JOSHUA SONDHEIMER, Esq. (SBN 152000)
MATTHEW EISENBRANDT, Esq. (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

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 Plaintiffs, v. LIU QI, and DOES 1-5, inclusive Defendants.	No. **C 02 0672 CW EMC** **PLAINTIFFS' RESPONSE TO STATEMENTS BY UNITED STATES DEPARTMENT OF STATE AND GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA** Date: October 30, 2002 Time: 10:30 a.m. Place: Courtroom C, 15th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

<u>Federal Cases</u>

International Cases

Federal Statutes

Legislative Materials

Treaties

INTRODUCTION

Plaintiffs respectfully submit this response to the letter presented to this court by William H. Taft, IV, Legal Advisor of the State Department (hereinafter "Statement of Interest"), and to the statement submitted by the government of the People's Republic of China. The State Department and Chinese Government have suggested that this court either dismiss the case on the basis of sovereign immunity or find the case non-justiciable under the act of state doctrine. The State Department and the Government of China misunderstand the allegations set forth in the complaint. Their statements focus on the Chinese government's policy toward the Falun Gong, and their arguments suggest that the present case is an attack on China's ban on Falun Gong practice. To the contrary, the complaint sets forth claims for damages for unauthorized human rights abuses committed by Defendant's subordinates in violation of the Chinese government policy. Acts of arbitrary detention, torture and cruel, inhuman, or degrading treatment violate Chinese laws and official policy, as well as international law. The propriety of China's ban on Falun Gong is not at issue.

I. DEFENDANT LIU QI IS NOT ENTITLED TO SOVEREIGN IMMUNITY

A sitting government official has no claim to sovereign immunity when he acts outside the scope of his legal authority. The State Department suggests that Defendant Liu is entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605, because he merely implemented government policy and because he is a current official. These conclusions are both factually and legally inaccurate.

A. Defendant's Actions Were Outside the Scope of His Authority and Are Not Official Acts

The FSIA "will not shield an official who acts beyond the scope of his authority." *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990). The Ninth Circuit has refused to grant immunity to defendants alleged to have committed human rights abuses when such abuses fell outside the scope of the official's authority. *See Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1471 (9th Cir. 1994) ("*Hilao*").

The actions of Defendant and his subordinates were not carried out in accordance with the policies and laws implemented as part of the Chinese government's ban on Falun Gong. ~~The heart of~~ Plaintiffs' claims ~~against Defendant does~~do not even implicate China's movement to regulate Falun Gong practice. Rather, Plaintiffs assert that Defendant ~~exceeded~~ violated Chinese ~~government policy, constitutional and statutory~~ law, and customary international law when he ordered and permitted his subordinates to commit acts of torture, arbitrary detention and other abuses alleged in the complaint. ~~R~~Regardless of ~~official~~ widespread abuses committed by Chinese ~~policy~~ authorities against ~~toward~~ Falun Gong practitioners, neither Chinese government policy nor law authorizes such abuses. As Plaintiffs allege, Defendant therefore exceeded the bounds of his authority when he authorized and permitted his subordinates to arbitrarily detain and physically mistreat Plaintiffs. *See generally* Affidavit of Robert C. Berring ("Berring Affidavit"), attached to Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Motion for Default Judgment ("Supplemental Memorandum").

The State Department's assertion that "this suit is directed at PRC government policies rather than past conduct of a specific official" is misleading and incorrect. Statement of Interest at 4, n. 3. The suit is specifically directed against Defendant's authorization of and failure to curb serious abuses by security forces under his authority, about which he was or should have been aware. ~~Each of the Plaintiffs suffered specific harms and violations of their human rights at the hands of Beijing police officers acting under Defendant's authority. Each of the acts alleged in the complaint were specifically directed at one of the Plaintiffs and constitute violations of international law because they exceeded permissible bounds of government action.~~ Regardless of whether Chinese laws permit a ban on Falun Gong, they do not (and could not, consistent with China's customary international law obligations) sanction torture, arbitrary detention and cruel, inhuman or other degrading treatment. *See* Berring Affidavit at ¶¶ 3-13, 22-24.

