UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEN GANG, DOES 1-3, ZOU WENBO, AND OTHERS SIMILARLY SITUATED,	:	Civil Action No. 3:04-cv01146(RNC)
Plaintiffs,	:	
v.	:	
ZHAO ZHIZHEN, & DOES, 1-5 INCLUSIVE,	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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INTRODUCTION

Ideological persecutions are carried out in the People's Republic of China (PRC) in part through language that "would be recognizable to George Orwell. Political pressure on an individual is called help, the violation of rights is described as the protection of rights…real democracy movements are denounced as counterrevolutionary rebellions; and a system of servile courts is hailed as the rule of law." *See* Marsh Decl. at Exh. N.

Contrary to Defendant's mischaracterizations of his contribution to the persecution of Falun Gong as merely a form of benign "help," Motion to Dismiss (MTD) at 21, which have no support in the Second Amended Complaint (SAC) or elsewhere, Plaintiffs allege with specificity that Defendant aided and abetted and conspired to commit the persecution of Falun Gong practitioners in the PRC, including Plaintiffs and all persons similarly situated.

Defendant's attempts to absent himself from any role in the perpetration of the persecutory campaign against Plaintiffs is matched by his apparent refusal to acknowledge the severity of Plaintiffs' injuries, which are not only alleged in the SAC but also described in detail in third party reports such as UN Commission on Human Rights reports, Amnesty International reports, and media reports such as John Pomfret's *Washington Post* article noting the twin role of propaganda and violence in the persecution of Falun Gong. *See* Marsh Decl. at Exhs. B–E, G.

Under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA), Defendant is obligated to refrain from aiding and abetting and conspiring to commit torts in violation of the law of nations. This court should reject Defendant's motion to dismiss and exercise its jurisdiction pursuant to these statutes.

FACTUAL BACKGROUND

A. The Parties

Plaintiffs are individually identified citizens of the PRC or refugees of that country, as well as all others in the designated class similarly situated or affected. SAC ¶ 1. Plaintiffs are practitioners of Falun Gong, a peaceful spiritual practice similar to the practices of Taoism and Buddhism and part of a long-standing tradition of "cultivation practice," a process of self-improvement with the goal of achieving greater wisdom or enlightenment. SAC ¶ 1.

Plaintiffs are victims of the persecutory campaign waged in the PRC against Falun Gong practitioners since 1999. SAC ¶ 2. This campaign includes the use of torture; crimes against humanity; extrajudicial killing; arbitrary arrest and detention; and other violations of international human rights law. SAC ¶¶ 2, 4, 5. The individual Plaintiffs' specific abuses are detailed in the SAC at paragraphs 18-24. These abuses include regular beatings, electrocution with electric batons, sleep deprivation, sustained exposure to extreme cold, and forced viewings of Defendant's anti-Falun Gong propaganda, resulting in extreme emotional and mental harm. SAC ¶¶ 18-24.

Defendant is Zhao Zhizhen, founder and leading Standing Committee Member of the Executive Council of the China Anti-Cult Association (CACA) since November 2000, as well as former Chief of Wuhan Radio and TV Broadcasting Bureau (WRTB), and former Executive Director of Wuhan Television Station (WTV) from 1986 until at least 2003. SAC ¶ 3. Defendant personally, and in collaboration with others, mobilized, instigated, and aided and abetted police, labor camp, and other security forces to commit the abuses suffered by Plaintiffs. SAC ¶ 3. These abuses took place as a result of his production, broadcast and dissemination of authoritative propaganda material calling for and intensifying the persecutory campaign against Falun Gong, particularly in his own jurisdiction of Wuhan. SAC ¶ 3.

B. The Defendant's Intentional Production and Dissemination of Media Used to Persecute the Plaintiffs

Defendant participated in a collective plan with media outlets, extrajudicial security operations, and Chinese Communist Party (CCP) officials to bring about the persecution of Falun Gong practitioners. SAC ¶¶ 125, 129. Defendant used his CCP stature and influence to assist and coordinate with the CCP, state media and police and security officers, all acting *ultra vires* and pursuing a common plan to persecute Falun Gong. SAC ¶¶ 33-40; 46-47. His role in this plan was to instigate, mobilize, induce, and encourage police, labor camp and other security forces to commit the abuses alleged. SAC ¶ 3.

Defendant co-founded and, as part of its elite standing committee, managed the CACA, a private, not-for-profit organization dedicated solely to the development and dissemination of training material describing how to "transform" Falun Gong practitioners through torture, propaganda calling for Falun Gong's persecution, and other efforts to support and aid the persecutory campaign against Plaintiffs. SAC ¶¶ 4, 11. In these capacities, Defendant exercised enormous influence and authority over the national CACA, as well as its members and local branches, or ACAs, that carry out the decisions and policies of the national CACA. SAC ¶¶ 44, 70. His specific duties included the authority to set policy, to initiate, annul and terminate CACA projects, and to supervise the design and operation of the CACA website. SAC ¶¶ 11, 45. Defendant was responsible for supervising all CACA activities, including "transformation"-related activities, reviewing annual reports, and selecting, appointing, and removing CACA officials. SAC ¶ 11.

As a member of the governing body of the CACA, Defendant proposed and maintained personal responsibility over the CACA website, managed under his direction to "broaden [CACA's] means of propaganda and increase the efficiency of our *jiepi* of [the religion and adherents of] Falun Gong." SAC ¶ 58. He directed that the CACA website "encompass all information related to anti-cult work, and report on anti-cult strategies and actions in China," in order to enact "spear-to-spear *douzheng*" against Falun Gong. SAC ¶ 72. By defining the

purpose of the CACA website as spreading "the war flames of *douzheng* against the evil cult to the Internet," and using the website as a platform for anti-Falun Gong directives and vilification (including grotesque imagery of adherents as mentally subhuman, diseased, or pestilential, coupled with calls to "wipe [them] out") he played a key role in instigating and promoting instances of persecution against Falun Gong practitioners. SAC ¶¶ 45, 58, 61, 63, 64, 67-68, 73-81, 85; *see* Marsh Decl. at Exhs. A, I.

Defendant additionally authorized and permitted the production and dissemination of CACA training classes, manuals, lectures, books and conferences, providing instructions, guidelines and indoctrination programs that he knew would be used by police and security officers to subject Plaintiffs to torture as a means of "transformation." SAC ¶ 19. Defendant personally, or through his subordinates at CACA, provided "transformation manuals" to "thought transformation" centers engaging in torture against Falun Gong practitioners. SAC ¶¶ 82, 92-96. Handbooks, manuals and indoctrination material available on the CACA website were routinely distributed to prisons and labor camps across the PRC by regional and other CACA subordinates. SAC ¶ 92. Security forces acted upon the propaganda and instructions provided by Defendant by torturing Falun Gong detainees, SAC ¶ 48, and used the indoctrination videos, including *Li Hongzhi—The Man and His Deed*, as the central instruments of the "transformation" torture practice. SAC ¶¶ 105, 110, 21-24.

Defendant also served as the executive director of WRTB (a municipal instrumentality) and director of WTV, which operates as a subsidiary of WRTB. SAC ¶ 10. As executive director of WRTB, his areas of responsibility included implementing directives and policies of the CCP in the area of radio and TV propaganda, managing the radio and propaganda activities of Wuhan, producing radio and TV programs, overseeing the formation and dissolution of radio and TV broadcasting and programming organizations, determining broadcast authorization for programs, and ensuring ideological content of broadcast programming. SAC ¶ 10. As director of WTV, his areas of responsibility included authority to set editorial and programming policy and directives, to produce and control the content and selection of such media programs, to manage local and

national broadcasting and publication of such programs, to sign important contracts, and to select, appoint, remove, discipline, and supervise WTV management. SAC ¶ 10.

Beyond Defendant's official professional titles, he shaped and influenced the ideological content of the anti-Falun Gong propaganda campaign through other positions of influence. Defendant has been and continues to be a prominent figure within the CCP, and has received numerous domestic awards conferred by organizations affiliated with the CCP. SAC ¶¶ 33, 34. Indeed, his status within the CCP led to his positions as a founding member of the CACA and the head of WTV. SAC ¶¶ 34-35, 38-39.

As chief editor of the "Light of Science" series, Defendant also personally directed, exercised editorial control over, and otherwise created the documentary *Li Hongzhi—The Man and His Deed*, which aired on WTV. SAC ¶ 41. This program introduced the first piece of indoctrinating propaganda disseminated to aid in the practice of "transforming" Falun Gong practitioners, and was played at a 1999 meeting of CCP officials initiating the persecutory campaign against Falun Gong. SAC ¶ 42. The program is a scathing attack on the Falun Gong belief system, labeling it a threat to society and characterizing its practitioners as "demons" who must be eradicated. SAC ¶ 18.

The program further demands that viewers take part in the ideological struggle, or "*douzheng*," against Falun Gong. SAC ¶ 25. *Douzheng* is the term used by CCP officials to describe the campaign to eradicate Falun Gong practitioners in the PRC. SAC ¶ 2. A key element of such a campaign is the mental "transformation" of targets through torture. SAC ¶ 2. Reasonable Chinese citizens alive today associate this and other terms used by Defendant with campaigns of ideological persecution and hatred. SAC ¶ 27; *see* Marsh Decl. at Exhs. I, K.

Li Hongzhi became a ubiquitous instrument used during the "transformation" torture practice. SAC ¶ 27. Plaintiffs or their decedents were forced to watch the program repeatedly and were punished for failing to pay attention or respond correctly to the program's demands, including being subjected to torture. SAC ¶¶ 9, 21, 24, 42, 96, 110. Plaintiffs Jane Doe II and Chen Gang were beaten and electrocuted, respectively, for objecting to the viewing of *Li*

Hongzhi. SAC ¶¶ 21, 24. Defendant personally or through his subordinates at CACA furnished this and other anti-Falun Gong documentaries to detention centers in the PRC. SAC ¶¶ 82, 119.

