute of the International Criminal Court also incorporates the doctrines of command and superior responsibility. Rome Statute of the International Criminal Court, art. 28. U.N. Doc. A/CONF.183/9 (July 17, 1998), available at: http://www.un.org/law/icc/statute/romefra.htm.

Ford, 289 F.3d at 1288. The *Ford* court noted consensus about the standard, observing that the statutes of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") provide for imposition of command responsibility "on substantively identical grounds" as those enunciated by the Supreme Court in *Yamashita*. *Id.* at 1288-89.

The ICTY and ICTR statutes do not distinguish between military and civilian superiors, providing that a superior may be held individually responsible for crimes of subordinates where the superior "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[8] Both Tribunals have held this standard applicable to civilian superiors. *Delalic*, ¶¶ 346, 355-93; *Prosecutor v. Kayishema*, No. ICTR 95-1 ¶¶ 208-28, Judgment (Trial Chamber, ICTR, May 21, 1999).[9]

Under this standard, Plaintiffs' complaint sufficiently alleges Defendant's liability under the superior responsibility doctrine. Plaintiffs allege that Defendant "knew or reasonably should have known that Beijing police and other security forces were engaged in a pattern and practice of severe human rights abuses against Falun Gong practitioners," and that he failed to take all reasonable measures to prevent the abuses, or punish the perpetrators. Complaint, ¶¶ 33**,** 37.

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[8] See Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(3). S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/807 (1994), available at http://www.un.org/icty/legaldoc/index.htm; Statute of the International Criminal Tribunal for Rwanda, art. 6(3), S.C. Res. 955, U.N. SCOR, 48th Sess., 4353th mtg., U.N. Doc. S/RES/955 (1994), available at http://www.ictr.org/wwwroot/ENGLISH/basicdocs/statute.html.

[9] In *Delalic,* the ICTY held that in addition to "actual knowledge," a civilian superior may possess the *mens rea* required to incur criminal liability where the superior "had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether . . . crimes were committed or were about to be committed by his subordinates." *Delalic*, ¶ 383. The ICTR, in *Kayishema*, similarly held that the "should have known" standard in the civilian superior context requires proof of "conscious[] disregard" of information that would have put the superior on notice

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court find this case justiciable and enter default judgment against Defendant in this matter. Should the Court determine that abstention might be required if monetary damages remain an option for relief, Plaintiffs urge the Court to fashion its order in a manner that minimizes the potential injury to U.S. foreign relations, such as limiting available relief to a declaratory judgment.

Dated: November 12, 2002

Respectfully submitted,

s/Joshua Sondheimer

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of abuses by subordinates. *Kayishema*, ¶ 228. Accordingly, there is consensus on the *mens rea* standard for superior responsibility under customary international law.

CERTIFICATE OF SERVICE

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

On November 12, 2002, I served a true copy of the following documents:

PLAINTIFFS' POST-HEARING MEMORANDUM IN RESPONSE TO COURT'S INQUIRIES

on the following persons:

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

And by causing said document(s) to be faxed to said part(ies) at the fax number(s) above.

Executed in San Francisco, California, on November 12, 2002.

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

s/Joshua Sondheimer
JOSHUA SONDHEIMER (SBN 152000)