B. ~~B.~~ A Current or Sitting Official Is Not Entitled to Sovereign Immunity When He Acts Outside the Scope of His Authority

Government officers may be held liable under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73

(1992) (codified at 28 U.S.C. § 1350 Note), regardless of whether they are current or former officials. The State Department attempts to limit TVPA actions to former officials through two lines of reasoning. First, the State Department asserts that suits against current officials "may well" constitute "the 'practical equivalent' of suits against the sovereign." Statement of Interest at 4. Next, the State Department asserts that the TVPA contemplates only suits against former officials and does not override already-existing immunities for current or sitting officials. In reaching these conclusions, the State Department has misinterpreted existing authority on the issue.

1. A Lawsuit Against A Current Official Only Constitutes A Suit Against the Sovereign When the Official Acts Within the Scope of His Authority

As discussed above, the Ninth Circuit has been clear that sovereign immunity protects individuals only when they act within the scope of their official authority. In quoting the "practical equivalent" language of the *Chuidian* decision, the State Department fails to acknowledge the Ninth Circuit's subsequent decision in *Hilao*. There, the court gave context its holding in *Chuidian*, stating:

> Immunity is extended to an individual only when acting *on behalf of* the state because actions against those individuals are "the practical equivalent of a suit against the sovereign directly." 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.

Hilao, 25 F.3d at 1472.

Cases cited by the State Department – *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992); *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989); and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) – do not support its suggestion that suits against a government official are the practical equivalent of suits against the sovereign. These cases hold that foreign *governments* are immune from suit regardless of the severity of the allegations against them. They do not involve claims against individual officials.[1] *Chuidian* makes clear that officials are immune only when

[1] The State Department's reliance on the decision of the European Court of Human Rights in *Al-Adsani v. The United Kingdom* (No. 35763/97, Nov. 21, 2001) is similarly inappropriate. The issue in *Al-Adsani* was the application of immunity to a foreign government. The case did not touch on the immunity of an individual officer. Indeed, the applicant in *Al-Adsani* had already obtained a

they perform official acts within the scope of their authority. *Hilao* demonstrates that individual officials who are alleged to have committed human rights abuses are not entitled to sovereign immunity.[2] As these cases reflect, the distinction between a foreign government and a current official is significant. Plaintiffs seek damages against only Mayor Liu, and do not seek to hold the government of Beijing, let alone China, responsible.

2. Congress ~~Intended the~~ Did Not Limit the TVPA and ATCA to ~~Apply~~ Former ~~to Current~~ Officials

The TVPA and ATCA apply to current and former officials. Neither ~~The text of these~~ statute~~s~~ ~~does not~~ contains any ~~limiting~~ language that would imply that the statutes ~~should~~ do not apply to current officials. To the contrary, ~~T~~the TVPA specifically requires that ~~provides for a cause of action against~~ actionable violations be committed by “an individual [acting] under actual or apparent authority, or color of law, of any foreign nation.~~…~~”

The State Department claims, “The principal aim of the TVPA was to codify the decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), by providing an explicit statutory basis for suits against former officials of foreign governments…” Statement of Interest at 5. While the congressional reports on the TVPA cite extensively to *Filartiga*, they do not indicate that the *Filartiga* precedent applies only to former officials, and they make clear that codification of *Filartiga* was not the only, or even the primary, aim of the TVPA. Rather, the Senate Report states, “The purpose of this legislation is to provide a Federal cause of action against *any* individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing.” S. REP. NO. 102-249 at *3 (1991) (emphasis added). The term “any” ~~eviscerates~~ flatly contradicts the State Department’s novel interpretation that the

---

default judgment in a domestic court against the individual who was responsible for his torture. Id. at 4, para. 4.