Defendant also produced and broadcast other programs on WTV that called for the *douzheng* of Falun Gong and especially their "transformation" by torture or extrajudicial killing. SAC ¶ 18. These programs included episodes of the series "Light of Science," such as "Criticizing Li Hongzhi's Scriptures," "Tiananmen Square Self-Immolation," and the "Fu Yibin Murder Story," which characterized practitioners of Falun Gong as violent and dangerous criminals, murderers, vermin, and "demons" who are ideologically defective "hostile elements" to the CCP and must be eradicated. SAC ¶¶ 82, 119. This ongoing vilifiation of and call to eradicate religious adherents created and fostered the widespread climate of hatred, fear, and violence that was essential to the perpetration of the unlawful conduct committed against Plaintiffs. SAC ¶¶ 26, 84–88, 100, 105. Following the airing of such programs, it became increasingly common for PRC police and security officers to take stronger measures to persecute Falun Gong, including through torture. SAC ¶ 102; *see* Marsh Decl. at Exhs. B, J.

Defendant's negative animus toward members of the religion is apparent from the ubiquitous anti-Falun Gong statements made by him and those under his supervision, such as describing Falun Gong practitioners in the same ideologically loaded *jiepi* invective as that used by Jiang Zemin, including dehumanizing imagery such as "human garbage," "terrorists," and "an evil cult." SAC ¶¶ 50, 58, 60, 68, 104, 105. It is also apparent from his call for the persecution of Falun Gong practitioners and his influential role at the CACA. Through the use of dehumanizing imagery and persecutory language against Falun Gong targets, Defendant deliberately helped to initiate, facilitate and justify the unlawful acts of the *douzheng* persecution and abuse. SAC ¶¶ 26, 41, 45, 51-59, 74-81, 89; *see* Marsh Decl. at Exhs. A, F, I, L.

Defendant's propaganda efforts were specifically calculated to create a climate of hatred and violence necessary to bringing about the eradication of the belief in and practice of Falun Gong, including through the torture of its practitioners. SAC ¶¶ 5, 27 n.2. Under his direction and design, the CACA website, CACA anti-Falun Gong conferences and materials, and the

WTV and "Science and Light" anti-Falun Gong programs became a key vehicle for the initiation, instigation, and justification of the widespread campaign of violence perpetrated even now against Falun Gong believers in the PRC. SAC ¶ 92. *See also* Marsh Decl. at K, L.

C. The Role of Censorship in the PRC

The CCP's censorship of all speech that runs counter to CCP ideology stands in sharp contrast to freedom of speech principles enshrined in the domestic law of the United States and international legal standards.

The CCP "provides guidelines for all offices in the media, monitors their compliance, warns them if they diverge, and punishes them if they do not heed the warnings." Marsh Decl. at Exh. M. Independent journalists, human rights lawyers, and religious groups are routinely subjected to imprisonment and other forms of persecutory retaliation in the PRC, and the PRC is consistently reported as a violator of free speech protections under international law. *See* Marsh Decl. at Exhs. B-E, G, L, M.

D. The U.S. Government's Human Rights Policy

The coordinate branches of the U.S. government have repeatedly denounced the conduct of the PRC toward Falun Gong practitioners. Since 1999, the Secretary of State has designated the PRC as a "Country of Particular Concern" under the International Religious Freedom Act for particularly severe violations of religious freedom. *See, e.g.,* U.S. DEPARTMENT OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (2010).

A 2010 House Resolution, passed 412 to 1, called upon the PRC's regime "to immediately cease and desist from its campaign to persecute, intimidate, imprison, and torture Falun Gong practitioners, to immediately abolish the 6-10 office, an extrajudicial security apparatus given the mandate to 'eradicate' Falun Gong." H.R. 605, 111th Cong. (2010). In 2005, a House Resolution condemned the "escalating levels of religious persecution" in the PRC, including the "brutal campaign to eradicate Falun Gong." H.R. 608, 109th Cong. (2005). The U.S. House of Representatives has passed similar resolutions in 1999, 2002, 2004, and 2006. *See*

H.R. Con. Res. 218, 106th Cong. (1999); H.R. Con. Res. 188, 107th Cong. (2002); H.R. Con. Res. 304, 108th Cong. (2004); H.R. 794, 109th Cong. (2006).

ARGUMENT

I. DEFENDANT'S UNSUPPORTED FACTUAL ALLEGATIONS SHOULD BE IGNORED.

A court must accept as true all material factual allegations in a complaint when considering a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Defendant attempts to introduce allegations of material fact contrary to those in the SAC through alternate translations of documents provided by Plaintiffs. These allegations are inappropriate at this stage of litigation, and they cannot form the basis for dismissal for lack of subject matter jurisdiction or failure to state a claim.

Specifically, Defendant construes the Chinese word "*douzheng*" as meaning "struggle" and the Chinese word "*jiepi*" as meaning "expose and criticize." MTD at 7. Defendant later defines the Chinese word "*chuli*" as to "handle" or "dispose of." MTD at 22. These unsupported factual allegations contradict material allegations of fact in the SAC. Plaintiffs allege that "*douzheng*" is a word used to describe a persecutory campaign and specifically includes "the mental 'transformation' of targeted groups *through torture*." SAC ¶ 2 (emphasis added). Plaintiffs further allege that "*jiepi*" has a "highly specialized meaning as the inaugural step in a *violent* Cultural Revolution-style *douzheng* campaign" and that "*chuli*" may be "used as a general euphemism for *killing or various other forms of human rights abuse*." SAC ¶ 57 (emphasis added). *See also* Marsh Decl. at Exh. K.

Defendant attempts to circumvent the general rule that the court must limit its review to the facts alleged in the complaint, first, on the ground that additional materials may be considered pertaining to jurisdictional factual issues. MTD at 10. This argument rests on Defendant's assertion that "there can be no jurisdiction without proof of specific direct incitement to imminent action." MTD at 11. As Plaintiffs argue below, jurisdiction arises in this

case without such proof. *See infra* Section IV.A. Therefore, Defendant's contrary factual allegations may not be included on this ground.

Defendant further argues that the additional materials may be included because the relevant documents have been "incorporated by reference." MTD at 10. Plaintiffs do not dispute that the documents in question are central to Plaintiffs' claims and are therefore incorporated by reference. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). This does not, however, allow Defendant to introduce translations of words or phrases that are entirely distinct from Plaintiffs' translations. The SAC "is deemed to include…any statements or documents incorporated in it by reference." *Id*. at 152 (quoting *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995)). The court is therefore entitled to consider the entirety of the documents in question. But where Plaintiffs allege that a term, taken in its context, has a particular meaning—in this case, that the terms in question convey the use of violence—the court must defer to this meaning, as these translations constitute allegations of material fact, which are to be construed in the light most favorable to Plaintiffs. *See Scheuer*, 416 U.S. at 236. Otherwise, Defendant's incorporation of the documents would allow the court to resolve evidentiary disputes over the meaning of Chinese terms that are best left to the fact-finder at a later stage of litigation, or to a motion for summary judgment where "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." *Chambers*, 282 F.3d at 152 (quoting Fed. R. Civ. P. 12(b)).[1]

In any event, Defendant's translations of the relevant words and phrases cited above are incorrect. *See* Marsh Decl. at Exh. K (stating that the Chinese terms employed by Defendant have "clear and unmistakable meanings" that invoke violent persecution of ideologically targeted groups).

[1] As counsel stated at oral argument in 2005, there are over 3,000 documents that arguably support Plaintiffs' claims. Since the parties agreed to postpone the exchange of initial disclosures until after a resolution of this phase of the litigation, counsel has not yet translated more than a relevant sampling of this material.

Defendant's unsupported factual allegations are premature and irrelevant at this stage of the litigation and cannot form the basis for dismissal for lack of subject matter jurisdiction or failure to state a claim. Instead, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer*, 416 U.S. at 236.

II. THIS COURT MAY PROPERLY EXERCISE SUBJECT MATTER JURISDICTION IN THIS CASE UNDER THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT.

Defendant alleges that this court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). All of Plaintiffs' causes of action are based on violations of international human rights law that meet the Supreme Court's subject matter jurisdiction requirements in ATS actions, namely that the norms at issue be specific, universal, and obligatory. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Defendant's claim is therefore unavailing, and the court can exercise subject matter jurisdiction over this case.