[2] The *Hilao* court specifically rejected the argument the State Department now makes:

> However, *Siderman* was an action *against the Republic of Argentina,* which clearly fell within the "foreign state" scope of FSIA. In this case, the action is against the estate of *an individual official* who is accused of engaging in activities outside the scope of his authority. FSIA thus does not apply to this case.

25 F.3d at 1472.

TVPA and ATCA apply only to former officials.~~attempt to limit the coverage of theTVPA and ATCA to former officials.~~[3]

The next sentence of the Senate report indicates that an additional purpose of the legislation was to “carry out the intent of the Convention Against Torture…” *Id*. The Torture Convention requires a State Party to “take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.~~…~~” Convention Against Torture and Other Cruel, Inuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 5(2). The Convention further requires that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress.~~…~~” *Id.* at art. 14(1). The Torture Convention makes no provision for sitting officials to avoid justice.

The State Department asserts that the FSIA still applies to current officials and that the TVPA was not intended to override sovereign, or any other type of, immunity. Statement of Interest at 5. However, the House Report on the TVPA indicates that Congress expected that the FSIA would not generally apply to actions under the statute. The Report states:

> While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.

H.R. REP. NO. 102-367(I) at 6 (1991). In light of the significant ambiguity that exists as to whether Congress intended the FSIA to apply to individual officials at all,[4] the State Department’s suggestion that Congress intended sitting officials to be protected by the FSIA from TVPA suits can scarcely be given credence.

Cases cited by the State Department to support its strained interpretation shed no light on

---

[3] The *Filartiga* case is discussed in subsequent paragraphs of the report, but it is cited to support the conclusion that “[t]he TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, derived from the Judiciary Act of 1789 (the Alien Tort Claims Act)…” S. REP. NO. 102-249 at *4.

[4] See Plaintiffs’ Supplemental Memorandum of Authorities in Support of Motion for Default Judgment, at 1, n.1, and authorities cited therein.

the applicability of the FSIA in the present circumstances. Each of the three cases cited -- *Saltany v. Reagan*, 702 F.Supp. 319 (D.D.C. 1988); *Lafontant v. Aristide*, 844 F.Supp. 128 (E.D.N.Y. 1994); *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001) -- involved an acting head of state, and each of the lawsuits was dismissed on the common law ground of head of state immunity.[5] The *Saltany* court did not even refer to the FSIA. The *Aristide* and *Mugabe* courts both distinguished the FSIA as inapplicable to heads of state. *See Mugabe*, 169 F.Supp.2d at 288; *Aristide*, 844 F.Supp. at 137.[6]

There have been numerous domestic lawsuits against acting officials that have not been dismissed on grounds of sovereign immunity. In fact, a district court specifically rejected an FSIA defense by an acting official in an ATCA and TVPA case. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996). Citing *Chuidian*, the court held that the Deputy Chief of National Security of Ghana was not entitled to immunity because he had committed torture, which was beyond the scope of his authority. *Id*. at 1198. Courts in other ATCA and TVPA cases have held acting officials liable for customary law violations. *See, e.g., Doe v. Lumintang*, Civ. Action No. 00-674 (D.D.C. 2001); *Todd v. Panjaitan*, No. 92-12255WD (D.Mass. 1994).

While "[d]ealing with sitting officials is a component of the President's power over the nation's foreign relations," Statement of Interest at 5, n. 5, it is not the exclusive domain of the Executive branch. The Executive does not have unfettered discretion over areas of foreign affairs. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The State Department argues that Congress would be required to adopt a "clear statement" of intent to alter the balance of

---

[5] Likewise, the *Yerodia* case (Case Concerning the Arrest Warrant of 11 April 2000 – Democratic Republic of the Congo v. Belgium, International Court of Justice, Feb. 14, 2001) is inapplicable to the present case. The issue in *Yerodia* was whether a Minister for Foreign Affairs is entitled to the same absolute immunity as a Head of State. *Yerodia* at 19, ¶ 53. There can be no contention here that Defendant is entitled to immunity under customary international law as a State representative.