A. Plaintiffs' Allegations Are Entitled to a Broad and Favorable Interpretation.

"It is well settled that the allegations in a complaint will be construed broadly and liberally, in conformity with the general principle set forth in Rule 8(f) with the caveat that unreasonable inferences favorable to the pleader will not be drawn and conclusory allegations will not be credited." 5B CHARLES ALLAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d. ed. 2007); *see also Michaelesco v. United States*, 383 Fed. Appx. 42, 43 (2d Cir. 2010). Moreover, if a 12(b)(1) motion presents a "facial" challenge to jurisdiction, that is, that the facts as stated do not provide for federal jurisdiction, the factual allegations in the complaint must be accepted as true. WRIGHT & MILLER § 1350.[2]

Defendant misreads *Kadic* to argue in support of a "heightened pleading standard." MTD at 11-12. The reference is misleading: "[A] Court's more searching review is limited to

[2] If a defendant presents a "factual" challenge to the exercise of jurisdiction under 12(b)(1), which Defendant has not done here, the court is not obligated to treat Plaintiffs' allegations as true and may examine evidence to the contrary. WRIGHT & MILLER § 1350. As stated in more detail, *supra* Section I, the extrinsic evidence Defendant has submitted as exhibits A–F do not present a factual challenge to the court's subject matter jurisdiction. Rather, by providing alternate translations of Defendant's Cultural Revolution-style propaganda, Defendant attempts to present a factual challenge under Fed. R. Civ. P. 12(b)(6), a challenge that is not permitted under the Federal Rules.

determining (1) the existence of a CIL [customary international law] norm that meets the *Sosa* standard…and if so (2) whether the evidence suggests that the CIL norm has been violated." *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 (S.D.N.Y. 2009) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1996)). This jurisdictional caveat in the context of the ATS must be weighed against the general principle that a court has subject matter jurisdiction unless "a claim is wholly insubstantial and frivolous." *Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 152–53 (2d Cir. 1984) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

Defendant's interpretation of the "searching review" of ATS subject matter jurisdiction conflates subject matter jurisdiction with the 12(b)(6) merits analysis. There is nothing in the jurisdictional analysis in an ATS suit that displaces or augments Plaintiffs' obligations to allege facts under 12(b)(6) that support a "plausible" claim for relief. *Twombly v. Bell Atl. Corp.*, 550 U.S. 544, 555 (2007). A "more searching review" is, moreover, not an inquiry into defendant's conduct. *See Wiwa*, 626 F. Supp. 2d at 388 n.9 (noting that defendants have opportunity to challenge the "legal and factual basis for seeking to hold a defendant liable" under a theory of aiding and abetting by making such arguments under 12(b)(6) or at summary judgment). Rather, a more searching review is required in ATS cases only to determine whether a rule of international law has been violated. *Kadic*, 70 F.3d at 238. *See also Sosa*, 542 U.S. at 738 (determining that incarceration of one day, as alleged by plaintiff, was not actionable under the ATS).

B. Establishing Subject Matter Jurisdiction Under the Alien Tort Statute Requires Plaintiffs to Allege Violations of Universal, Specific, and Obligatory Norms of International Law.

Establishing subject matter jurisdiction under the ATS is a two-part inquiry.[3] First, "[t]he ATS 'confers federal subject matter jurisdiction where the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations.'" *Wiwa*,

[3] Defendant does not meaningfully challenge subject matter jurisdiction for claims related to torture under the Torture Victims Protection Act, 28 U.S.C. § 1350 note. At most, then, Defendant's subject matter jurisdiction argument implicates claims for crimes against humanity and arbitrary arrest and detention.

626 F. Supp. 2d at 381 (quoting *Kadic*, 70 F.3d at 238). Second, the alleged violation of the law of nations must meet three conditions, namely, that it "be (1) universally accepted by the civilized world; (2) defined with specificity…; and (3) abided…to by States out of a sense of legal obligation." *Id.* (citing *Sosa*, 542 U.S. at 732); *see also Abdullahi v. Pfizer*, 562 F.3d 163, 173–74 (2d Cir. 2009) (adjudicating a motion to dismiss for lack of subject matter jurisdiction by analyzing the claims made under the law of nations under *Sosa*'s universal, specific, and obligatory standard); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115–17 (2d Cir. 2008) (same).

Plaintiffs allege liability based on the following violations of well-established norms of international human rights law: torture, SAC ¶¶ 107–10; arbitrary arrest and detention, SAC ¶¶ 111–13; and crimes against humanity, SAC ¶¶ 114–17. All of these substantive norms satisfy *Sosa*'s requirements that a norm be universal, specific, and obligatory.

C. Plaintiffs Allege Violations of Universal, Specific, and Obligatory Norms of International Law.

Torture and all of the norms identified in the SAC are universal norms of international law. Defendant's arguments to the contrary are foreclosed by the law of this circuit.[4] Additionally, pursuant to the court's "more searching review," the SAC contains allegations "suggest[ing] that the CIL norm[s] ha[ve] been violated." *Wiwa*, 626 F. Supp. 2d at 382.[5]

1. The prohibition on mental and physical torture is a specific, universal, and obligatory norm of international law.

The law in this circuit, since the advent of modern ATS litigation, is that the prohibition of torture is a universal norm which gives rise to subject matter jurisdiction in the federal courts.

[4] Defendant concedes that Plaintiffs are (1) aliens alleging (2) torts that are (3) in violation of the law of nations, satisfying the first set of jurisdictional inquiries. *See Wiwa*, 626 F. Supp. 2d at 381. Nor does Defendant dispute that norms prohibiting torture, crimes against humanity, and arbitrary arrest and detention have an obligatory character or, in the case of torture and crimes against humanity, that they lack specificity. Defendant's only argument in addition to universality under *Sosa* is that the norm prohibiting arbitrary arrest and detention lacks specificity. MTD at 29 n.34. For reasons explained below, this claim is unavailing. *Infra* Section II.C.3.

[5] Plaintiffs sufficiently allege, under *Twombly*, 550 U.S. at 570, that these norms were violated. *See infra* at Section III.A. Therefore, Plaintiffs' allegations meet the inquiry for subject matter jurisdiction.

Filartiga v. Pena-Irala, 620 F.2d 876, 890 (2d Cir. 1980); *Kadic*, 70 F.3d at 243–44; *see also Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (noting that "not only substantive agreement…but also procedural agreement" exists with respect to the universal condemnation of torture). No court has ever held otherwise, and Defendant points to no authority suggesting as much.

In addition to the physical torture at issue in *Filartiga* and *Kadic*, mental torture also violates a specific, universal, and obligatory norm of international law. Mental torture has been recognized as a norm of international law that gives rise to subject matter jurisdiction under the ATS. *Aldana v. Del Monte Fresh Produce N.A.*, 416 F.3d 1242, 1252–53 (11th Cir. 2005). The definition of torture relied on in the instruments cited by courts in this circuit to determine that torture violates international law explicitly reference mental torture. For example, the Convention Against Torture defines torture as any act "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…" Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, December 10, 1984, art. 1(1), S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (hereinafter "CAT"). *See, e.g.*, *Kadic*, 70 F.3d at 243–44 (looking to the CAT for its definition).

The TVPA also provides a precise definition of mental torture. This definition reflects specific and universal international law, as the TVPA partially fulfills the United States' obligations under the CAT. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002). It provides a definition of mental torture as specific as that in the CAT. Torture itself may be "any act…by which severe pain or suffering, whether physical or mental, is intentionally inflicted on that individual…" 28 U.S.C. § 1350 note § 3(b)(1). In turn, "mental pain and suffering refers to prolonged mental harm caused by or resulting from…the administration of…procedures calculated to disrupt profoundly the senses or personality." *Id*. § 1350 note 3(b)(2)(B). The prohibition on mental torture is thus both universal and specific, as required by *Sosa*. 542 U.S. at 732.

The court has subject matter jurisdiction over claims based on physical and mental torture, because their prohibitions are universal and specific norms of international law.

2. The prohibition on crimes against humanity is a specific, universal, and obligatory norm of international law.

"[C]rimes against humanity violate the law of nations and [are norms] of sufficient specificity and definiteness to be recognized under the ATS." *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 274 (E.D.N.Y. 2007) (collecting cases). *See also Sosa*, 542 U.S. at 762 (Breyer, J., concurring).

Crimes against humanity, for the purposes of this case, are defined specifically in the Rome Statute as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population…: "[d]eportation or forcible transfer of population…, [i]mprisonment…in violation of fundamental rules of international law…, [t]orture, [or] [p]ersecution against any identifiable group or collectivity on…religious grounds…" Rome Statute of the International Criminal Court, art. (7)(1), July 17, 1998, 2187 U.N.T.S. 3 (hereinafter "Rome Statute"). *See also Almog*, 417 F. Supp. 2d at 275 (relying on the Rome Statute for its definition of crimes against humanity). Persecution under international law is "the intentional and severe deprivation of fundamental rights contrary to international law…by reason of identity." Rome Statute art. 7(2)(g). Defendant does not contest that persecution and forced exile fit squarely within the definition of crimes against humanity and are also independent violations of the law of nations.

The court can thus exercise subject matter jurisdiction over Plainitffs' claims of crimes against humanity.

3. The prohibition on prolonged arbitrary arrest and detention is a specific, universal, and obligatory norm of international law.

The prohibition on arbitrary arrest and detention is a norm of sufficient specificity and universality to provide subject matter jurisdiction under the ATS. *See Wiwa*, 626 F. Supp. 2d 382 n.4; *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465–66 (S.D.N.Y. 2006), *rev'd on other grounds*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3019 (U.S. Oct. 17, 2011) (No. 10-1491) ("'Arbitrary detention' occurs when a person is detained without

warrant…is not apprised of charges…and is not brought to trial."). Arbitrary detention qualifies as a violation of international law if it is prolonged and violates state norms regarding lawful detention. *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1285, 1325-27 (N.D. Cal. 2004) (quoting Affidavit of Robert C. Berring and finding arbitrary arrest and detention is actionable under the ATS). The court can thus exercise subject matter jurisdiction over the arbitrary arrest and detention causes of action.

III. DEFENDANT IS LIABLE FOR THE HUMAN RIGHTS ABUSES ALLEGED.

Plaintiffs must allege sufficient facts to support a reasonable inference that Defendant is liable for the violations alleged. *See Twombly,* 550 U.S. at 570; *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009). Defendant is liable for the human rights abuses suffered by Plaintiffs by virtue of aiding and abetting, conspiring in, and exercising command responsibility over their commission. These theories of liability are universal, specific, and obligatory norms of international law and are thus available under the ATS. *See Sosa*. 542 U.S. at 732. Plaintiffs have pled sufficient facts under *Twombly* regarding both the principle violations and Defendant's accessory liability.

A. Plaintiffs Sufficiently Allege the Principle Human Rights Abuses.

Plaintiffs allege sufficient facts to support a reasonable inference that the principle violations occurred. *See Twombly,* 550 U.S. at 570; *Iqbal,* 129 S.Ct. at 1949.

With respect to torture, Plaintiffs allege acts of violence or mental abuse performed for purposes of "coercion" or as a result of "discrimination." 28 U.S.C. § 1350 note 3(b)(1); CAT art. 1(1). The campaign against Falun Gong is discriminatory and attempts to violently coerce practitioners to change their beliefs. SAC ¶ 2. Plaintiffs Wenbo, Chen, and Does II and III were all subjected to such attempts. SAC ¶¶ 21–25. Doe I did not live long enough to suffer such an attempt, though her Falun Gong practice led her to be singled out for detention and torture. SAC ¶ 20.

All Plaintiffs have suffered gruesome physical torture, amounting to "severe pain and suffering," CAT art. 1(1), which Plaintiffs describe in detail. SAC ¶¶ 20–24. Plaintiffs were

"shocked with electric batons," "handcuffed to two beds…wherein her body was stretched in…opposite directions," "hung from the ceiling with handcuffs," and so on. SAC ¶¶ 20–24. All Plaintiffs have also suffered severe mental torture. Plaintiffs were forced while in custody to view the anti-Falun Gong propaganda produced and disseminated by Defendant. SAC ¶¶ 20–24. Exposure to this media was explicitly intended not just to "disrupt profoundly the senses or personalit[ies]" of Plaintiffs, 28 U.S.C. § 1350 note § 3(b)(2)(B), but to entirely remake their personalities and force them to renounce their beliefs. SAC ¶¶ 20–24.[6]

With respect to crimes against humanity, Plaintiffs allege that the abuses are widespread. Defendant does not deny this. Rather, he ackowledges the "huge amounts of human and material resources" dedicated to eradicating Falun Gong. MTD at 21. The particular acts that are elements of this widespread attack are specifically alleged, including torture, imprisonment, "deportation and forcible transfer," and persecution. *See* Rome Statute art. 7(1). Plaintiffs allege, based on State Department reports, that at least one hundred thousand Falun Gong practitioners have been unlawfully transferred to reeducation through labor camps. SAC ¶ 28. This forcible transfer includes relocation to facilities "outside the scope of the Chinese judicial system…" SAC ¶ 28. Three Plaintiffs have been detained in "transformation facilities," and Plaintiff Chen was detained in the Tuanhe Forced Labor Camp. SAC ¶¶ 21–24. It is undisputed that these acts constitute persecution on the grounds of Plaintiffs' religious beliefs. *See* Rome Statute art. 7(1)(h).

With respect to arbitrary detention, Plaintiffs allege that they have been detained either in transformation facilities or in the reeducation through labor system. SAC ¶¶ 20–24. These detentions were for extended periods of time, in some cases years. SAC ¶¶ 20–24. None of these detentions were pursuant to trials or any other procedural safeguard. SAC ¶¶ 20–24.

Plaintiffs have thus alleged sufficient facts to support a reasonable inference that the principle violations occurred. *See Twombly,* 550 U.S. at 570; *Iqbal,* 129 S.Ct. at 1949.

[6] Defendant embraces the purposes of his propaganda, analogizing it to "deprogramming" in the U.S. MTD at 21. This is tantamount to an admission that Defendant intentionally aided and abetted the mental torture of Plaintiffs.

B. Defendant Is Liable for Aiding and Abetting the Human Rights Abuses Alleged.

Aiding and abetting liability is available under the ATS in the Second Circuit, and Defendant, through his intentional and substantial assistance of the persecution of Falun Gong, aided and abetted the human rights violations suffered by Plaintiffs.

1. Aiding and abetting liability is available under the ATS.

Aiding and abetting liability meets the *Sosa* requirements for subject matter jurisdiction under the ATS. It is well-established in this circuit that "a plaintiff may plead a theory of aiding and abetting liability under the [ATS]." *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam). Defendant does not dispute this rule.

2. Defendant aided and abetted the human rights abuses alleged.

In this circuit, aiding and abetting under the ATS requires that a defendant "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). Defendant purposefully provided such assistance, as specifically alleged by Plaintiffs.

a. Defendant provided practical assistance having a substantial effect on the perpetration of the abuses alleged.

Defendant provided practical assistance having a "substantial effect" on the perpetration of the crimes alleged, thus meeting the first element of aiding and abetting liability. *Talisman*, 582 F.3d at 259.

In *In Re South African Apartheid Litig.,* 617 F. Supp. 2d 228 (S.D.N.Y. 2009), the defendants' conduct met the substantial assistance standard because their assistance provided the "means by which" the violations were carried out[7] or was "specifically designed" to effectuate

[7] The court noted, however, that the defendant need not provide the *only* means by which the violations were carried out. 617 F. Supp. 2d at 259.

these crimes. *Id*. at 265–66. *See also Doe v. Nestle*, 748 F. Supp. 2d 1057, 1101 (C.D. Cal. 2010). The court also noted that the assistance need not be essential to the perpetration of the crimes. *Id*. at 257–58. *See also Almog*, 471 F. Supp. 2d at 286–87, 292; *Nestle*, 748 F. Supp. 2d at 1080. Not only is the same kind of conduct alleged here, but Defendant's conduct was essential to the persecutory campaign. SAC ¶¶ 26, 105.[8] Defendant provided propaganda that was used during the interrogation of Plaintiffs as the means by which their mental torture was carried out. SAC ¶¶ 9, 42, 82, 105, 110, 117. His actions were also specifically designed to facilitate the alleged human rights abuses, as evidenced by materials Defendant produced and disseminated that (1) were specifically directed toward instructing security officials on how best to engage in torture and other abuses, SAC ¶¶ 4, 19, 48, 82, 91; and (2) created an environment of fear and hatred instrumental to calling for the *douzheng*, *jiepi* and other persecutory acts against Falun Gong. SAC ¶¶ 25 n.2, 27–29, 70–71, 83, 98–104. Defendant's conduct thus had a substantial effect on the abuses suffered by Plaintiffs. *See* Marsh Decl. at Exhs. J, L.

In *Talisman*, the court concluded that the plaintiffs had not adequately alleged facts showing the defendant's conduct had a substantial effect on the crimes alleged, because the defendant engaged in a series of acts that, while they may have been useful to the principal perpetrators of the violations, were also used for "benign and constructive" purposes. 582 F.3d at 262–63. See *also Nestle*, 748 F. Supp. 2d at 1099. For example, the defendant created a "buffer zone" around its oil fields for necessary and understandable security purposes. Although this conduct resulted in forced displacement in surrounding areas, the court found this was merely an incidental and unintended consequence, and thus did not have a substantial effect on the abuses alleged. *Talisman*, 582 F.3d at 263. In contrast, the conduct engaged in by Defendant here had no constructive purpose beyond the facilitation and promotion of the persecutory campaign against Falun Gong. As discussed above, the conduct was "specifically designed" to further the

[8] Moreover, unlike in *South African Apartheid*, 617 F. Supp. 2d at 265, Plaintiffs here allege purposeful rather than merely knowing conduct. *See infra* Section III.B.2.b.

persecutory campaign. *In Re South African Apartheid Litig.,* 617 F. Supp. 2d at 265. It therefore had a substantial effect on the abuses suffered by Plaintiffs.

Defendant relies heavily on a comparison to *Liu Bo Shan v. China Const. Bank Corp.*, 421 F. App'x. 89 (2d Cir. 2011). MTD at 32. In that case, the defendant bank provided false evidence to the police, leading to the plaintiff's arrest, knowing that the police would subject him to mistreatment. *Id*. at 94. Defendant makes much of the fact that both *Liu Bo Shan* and the present case take place in the PRC, but fails to address the vast differential of power, agency, influence and intent between the civilian financial institution in *Liu Bo Shan* and the celebrated CCP propagandist here. Defendant here used his power, agency and influence to call for and directly participate in the persecutory campaign against Falun Gong by helping to construct the ideological framework for this persecution, instigating the torture of Falun Gong practitioners, and even proposing the methodology by which some of the persecutory acts were carried out, as discussed above. His role in the abuses suffered by Plaintiffs is therefore far more extensive than the defendant's role in *Liu Bo Shan*, and is more similar to the defendants' conduct in *In Re South African Apartheid Litig*.

Defendant misrepresents Plaintiffs' allegations when he claims that they allege nothing more than "contribut[ion] to a propaganda campaign [and to] a hostile attitude toward Falun Gong practitioners." MTD at 32. Plaintiffs in fact allege that Defendant specifically and intentionally promoted and instigated the persecution of Falun Gong practitioners through his production and dissemination of media and documents calling for Falun Gong's *douzheng* and prescribing the use of torture. Plaintiffs allege these facts with specificity. SAC at ¶¶ 9, 25 n.2, 27, 42, 92–105, 110. Defendant's acts had an ongoing, practical function as an indispensable element to the practice of "transforming" Falun Gong practitioners through torture. At the very least, the persecution of Falun Gong would not have occurred in the same way or with the same virulence without Defendant's conduct.

b. Defendant acted with the purpose of facilitating the commission of the abuses alleged.

In addition to committing acts with a substantial effect on the crime, the defendant must also have acted "with the purpose of facilitating the commission of the crime." *Talisman*, 582 F.3d at 259. That Defendant acted with the requisite purpose in this case is clear based on his well-established animosity toward Falun Gong.