[6] Moreover, both *Aristide* and *Mugabe* support the conclusion that the State Department no longer has a role in the determination of sovereign immunity for officials who are not heads of state or diplomats. *See Mugabe*, 169 F.Supp.2d at 272-73 (*quoting* H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 8-9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607) ("The FSIA's major departure was its removal of the State Department's former role in the foreign state immunity process: it transferred 'the determination of sovereign immunity from the executive branch to the judicial branch.'"); *Aristide*, 844 F.Supp. at 135.

power between the two branches. Congress has provided precisely such a statement. The House Report to the FSIA states, "A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds." H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606. The legislature could not have been clearer in its intent to remove the State Department from all determinations of sovereign immunity through enactment of the FSIA. Congress further demonstrated its intent to allow the courts to share in the field of "[d]ealing with sitting officials" who commit torture and other universally-condemned abuses when it enacted the TVPA and re-affirmed the ATCA.

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

"[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Despite this instruction from the Supreme Court, the State Department asks this Court to find the case non-justiciable based on "potentially serious adverse foreign policy consequences." Nowhere does the State Department provide any examples or details of what such consequences might be. This Court should not be persuaded by conclusory assertions and speculation. The State Department further argues that "adjudication of these multiple lawsuits [against Chinese officials], including the cases before Magistrate Chen, is not the best way for the United States to advance the cause of human rights in China." Statement of Interest at 7. However, whether this lawsuit is "the best" way or any way for the United States to advance the cause of human rights is, of course, not an issue before the court, nor should it be a factor in determining justiciability if it was.

The courts should not be ruled by *ad hoc* political expressions from the Executive branch. Rather they are charged with applying legal precedents and upholding the rule of law, including the separation of powers. The Supreme Court has set out clear rules for the implementation of the act of state doctrine. As Plaintiffs discuss in their Supplemental Memorandum of Points and Authorities in Support of Motion for Default Judgment ("Supplemental Memorandum"), the

Supreme Court and the Ninth Circuit have specified that four factors should be balanced in deciding whether application of the doctrine is advisable. *See* Supplemental Memorandum at 10-16. The first factor to be considered is the degree of consensus regarding an area of international law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). Each of Defendant's alleged acts violate norms which are clearly established under international law. *See* Supplemental Memorandum at 25-44.

Even if the State Department had provided any guidance as to how this lawsuit will obstruct its efforts at foreign diplomacy, such concerns represent only one of the factors to be considered in applying the act of state doctrine. *See Sabbatino*, 376 U.S. at 401. Moreover, this case has little chance of disrupting foreign relations because it is entirely consistent with the Executive's own statements regarding human rights in China. Twice in its eight pages of remarks the State Department emphasizes its "absolute and uncompromising abhorrence of human rights violations" and "strong opposition to violations of the basic human rights of Falun Gong practitioners in China." Statement of Interest at 7. Plaintiffs have also documented extensively the U.S. Government's public criticism of Chinese policy toward Falun Gong pracititioners. *See* Supplemental Memorandum at 12-15.

In a recent case, the Ninth Circuit refused to apply the act of state doctrine in an ATCA case. In finding that the case would not have an impact on foreign relations, the court reasoned, "Regarding the second [Sabbatino] factor -- implications for our foreign relations -- the coordinate branches of our government have already denounced Myanmar's human rights abuses and imposed sanctions." *Doe v. Unocal,* 2002 WL 31063976, *21 (9th Cir. 2002). Because the Executive and Legislative branches continue to strongly condemn Chinese policy toward Falun Gong practitioners, this is not "the sort of case that is likely to … result in differing pronouncements on the same subject." *See Liu v. Republic of China*, 892 F.2d 1419, 1433 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990).

As support for the proposition that courts should be cautious in cases involving foreign officials, the State Department cites its own testimony before Congress during consideration of the TVPA in 1990, in which it urged rejection of the proposed Act based on speculation about its effect on the executive's management of foreign affairs. Statement of Interest at 7, n. 6. (*quoting* S. HRG. 101-1284 at 28). However, Congress clearly rejected the State Department's concern when it enacted the TVPA into law.[7] *See, e.g., id.* at 33 (Statement of Sen. Harlan Specter) ("Well it may just boil down to the views of public policy which you gentleman are articulating from the Department of Justice and Department of State . . . . Speaking for myself, they are not convincing to me, and I do no know that it is worthwhile to pursue them.")