In *Talisman*, where the purpose requirement was not met, the court made special note of the fact that the plaintiffs there did not show or even suggest that the defendant "was a partisan in regional, religious, or ethnic hostilities, or that [the defendant] acted with the purpose to assist persecution." *Id*. at 263. Indeed, the evidence there suggested that the human rights abuses being committed "tarnished [the defendant's] reputation" and "angered its employees and management." *Id*. These facts stand in stark contrast to the facts alleged here, which provide precisely the kind of evidence the court suggests would satisfy the purpose requirement. Defendant here is clearly "a partisan in regional, religious or ethnic hostilities." Defendant has taken a side in the anti-Falun Gong persecutory campaign, describing Falun Gong as, among other things, "human garbage," "demons," "terrorists," and "an evil cult." SAC ¶¶ 18, 104, 105. He has produced extensive media denigrating Falun Gong and directly calling for their torture and persecution. SAC ¶¶ 26, 105.

Defendant barely attempts to counter these allegations, arguing that Defendant's language is simply "sarcastic," "unpleasant," and "harsh," but not indicative of an intent to facilitate torture. Defendant's statements, placed prominently on the CACA website, calling for intensified "transformation work" in order to "prevent [] the spread of this psychological epidemic" amount to far more than mere criticism. SAC ¶ 62. The CACA website also includes calls to "wipe out the evil cult," bring about its "apocalypse", and defeat its "[mobilized] mass under the flag of demons." SAC ¶¶ 80, 81, 85. At no point do Plaintiffs allege that this apocalyptic imagery is used sarcastically; rather, they allege that it is a direct statement of Defendant's intent to violently eliminate Falun Gong as a religion and bring about the ideological conversion of its adherents through torture and other abuses. SAC ¶ 73.

Defendant's language mirrors that of other major perpetrators of the anti-Falun Gong persecutory campaign, as well as earlier campaigns throughout the PRC's history. SAC ¶¶ 26, 27, 53, 57, 68, 69. To CCP members throughout the PRC, this language has been taken as a clear sign of the intent to violently crack down upon its targets and to instigate, ideologically justify, and facilitate the mobilization of that violent crackdown. *See* Marsh Decl. at Exh. K (stating that the Chinese terms employed by Defendant have "clear and unmistakable meanings" that invoke violent persecution of ideologically targeted groups). Given the context of the persecutory campaign against Falun Gong that Defendant helped to promote and the language employed in the materials that Defendant produced and disseminated, Defendant's claims are not plausible. Defendant's language is not merely unpleasant; it is demonstrative of Defendant's intent to aid the persecution of Falun Gong. *See* Marsh Decl. at Exhs. A, I. He therefore acted purposefully.

Because Defendant purposefully provided practical assistance through the production and dissemination of media having a substantial effect on the abuses suffered by Plaintiffs, he is liable under the ATS for aiding and abetting those abuses.

C. Defendant Is Liable for Conspiracy to Commit the Human Rights Abuses Alleged.

Plaintiffs allege that Defendant conspired to commit the international law violations alleged. SAC ¶¶ 2, 7, 15, 16, 106, 108, 109, 113, 115, 117, 120, 125, 129, 131. Conspiracy liability is available under the ATS, and Plaintiffs plead sufficient factual allegations to show that Defendant participated in a conspiracy to commit human rights abuses against Plaintiffs.[9]

1. Conspiracy liability is available under the ATS.

In *Talisman*, this circuit assumed without deciding that plaintiffs could assert conspiracy liability under the ATS. 582 F.3d at 260. The court there stated that "[a]s a matter of first principles, we look to international law to derive the elements for any such cause of action," and noted that the "analog to a conspiracy as a completed offense in international law is the concept

[9] Defendant does not even address claims of conspiracy liability in his Motion to Dismiss, despite Plaintiffs' numerous allegations of such a conspiracy.

of the 'joint criminal enterprise.'" *Id*. (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006)). This form of conspiracy liability is universally recognized under international law, a conclusion supported by the bulk of federal precedent and by various sources of international law, including international tribunals, treaties, and international legal scholars. Thus, conspiracy liability meets the requirements of *Sosa*, 542 U.S. at 732, and is available under the ATS.

The overwhelming majority of federal courts to address the issue have found that liability for ATS claims extends to conspiracies beyond genocide and aggressive war. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.12 (D.D.C. 2003). The Supreme Court also noted in *Hamdan* that "[t]he International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a 'joint criminal enterprise' theory of liability," a form of liability that is "akin to aiding and abetting." 548 U.S. at 611 n.40.

Indeed, both the ICTY and International Criminal Tribunal for Rwanda (ICTR) recognize liability for participation in a joint criminal enterprise, using a standard similar to that adopted domestically for conspiracy liability. *Prosecutor v. Tadic*, Case No. IT-94-1-A, ¶¶ 194-220 (July 15, 1999); *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73 (June 16, 2006). This standard has been followed repeatedly in these tribunals. *See, e.g., Prosecutor v. Vasiljevic*, Case No. IT-98-32-A (February 25, 2004); *Prosecutor v. Babic*, Case No. IT-03-72-A (July 18, 2005); *Prosecutor v. Stakic*, Case No. IT-97-24-A (March 22, 2006).

One of the earliest ICTY analyses of joint criminal enterprise liability was provided in *Tadic*, Case No. 94-1-A. The Appeals Chamber there held the accused liable for murder because he "took part in the common criminal purpose to rid the region of the non-Serb population, by committing inhumane acts," and because the killing of the non-Serbs in furtherance of this plan was a foreseeable outcome of which he was aware. *Id*. ¶¶ 194–220. If the defendant is not merely a willing participant in a common criminal design but also acts intentionally to further the design,

his conduct rises to the level of "co-perpetration," characterized by the ICTY as "firmly established in customary international law." *Id*. ¶ 22.

The Rome Statute provides for conspiracy liability as well. Article 25(d) states that a person shall be liable for a crime if he in any way "contributes to the commission…of such a crime by a group of persons acting with a common purpose." Rome Statute art. 25(d).

International legal scholars have also concluded that joint criminal enterprise liability is firmly established in international law. "It is now widely accepted by international criminal courts that in the case of collective criminality where several persons engage in the pursuit of a common criminal plan or design, all participants in this common plan or design may be held criminally liable for the perpetration of the criminal act, even if they have not materially participated in the commission of said act…" Antonio Cassese, INTERNATIONAL CRIMINAL LAW 191 (2d ed. 2008).

Thus, the overwhelming weight of federal precedent and international law supports the conclusion that conspiracy liability is universally recognized under international law and therefore gives rise to subject matter jurisdiction under *Sosa*. 542 U.S. at 732.

2. Defendant conspired to commit the human rights abuses alleged.

Liability for conspiracy to commit an international law violation requires that the defendant take part in a common criminal design and intentionally act to further that design. *Tadic* ¶ 22. This standard is consistent with *Talisman*, which requires that the defendant act purposefully. 582 F.3d at 260. Plaintiffs' allegations meets this standard.

Plaintiffs' allegations make clear that Defendant intentionally participated in the conspiracy to wage a persecutory campaign against Falun Gong. First, he conspired with CCP officials from the outset of the campaign to *douzheng* and eradicate Falun Gong. At all relevant times, Defendant has been a prominent figure within the CCP, having worked for eighteen years under the CCP's Propaganda Department prior to the initiation of the persecution of Falun Gong. SAC ¶ 33. The CACA, which Defendant co-founded, was sponsored by the CCP. SAC ¶ 34.

China Central Television (CCTV), the CCP's official propaganda vehicle, often rebroadcast programs produced by Defendant. SAC ¶ 34. Defendant himself has stated that his propaganda has provided "a crucial reference point to the central Party leadership to enact" the persecution of Falun Gong. SAC ¶ 56.

The CCP's persecutory campaign was formally announced on July 19, 1999, when CCP Chairman Jiang Zemin declared that "we must implement a *douzheng* strategy in order to split apart and disintegrate [Falun Gong]." SAC ¶ 53; *see* Marsh Decl. at Exh. F. Its implementation began the next day, July 20, 1999. SAC ¶ 25. Defendant helped to foment the public animus against Falun Gong that was necessary to wage the persecutory campaign with his anti-Falun Gong propaganda piece *Li Hongzhi—The Man and His Deed*, which was produced and aired immediately prior to Zemin's formal announcement. SAC ¶ 41. *Li Hongzhi* was then screened at the July 19 CCP meeting announcing the persecutory campaign. SAC ¶ 42. These allegations make clear that Defendant participated in the planning stages of the persecutory campaign prior to its formal announcement.

Defendant's production and dissemination of this and other propaganda significantly furthered the CCP's persecutory campaign for all of the reasons described above regarding Defendant's substantial assistance of the alleged human rights abuses. *See supra* Section III.B.2.a. In addition, the PRC's media is controlled by the CCP and is an essential component of the CCP's persecution of Falun Gong. SAC ¶¶ 10, 35, 40; *see* Marsh Decl. at Exh. B, L, M. Defendant's actions therefore must have been performed in coordination with the CCP and its illegal persecutory campaign against Falun Gong. As a reward for Defendant's actions furthering the CCP's "grip on power," Defendant has been lionized in the PRC's popular press and has received multiple awards from the CCP. SAC ¶¶ 38–40, 46; *see* Marsh Decl. at Exh. H.

Defendant also conspired with other media entities complicit in the *douzheng* campaign. Defendant's anti-Falun Gong propaganda created and maintained the environment necessary to persecute Falun Gong practitioners by instigating hostility and violence against them. SAC ¶¶ 49, 99. Many programs broadcast on Defendant's own television station, WTV, were devoted to the

jiepi and *douzheng* of Falun Gong adherents, and even called for their "utter extermination." SAC ¶¶ 34, 36, 83, 100. CCTV, the primary propaganda vehicle of the CCP, broadcast programs personally scripted by Defendant that were instrumental to the persecution. SAC ¶¶ 34, 36, 101. The *People's Daily*, the major CCP-run newspaper in the PRC, similarly published Defendant's explanation of the importance of *Li Hongzhi* to the *douzheng* campaign "by providing a crucial reference point to the central Party leadership to enact the *chuli* of Falun Gong." SAC at ¶ 56.

Defendant further conspired with police and security officials who carried out the torture and persecution of Plaintiffs. Members of the CACA produced and disseminated training manuals to police and security officials that encouraged and provided guidelines for the "transformation" of Falun Gong practitioners through torture. SAC ¶¶ 4, 11, 19, 48, 82, 92. The propaganda disseminated by Defendant also provided an ideological mandate under which security forces acted with impunity. SAC ¶¶ 101, 106.

The persecution flourished as a result of the symbiotic relationship between security forces and media entities, increasingly intensifying their respective efforts. *See* Marsh Decl. at Exh. B ("[The] high-pressure propaganda campaign against the group has also been critical. As Chinese society turned against Falun Gong…it became easier for the government to use violence against [them]."). Police and security forces were lent legitimacy as they increased the intensity of the *douzheng* campaign of torture and detention. The involvement of police and security officials in turn strengthened the "façade of institutional legitimacy" of Defendant's media institutions. SAC ¶ 48, 49.

Defendant engaged in these acts purposefully, as demonstrated by his anti-Falun Gong statements. *See supra* Section III.B.2.b.

Defendant purposefully participated in and furthered a criminal design to commit the human rights violations alleged by Plaintiffs. He is therefore liable for conspiracy.

D. Defendant Is Liable Under the Doctrine of Command Responsibility for His Subordinates' Aiding and Abetting of the Human Rights Abuses Alleged.

Liability under the doctrine of command responsibility is available under the ATS, and Plaintiffs sufficiently plead that Defendant exercised command responsibility over subordinates who aided and abetted the human rights abuses alleged.

1. Command responsibility is available under the ATS.

Liability under the doctrine of command responsibility exists where (1) there is a superior-subordinate relationship such that the superior possessed effective control over the subordinates engaged in illegal conduct, (2) the superior knew or had reason to know that those subordinates were about to or had committed illegal acts, and (3) the superior failed to take necessary and reasonable measures to prevent or punish those acts. *See Liu Qi*, 349 F. Supp. 2d at 1330 (N.D. Cal. 2004). *See also Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeal Judgment, ¶¶ 189–198, 225–6, 238–9, 256, 263, 346 (Feb. 20, 2001). Contrary to Defendant's claims, these elements are universally recognized under international law, regardless of whether the superior is a civilian[10] or whether the illegal conduct occurs during times of peace, a conclusion supported by federal precedent, international tribunals, and treaties. Thus, command responsibility satisfies the requirements of *Sosa*, 542 U.S. at 732, and is available under the ATS.

Command responsibility is well established in federal courts and has been applied to civilian defendants. *See In re Yamashita*, 327 U.S. 1, 13–14 (1946); *Liu Qi*, 349 F. Supp. 2d at 1332–33. The same elements are applied whether the defendant is a civilian or military superior. *See Liu Qi*, 349 F. Supp. 2d at 1332–33; *Hilao*, 103 F.3d at 776–77; *Ford v. Garcia*, 289 F.3d 1283, 1288-89 (11th Cir. 2002). The legislative history of the TVPA explicitly endorses the application of command responsibility to "anyone with higher authority" regardless of civilian status. S. Rep. No. 102-249 at 9, n. 16 (1991).

Courts have also applied this doctrine to illegal conduct occurring in peacetime. *Hilao*, 103 F.3d at 777 (noting the shared goals between international humanitarian and international

[10] Any differences in the application of these elements to civilian superiors as opposed to military superiors are evidentiary in nature, as the circumstances within a military chain of command may allow for stronger presumptions of effective control or knowledge. The factors are nevertheless identically applied to civilian and military leaders.

human rights law); *Liu Qi*, 349 F. Supp. 2d at 1258. The legislative history of the TVPA does not limit the doctrine to times of war.[11] *See* S. Rep. No. 102-249 at 9, n.16.

International courts have applied command responsibility to civilians since World War II. *See, e.g., France v. Roechling, in* 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1136 (1952). It continues to be an important source of liability for civilian leaders indicted before the international *ad hoc* tribunals. *See Delalic*, Trial Judgment, ¶ 356; *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, ¶¶ 213–16 (May 21, 1999); *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Trial Judgment, ¶¶ 973, 977 (Dec. 3, 2003). The founding statutes of both the ICTY and ICTR, as well as other *ad hoc* tribunals, do not limit the doctrine to military leaders, and it is settled both in ICTR and ICTY jurisprudence that the definition of a superior extends to civilians. *See Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Appeal Judgment, ¶ 85 (May 23, 2005); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea art. 29, NS/RKM/1004/006, Oct. 27, 2004; Statute of the Special Court for Sierra Leone art. 6(3), Jan. 16, 2002, 2178 U.N.T.S. 145. Articles 86 and 87 of Additional Protocol I to the Geneva Conventions also support the conclusion that any individual capable of exercising effective control can be found responsible pursuant to the doctrine of command responsibility. *See Delalic*, Appeal Judgment, ¶ 195. The elements necessary to establish command responsibility are thus considered "firmly established in international law" and a "principle of customary international law." *Kayishema*, Trial Judgment, ¶ 209.

In addition, international courts have applied command responsibility in cases where the subordinates committed the illegal acts by aiding and abetting the principal violations of international law. *See, e.g., Prosecutor v. Oric*, Case No. IT-03-68-T, Trial Judgment, ¶¶ 301,

[11] Although Defendant quotes a statement from *Hilao* noting the doctrine's widespread acceptance in wartime to indicate its limited applicability to wartime crimes, MTD at 36, the opinion goes on to note the acceptance of command responsibility in peacetime cases and acknowledges that U.S. law has indeed accepted it. 103 F.3d at 777.

578 (June 30, 2006); *Prosecutor v. Blagojevich*, IT-02-60-A, Appeal Judgment, ¶ 280 (May 9, 2007).

The doctrine of command responsibility is therefore universal, specific, and obligatory, meeting the standard in *Sosa*. 542 U.S. at 732.

2. Defendant is liable under command responsibility for the human rights abuses alleged.

Liability under command responsibility requires (1) a superior-subordinate relationship with effective control, (2) knowledge or reason to know that subordinates were engaged in illegal conduct, and (3) the failure to take necessary and reasonable measures to prevent or punish such conduct. *See Liu Qi*, 349 F. Supp. 2d at 1330. As a superior with effective control over subordinates at the CACA, WTRB, and WTV who aided and abetted the abuses alleged, Defendant is liable for failing to prevent or punish those abuses that he knew or had reason to know were occurring.

A superior has effective control when he has the material ability to prevent subordinates from committing crimes or to punish them after the crimes were committed.[12] *Kajelijeli*, Appeal Judgment, ¶ 86; *Delalic*, Appeal Judgment, ¶ 198. Factors that have been identified as indicative of a defendant's ability to control the acts of subordinates include the official position held by the accused, his capacity to issue orders, his position within the relevant hierarchy, and the actual tasks that he performed. *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Trial Judgment, ¶ 58 (Nov. 16, 2005). As long as a superior possesses effective control over subordinates, he can be held criminally responsible for their crimes even if they are several steps down the chain of command. *Delalic*, Appeal Judgment, ¶ 303; *Nahimana*, Appeal Judgment, ¶ 785.

Plaintiffs have alleged that Defendant meets the standard for effective control in this case. SAC ¶ 115. He held the highest positions of authority at WRTB, WTV, and the CACA. SAC ¶¶

[12] Defendant argues that he cannot be held liable under command responsibility because he did not exercise effective control over security or prison officials that committed harms against Plaintiffs. MTD at 30. However, Plaintiffs do not contend Defendant possessed such control. Rather, Plaintiffs contend that Defendant exercised effective control over his subordinates who aided and abetted security or prison officials. SAC ¶¶ 19, 50, 71, 72, 83, 92–97, 104, 115, 117.

10, 11. Because of his management and oversight responsibilities at WRTB, he had control over the ideological content of all radio and TV propaganda broadcast in Wuhan. SAC ¶ 10. As the director of WTV, he also set editorial and programming policy at the television station, selected and produced media programs, and had the power to appoint, remove, discipline and supervise employees. SAC ¶ 10. As a key member of the Standing Committee of the Executive Council of the CACA, he set policy, supervised all website and transformation-related activities, initiated and terminated projects, and had the power to select, appoint, and remove CACA officials. SAC ¶ 11. Defendant therefore had the ability to prevent the abuses alleged by, for instance, prohibiting programs or articles that instigated violence against Falun Gong. He had the power to punish subordinates whose work instigated human rights abuses by removing them from their posts, disciplining them, or simply passing them over for promotions. Defendant thus had effective control over subordinates at CACA, WRTB, and WTV.

The defendant must also have known or had reason to know that his subordinates committed the alleged acts. All of the facts available are taken as a whole in evaluating whether the information the defendant possessed was sufficiently alarming such that he was alerted to the risk of illegal conduct by subordinates. *Prosecutor v. Krnojelac*, IT-97-25-A, Appeal Judgment, ¶ 178 (Sept. 17, 2003). Facts that have been found sufficiently alarming to indicate knowledge of criminal activity by subordinates include reports of beatings, deaths from beatings or shootings, and the widespread nature of the crimes. *Id*. ¶¶ 178–180.