Because Congress has enacted two statutes authorizing U.S. courts to exercise jurisdiction over human rights abuses, this case "presents a purely legal question of statutory interpretation … which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986). Judges are particularly well-equipped to do this since "interpreting congressional legislation is a recurring and accepted task for the federal courts." *Id.* This Court is therefore bound by the mandate of Congress, not the preferences of the Executive Branch, in examining claims under the ATCA and TVPA. *See, e.g., U.S. v. Taylor,* 802 F.2d 1108, 1113 (9th Cir. 1986) ("Our objective when interpreting a statute is to ascertain the intent of Congress and to give effect to legislative will.").

The State Department states that it is especially concerned when, as in the present case, the defendants continue to occupy governmental positions, the acts at issue occurred outside the United States, personal jurisdiction was obtained during an "official visit", and subject matter jurisdiction rests on "generalized allegations of violations of norms of customary international law by virtue of the defendants' governmental positions." Statement of Interest at 7-8. Taken in turn, analysis of

---

[7] In some statements, the State Department seems to urge curtailment of TVPA and ATCA litigation generally and not just in this case. At several points in its Statement of Interest, the State Department refers to human rights litigation broadly, not to the present case. The State Department writes, "Such litigation can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy." Statement of Interest at 8. In a similar vein, "If the Court finds that the FSIA is not itself a bar to these suits, such practical considerations, when coupled with the potentially serious adverse foreign policy consequences that such litigation can generate, would in our view argue in favor of finding the suits non-justiciable." *Id.* Congress has expressed its intent for appropriate cases to go forward by enacting the TVPA. The State Department cannot now override the will of the legislature by means of intervention in selected cases.

these characteristics demonstrates that none of them impede the Executive's ability to conduct foreign affairs, especially not in this case.

The fact that Defendant continues to occupy a governmental position is irrelevant to the justiciability question under the act of state doctrine. The doctrine can only be invoked when adjudication of a claim would require a court to declare invalid a foreign sovereign's "official" acts. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405-06 (1990). As Plaintiffs have already demonstrated, courts have consistently held that actions taken by government officials in violation of norms of customary international law are not "official" acts deserving of protection by the act of state doctrine. *See* Supplemental Memorandum at 10-12. Also, several courts have refused to apply the act of state doctrine to sitting officials. *See id.* at 16-18.

The fact that the acts at issue occurred outside the United States, rather than militating for abstention by the court, as the State Department suggests, is actually a jurisdictional *requisite* for actions under the TVPA. TVPA, § 2(a) (limiting liability to individuals who commit torture or extrajudicial killing under authority "of any foreign nation"). As the Senate Report for the TVPA reads, "[T]he Torture Victim Protection Act (TVPA) is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture *committed abroad*." S. REP. NO. 102-249 at *3-4 (emphasis added).

Similarly the circumstances surrounding the service of process are irrelevant so long as Defendant was properly served within the United States. Service of process on a person who is found within the territorial boundaries of a court's jurisdiction complies with the requirements of the Due Process clause. *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). "Common law courts of general jurisdiction regularly adjudicate transitory tort claims between the individuals over whom they exercise personal jurisdiction, wherever the tort occurred." *Filartiga*, 630 F.2d at 885.