Plaintiffs have alleged that Defendant knew or had reason to know not only that the abuses against Falun Gong were taking place, but also that his subordinates aided and abetted the perpetrators.[13] SAC ¶ 64. In addition to personally encouraging the persecution of Falun Gong,

[13] Plaintiffs have alleged that Defendant's subordinates aided and abetted the alleged abuses. CACA staff routinely distributed and provided materials in prisons and labor camps, which explained best interrogation practices for the "transformation" of Falun Gong and which were used in the transformation process. SAC ¶¶ 92, 95–96, 110. CACA staff encouraged local ACAs to send more Falun Gong practitioners to labor camps and prisons, and organized meetings for local communities to view propaganda and to advocate eradicating Falun Gong. SAC ¶¶ 93–94, 104. The CACA and local ACAs provided training manuals, books and other materials to labor camps that were used in the transformation process. SAC ¶¶ 95–96. These subordinates acted purposefully, as is evident based on their repeated calls for *douzheng* and *jiepi* of Falun Gong and calls to escalate Falun Gong's persecution. SAC ¶ 71.

there has been widespread coverage of brutal interrogations, deaths, and unlawful imprisonments by police and labor camp officials. SAC ¶¶ 28–31. Many of the interrogations and torture sessions occurred in Wuhan, where Defendant was based, and in other localities where the CACA operated in close contact with police and labor camp officials. SAC ¶¶ 18, 19, 23. Defendant was also undoubtedly aware of the violent consequences of the infamous propaganda campaigns used in the past to target specific groups during the Cultural Revolution and other periods of persecution in the PRC's recent history. SAC ¶¶ 68–69.

Defendant also knew his subordinates were aiding and abetting the perpetrators because of his authority to set policy and manage activities in all three organizations. As the head of WRTB and WTV, he approved discriminatory programming on both television and radio. SAC ¶ 10. He also supervised all website and "transformation"-related activities at CACA, which included the routine distribution of training materials in prisons and labor camps that were used in the "transformation" process. SAC ¶¶ 11, 45, 58, 72, 92–96, 110.

A superior has a duty to take measures that come within his or her power or material possibility to prevent or punish criminal activity committed by subordinates, including aiding and abetting the principal perpetrators. *See Oric*, Trial Judgment, ¶ 301; *Delalic*, Appeal Judgment, ¶ 486; *Blagojevich*, Appeal Judgment, ¶ 280. Generally, a superior has the obligation to take active steps to ensure that subordinates will be punished. *Halilovic*, Trial Judgment, ¶ 100. In the case of civilian superiors, this duty can simply be fulfilled by reporting illegal conduct to the proper authorities. *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Trial Judgment, ¶ 418 (July 10, 2008); *Halilovic*, Trial Judgment, ¶ 100. The doctrine of command responsibility does not require direct causality between the superior's failure to act and the perpetrator's criminal acts. *Oric*, Trial Judgment ¶¶ 293, 338; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeal Judgment, ¶ 77 (July 29, 2004); *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Appeal Judgment, ¶ 832 (Dec. 17, 2004). A superior can be held responsible for failing to create or sustain an environment of discipline and respect for the law amongst his or her subordinates. *Oric*, Trial Judgment ¶ 336.

Plaintiffs adequately allege Defendant failed to take such measures. In fact, Defendant failed to take *any* measures to prevent or punish his subordinates, even though he possessed the authority to discipline staff, remove harmful content from the CACA website or television airwaves, or even to report the conduct of his employees to the proper authorities. Despite Defendant's claims that his plan was merely to advance the cause of science, he did nothing to stop the torture and violence that ensued from the actions of his subordinates. SAC ¶ 89. Rather, he encouraged the campaign to increase its violent targeting of Falun Gong practitioners by telling CACA staff directly of the need to increase the efficiency of the *jiepi* of Falun Gong and to use the Internet to increase *douzheng* efforts. SAC ¶¶ 58, 90. In so doing, he effectively sustained an environment of hostility toward Falun Gong and complete disrespect for fundamental human rights and the law.

For the reasons stated above, Defendant is liable under the doctrine of command responsibility for aiding and abetting the human rights abuses alleged.

IV. FREEDOM OF SPEECH CONSIDERATIONS DO NOT BAR THIS SUIT.

Defendant makes much of constitutional protections required by the First Amendment. MTD at 12–23, 23–30.[14] In asserting that the First Amendment has "jurisdictional consequences" in this case, Defendant misunderstands the nature of the jurisdictional inquiry required by *Sosa*. Additionally, to the extent that Defendant apparently attempts to erect some sort of substantive

[14] The concept of "performative utterance" as language used to alter the state of the world has relevance to the allegations in the SAC. The role of propaganda in persecutory campaigns is intended to bring about a radical change in PRC security's treatment of the target group. The actual identity of the group is irrelevant. What matters is that the same "operative phrases" are used to mark the members of the target group as CCP enemies, thereby authorizing and mandating their subjection to disdain, public humiliation, ideological conversion that makes use of torture and detention, and, where necessary, elimination. PRC security subject members of the group to public humiliation and ideological conversion because they understand the meaning of the "operative phrases." Austin's definition of "performance utterance," *see* MTD at 34 n.35, has undergone significant criticism and modification since he introduced it, such that the category of speech that "gets things done by the mere uttering" has been expanded to include speech used to directly alter the state of the world. *See, e.g.*, Jean Francois-Lyotard, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 9-17 (Geoff Bennington & Brian Massumi, trans., 1989).

defense based on the Constitution, Defendant is wrong as a matter of First Amendment law and policy.[15]

A. The First Amendment Has No "Jurisdictional Consequences" for the Purposes of Evaluating Subject Matter Jurisdiction Under the ATS.

Defendant, by and large, never discusses any of the norms of international law that form the basis of the SAC. Instead, Defendant wrongly asserts that Plaintiffs have alleged violations of defamation, hate speech, "propaganda," and perhaps even incitement to genocide. In the SAC, Plaintiffs have set forth their claims clearly at paragraphs 107–130, without any reference whatsoever to these norms. As is made clear in the SAC and *supra* at Section II.C.1–3, Plaintiffs allege violations of specific and universal international norms, such as torture and crimes against humanity, that meet the standard laid out in *Sosa*. Defendant largely ignores these allegations and instead makes the novel but mistaken argument that there can be no subject matter jurisdiction here unless there is a universal norm prohibiting the particular acts of the defendant that give rise to accessory liability (here producing propaganda), a norm which Defendant argues cannot exist due to the First Amendment's purported protection of Defendant's speech. As put in the MTD, "there is a fatal *jurisdictional consequence* [to Defendant's First Amendment arguments]…The claims cannot constitute claims of violations of *universal* norms of international law…" MTD at 13 (emphases in original). Defendant mischaracterizes the nature of Plaintiffs' claims and compounds his error by misstating fundamental aspects of ATS law. For these reasons, Defendant is wrong.

Sosa requires, as a jurisdictional matter, an inquiry into whether the norms at issue are universal. This is emphatically not an inquiry into whether the conduct that gives rise to accessory liability—here, Defendant's purportedly protected speech—is universally condemned. "The issue of consensus relates to whether there is…a norm." *Almog*, 471 F. Supp. 2d at 274 n.21. Defendant has confused an assessment of the universality of international norms with an

[15] Defendant seems only to suggest that the First Amendment implicates subject matter jurisdiction. MTD at 13 (Defendant's First Amendment argument has a "*jurisdictional consequence*"); *but see* MTD at 13 ("Plaintiff's Claims Are Barred by the First Amendment."). Thus secondary matters of substantive First Amendment law are treated at length *infra* at Sections IV.B–C.

assessment of whether Defendant's accessorial conduct can give rise to liability under these norms. Defendant cites no authority endorsing, applying, or even contemplating his approach, because no court could possibly support it.

Such a rule is contrary to the rules of subject matter jurisdiction generally. "When Congress does not rank a statutory limitation…as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). There are only three statutory limitations on jurisdiction under the ATS: that the suit be brought (1) by an alien, (2) for a tort, (3) in violation of the law of nations. *Wiwa*, 626 F. Supp. 2d at 381; 28 U.S.C. § 1350. To this has been added the requirement that the international law norm meet certain criteria before a federal court exercise jurisdiction over it under the ATS. *Sosa*, 542 U.S. at 732.[16] If the limitation is nonjurisdictional, however, it is treated as a matter of the merits of the case. *See Arbaugh*, 546 U.S. at 511–13. Defendant's invocation of the First Amendment conflates 12(b)(1) and 12(b)(6), and has no place under either. As a *Sosa* jurisdictional inquiry into the universality of the norms alleged in the case at bar, the First Amendment is irrelevant.[17] As a matter of the merits of the case, the fact that Defendant's liability depends in part on speech means only that Plaintiffs must plausibly allege that this speech, together with his other conduct, aided and abetted violations of international law. *See Twombly*, 550 U.S. at 555. In neither case is a First Amendment rule relevant.

Notwithstanding Defendant's reliance on the First Amendment, this court can exercise subject matter jurisdiction over this action.

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[16] *Sosa*'s requirements have also been described as guiding principles for lower courts in deciding whether or not to exercise common law power to create a cause of action under the ATS. *Khulumani*, 504 F.3d at 266–68 (Katzmann, J., concurring). Regardless of the analytical attractiveness of this position, it does not seem to reflect the approach to subject matter jurisdiction most often adopted in this circuit. *See supra* Section II.B. Nor does it add support to Defendant's position, as the inquiry is still into the norm at issue and not the conduct that gives rise to liability. Whether the *Sosa* requirements are considered part of a court's common law power or an aspect of subject matter jurisdiction, the First Amendment is not relevant to universality under *Sosa*.

[17] Defendant's references to the U.S. position on the definition of "hate speech" under the ICCPR and incitement under the Genocide Convention are therefore inapposite. MTD at 24-25. Neither hate speech nor incitement to genocide forms the basis for liability in the SAC.