Finally, the State Department's characterization of Plaintiffs' claims as "generalized allegations of violations of norms of customary international law by virtue of the defendants' governmental positions" grossly mischaracterizes plaintiffs' allegations. Plaintiffs do not seek to impose strict liability on Defendant by virtue of his authority over Beijing police. Rather, plaintiffs allege that Defendant may be held liable because he: 1) authorized abuses by Beijing police against Falun Gong detainees, or 2) under the established doctrine of superior responsibility, failed to take action to curb such abuses about which he was or should have been aware. The United States government has approved the statutes of the international criminal tribunals for Yugoslavia and Rwanda, which recognize the doctrine of superior responsibility as part of customary international law. The State Department cannot now complain that application of the doctrine in this case is unwarranted and requires judicial abstention. The State Department worries about lawsuits against officials "who are not torturers," but international law recognizes that superior officials may be held responsible under appropriate circumstances specifically because they are in a position to recognize and take measures to curb systematic rights violations. See Supplemental Memorandum at 44-45.

The legislative history of the TVPA demonstrates that Congress intended that liability could be premised on command or superior responsibility. *Id*. at 1289. The Senate Report states, "Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." S. REP. NO. 102-249 at *9. The doctrine of superior responsibility is well accepted in international law and in domestic jurisprudence. *See In re Yamashita*, 327 U.S. 1 (1946); *Hilao*, 25 F.3d 1467; *Forti v. Suarez-Mason*, 672 F.2d 1531 (N.D. Cal. 1987). Application of the doctrine is not a reason for the Court to dismiss this case.

The State Department raises a concern that similar cases will be brought against U.S. officials in foreign countries based on actions taken within their "official functions under the Constitution, laws and programs of the United States." The Department 's fear of reciprocal litigation is exaggerated and empirically unsupported. The ATCA has provided a cause of action for human rights violations since *Filartiga* was filed in or about 1978. Since that time, dozens of lawsuits have been brought, involving former officials, sitting officials and foreign governments. The TVPA was then enacted in 1992, reconfirming the propriety of such cases. The State

Department has not cited one instance during that time in which a lawsuit under the ATCA or TVPA has spawned such reciprocal litigation in a foreign country, nor are Plaintiffs aware of such a case. Nonetheless, despite twenty-three years of human rights litigation without any retaliatory lawsuits filed abroad, the State Department still asks this Court to dismiss the present case based on a chance that such suits might arise. Speculation of this nature does not provide sufficient reason for the Court to dismiss this case.

Moreover, if reciprocal treatment in foreign courts were a legitimate concern, virtually all litigation concerning international topics would have to cease. This nation's courts regularly adjudicate cases of international scope, involving commerce, extradition, environmental regulations and human rights. The FSIA even provides for jurisdiction over foreign governments in particular instances. Under the State Department's reasoning, reciprocal litigation would be a threat and a basis for dismissal in those cases as well. This viewpoint is contrary to the dictates of the Supreme Court, which has instructed that:

> 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.

Kirkpatrick, 493 U.S. at 409.

By enacting the TVPA and expressly affirming the ATCA, Congress decided that these human rights lawsuits are consistent with U.S. foreign policy and support for human rights worldwide. The State Department itself, at other times, has taken the same view. See Supplemental Memorandum at 15. Congress was aware that U.S. courts may only litigate ATCA claims based on universal, obligatory and definable norms of international law. *See Forti,* 672 F.Supp. at 1539-40; *Filartiga,* 630 F.2d at 881; *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 781 (D.C.Cir. 1984) (Edwards, J., concurring). Congress thereby made the legislative determination that adjudication of such norms would not impair the conduct of foreign affairs. Moreover, under *Chuidian*, foreign officials are entitled to sovereign immunity only when acting in their official capacities. Human rights lawsuits are limited to only those officials who act outside the scope of their legal authority. This is a narrow set of cases. Lawsuits cannot be maintained against the vast majority of U.S. and foreign sitting officials acting within the scope of their official authority.

As Plaintiffs have noted, Congress has clear constitutional authority under Articles I and III to provide a cause of action in federal courts for rights recognized under international law. *See* Supplemental Memorandum at 18-23. Using this power, Congress enacted two statutes authorizing U.S. courts to adjudicate this narrow group of cases. In so doing, Congress determined that litigation of such cases is entirely consistent with U.S. foreign policy. Therefore federal courts should not dismiss actions properly falling within their reach, for "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling,* 478 U.S. at 230. This Court should not, based on the speculative concerns of the executive, decline jurisdiction that Congress clearly intended to confer.

III. THE CHINESE GOVERNMENT FAILS TO ESTABLISH ANY GROUNDS UPON WHICH THIS CASE SHOULD BE DISMISSED

The government of China has now submitted two statements (hereinafter "China's Statements") to this Court arguing that the present case is invalid. The statements are largely duplicative, except that the first statement, submitted to this court on July 9, 2002, also argues that service of process was improper. The Chinese government's assertions on this issue should be disregarded, as it was not invited to represent Defendant in this matter, and lacks standing as a non-party to raise this issue. *See, e.g., U.S. v. State of Michigan,* 940 F.2d 143, 166 (6th Cir. 1991). In any event, plaintiffs have addressed the issue of service of process in its separate response to the *amicus curiae* brief of the San Francisco Chinese Chamber of Commerce.

A. Chinese Government Justifications for Banning Falun Gong Are Irrelevant

Plaintiffs' claims are based on the physical abuse and arbitrary detention they suffered as a result of exercising their right to freedom of religion or belief. The justifications for the Chinese government's prohibition of Falun Gong provided in China's Statements are immaterial to this case. Plaintiffs allege that, regardless of the legality of the ban, Defendant acted outside the scope of his authority under international and Chinese law. While provisions of Chinese law or regulation may prohibit Falun Gong practice and membership, they do not authorize physical abuse or arbitrary detention of Falun Gong practitioners. *See* Berring Affidavit at ¶¶ 3-13, 22-24. Because Defendant's actions and omissions violated customary international law, they were not official acts for the purposes of the act of state doctrine, and they were outside the scope of his authority under the FSIA. Whether or not Falun Gong is an outlawed "cult," this case does not call into question official Chinese government policy and should not be dismissed.

B. Sovereign Immunity Does Not Apply

Plaintiffs have established proper subject matter jurisdiction in this case by alleging violations of customary international law under the ATCA and TVPA. Plaintiffs have also demonstrated in Section I, *supra*, that Defendant is not entitled to sovereign immunity. Contrary to the Chinese government's assertion that absolute sovereign immunity applies, the determination of sovereign immunity is governed under United States law by the FSIA. Under *Chuidian*, foreign officials are not entitled to sovereign immunity when they act outside the scope of their authority. 912 F.2d at 1106. The Ninth Circuit has held that officials who commit human rights abuses act beyond their authority, thereby nullifying their claims to immunity. *Hilao*, 25 F.3d at 1471. Defendant is alleged to have violated several provisions of customary international law and therefore is not immune from suit in this Court.

~~IV.~~CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court not dismiss or abstain from the case, and that the Court enter default judgment against the Defendant in an amount to be proven at a later hearing on damages.

Dated: October 16, 2002

Respectfully submitted,

/s/Joshua Sondheimer

JOSHUA SONDHEIMER (SBN 152000)
MATTHEW 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

TERRI MARSH, Esq. (Admitted *Pro Hac Vice*)
3133 Connecticut Ave., N.W., Suite 608
Washington, D.C. 20008
Tel: (202) 369-4977

MICHAEL S. SORGEN, Esq. (SBN 43107)
TANIA ROSE, Esq. (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 Plaintiffs

CERTIFICATE OF SERVICE

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

On October 16, 2002, I served a true copy of the following document:

PLAINTIFFS' RESPONSE TO STATEMENTS BY UNITED STATES DEPARTMENT OF STATE AND GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

on the following persons:

Alison N. Barkoff
U.S. Department of Justice
Room 1030
P.O. Box 883
Washington, D.C. 20044

Morton Sklar
World Organization Against Torture USA
1725 K St., N.W., Suite 610
Washington, D.C. 20006

Karen Parker
154 5th Ave.
San Francisco, CA 94118

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

Executed in San Francisco, California, on October 16, 2002.

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

/s/Joshua Sondheimer
JOSHUA SONDHEIMER