B. Defendant's Actions Cannot Be Treated as Protected Speech Under U.S. Constitutional Norms.

Defendant's claims based on the First Amendment also cannot provide a substantive defense in this case, because the First Amendment does not protect an alien's speech overseas, speech that aids and abets a crime, or speech that incites violence.

1. The First Amendment does not protect the speech of an alien made outside the United States.

Defendant asks this court to announce a new rule of constitutional law, that the First Amendment protects the speech of aliens made abroad. Such a rule is unsupported and unwise.

Defendant confuses the issue of the extraterritorial reach of the First Amendment with the predicate question of the applicability of the First Amendment. Defendant contends, "It does not matter where the speech was uttered. It *does matter* that a U.S. court is adjudicating." MTD at 12 n.17. In fact, both matter. That a U.S. court is adjudicating matters because it might very well establish the existence of state action sufficient to trigger the application of the First Amendment in a suit between private parties. *See New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). (This assumes that defendant's actions are protected speech under the First Amendment, a proposition Plaintiffs dispute below.)

Where, and by whom, the speech was uttered also matters. Defendant's theory requires that the First Amendment reach the speech of an alien made abroad. MTD at 12–23. No court has suggested, and no principle of constitutional law suggests, that the First Amendment enjoys such reach. The only court, apparently, to have addressed in detail whether First Amendment rights extend to aliens abroad has rejected this proposition. *Laker Airways Ltd. v. Pan American World Airways Inc.*, 604 F. Supp. 280, 287–88 (D.D.C. 1984) ("[N]o court has held…that a United States tribunal is compelled by the First Amendment to protect an alien's desire to speak in a foreign country…[D]efendants could prevail…only if this Court broke new constitutional ground."). Even in cases dealing with the speech of a U.S. citizen abroad (which Defendant is not), courts have been generally unreceptive. *See Haig v. Agee*, 453 U.S. 280, 308 (1981); *Yahoo! Inc. v La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1217 (9th Cir.

2006) (en banc) (collecting cases). Cases cited by Defendant are not to the contrary.[18] This court should, in harmony with the *Laker* court, decline to break "new constitutional ground." 604 F. Supp. at 288.

There are sound justifications for refusing to extend the protections of the First Amendment to aliens abroad.[19] In *Johnson v. Eisenstrager*, 339 U.S. 763, 784 (1950), the Supreme Court rejected the application of the Fifth Amendment to aliens detained abroad. The Court reasoned that this rule "would mean that during military occupation irreconcilable enemy elements…could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, [and the] right to bear arms as in the Second." *Id*. The situation envisioned in *Eisenstrager* is as undesirable now as it was at the time the decision was written.[20]

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[18] Such cases are of two sorts. The first set of cases deal with enforcement of foreign judgments. *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 3–4 (D.D.C. 1995); *Bachanan v. India Abroad Publin's Inc*., 154 N.Y.S. 2d 661, 154 Misc. 2d 228, 229 (N.Y. Sup. Ct. 1992). The second set of cases turn on choice-of-law questions. *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591 (S.D.N.Y. 1994) (apparently invoking public policy considerations in a choice-of-law analysis dismissing a claim based on British libel law); *DeRoburt v. Gannett Co., Inc.*, 83 F.R.D. 574, 579 (D. Haw. 1979). The rules governing the choice-of-law and the enforcement of a foreign judgment in libel and defamation actions both require courts to look to the public policies of a domestic forum. *Bachanan*, 154 Misc. 2d at 229 (laying out rules for enforcement of foreign judgments); *DeRoburt*, 83 F.R.D. at 579 (laying out rules for choice-of-law). By contrast, in this case there is no rule that requires the court to compare two sets of laws which are either more or less protective of speech. Rather, Defendant is asking the court to unilaterally expand the reach of the First Amendment to Defendant's conduct. Defendant's citations do not lend support to the "remarkable claim," *Laker*, 604 F. Supp. at 287, that aliens in foreign countries enjoy the freedoms of the First Amendment.

[19] If this court could extend the reach of First Amendment norms to all people in the PRC including dissidents like pro-democracy advocates, Tibetans, rights lawyers, journalists and Falun Gong, the extension of these norms to protect Defendant's speech might comport with First Amendment commitments and principles. In light of the PRC's arrest and persecution of Plaintiffs and other persons similarly situated precisely for expressive acts that protest the persecution of Falun Gong and speak favorably about the religious practice, Defendant's request for protections denied to Plaintiffs and other minorities in the PRC runs counter to the First Amendment principles and norms he invokes.

[20] Defendant's references to the legislative history of the Proxmire Act, which implemented the Genocide Convention, do not support the extraterritorial application of the First Amendment. MTD at 24-25.The Act was understood to, and did, create jurisdiction only "over an offense if it is committed within the United States or if the alleged offender is a national of the United States." S. Rep. 100-333 at 5 (May 11, 1988); The Proxmire Act, Pub. L. 100-606 § 2 (1988). The Act was only recently amended to provide jurisdiction over defendants "regardless of where the offense is committed" if the offender is "present in the United States." Human Rights Enforcement Act, Pub. L. 111-122 § 3(a) (2009). There is nothing in the legislative history of the revised act that suggests that Congress assumed that the First Amendment would travel with the expanded jurisdiction of the Proxmire Act. As such, all references to the legislative history of the original Proxmire Act for First Amendment purposes are irrelevant. Furthermore, these changes were explicitly made in order to "make it easier to prosecute perpetrators of genocide." 155 Cong. Rec. S7702-01, at 4 (daily ed. July 20, 2009) (statement of Sen. Richard Durbin). It would be

Lacking any authority or justification to extend the protections of the First Amendment to the speech of Defendant, the court should decline to do so.

2. Defendant's speech that aids and abets the violations alleged is not protected under the First Amendment.

Defendant appears to argue as follows: because the First Amendment protects speech including the printed word, even if Defendant uses the printed word to aid, abet and carry out torture and other crimes, the First Amendment protects his printed word. Defendant's argument is flawed. "It has never been deemed an abridgment of freedom of speech…to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). The First Amendment thus does not provide a defense to a criminal charge simply because Defendant uses words to carry out an illegal purpose. *U.S. v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982).

Speech that aids and abets criminal conduct is beyond the protection of the First Amendment. *Barnett*, 667 F.2d at 842 (citing *U.S. v. Buttorff*, 572 F.2d 619 (8th Cir. 1978)) (holding that speech constituting aiding and abetting drug crimes was not entitled to First Amendment protection); *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 244 (4th Cir. 1997) (speech "has long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses."). A defendant can be held liable for aiding and abetting a crime even where he did not have direct contact with the principals. *Barnett*, 667 F.2d at 842.

Defendant's specific conduct is not protected under the First Amendment. Defendant's indoctrination videos, including *Li Hongzhi—The Man and His Deed*, constituted the instrument by which Plaintiffs were tortured. SAC ¶¶ 21–24, 105, 110. Mental torture, as both a matter of

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strange if, in attempting to pass a law to make it easier to prosecute perpetrators of genocide, the political branches also erected a substantive First Amendment defense when this conduct took place abroad. It would also be a remarkable reach to believe that what the political branches believed to be one of multiple mere "technical changes," *id*., to the Proxmire Act was at the same time the announcement of the expansion of First Amendment protections abroad, given their previously limited scope. *See, e.g.*, *Laker*, 604 F. Supp. at 288. Additionally, as an element of substantive First Amendment law, the reach of the First Amendment is for the courts, and not Congress, to decide. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("[I]t is this Court's precedent, not [congressional statutes] which must control" the substance of the First Amendment). For these reasons, the Proxmire Act cannot support the extraterritorial reach of the First Amendment.

international and domestic law, can be achieved through speech. *See* 28 U.S.C. § 1350 note § 3(b)(2)(B)–(D); *supra* Section II.C.1. When speech is the instrument by which a crime is achieved, it is beyond the protection of the First Amendment. *See U.S. v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999) (First Amendment protection not available where speech constituted criminal solicitation); *U.S. v. White*, 610 F.3d 956, 960 (7th Cir. 2010) (speech "integral to solicitation" is unprotected). Moreover, "[t]he provision of instructions that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment." *Rice*, 128 F. 3d at 245. Defendant engaged in the provision of such instructions, as well as other conduct that aided and abetted the international law violations alleged, as discussed *supra* at Section III.B.2

Defendant's calls for the persecution of Plaintiffs is similarly unprotected. Defendant's application of *Brandenburg* to this case ignores the fundamental principles that animate free speech protections in the United States, protections that are conspicuously absent in the PRC. "[I]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Such discussion is not possible in the PRC due to widespread censorship. Without the possibility of contrary views to mitigate discriminatory or other viewpoints, the *Brandenburg* inquiry and corollary protections are without merit, making its strict application inappropriate.

In any event, Defendant's calls for the persecution of Falun Gong do far more than merely advocate for or express an idea to others. Rather, it "solicits," "induces," commands, or in other ways persuades other persons to engage in unlawful conduct. In similar cases, *Brandenburg* has not precluded a finding of aiding and abetting liability. *See U.S. v. Rowlee*, 899 F. 2d 1275, 1280 (2d Cir. 1990) (First Amendment not a defense if defendant aided and abetted the violation of tax laws); *U.S. v. Buttorff*, 572 F. 2d at 624 (speech aiding and abetting the filing of fraudulent income tax forms not entitled to First Amendment protection).

The First Amendment does not protect Defendant's aiding and abetting of human rights violations.

3. The First Amendment would not protect the incitement of lawless action, which Defendant engaged in here.

Even if the First Amendment were to apply to Defendant's conduct, and even if it was necessary to analyze its content under *Brandenburg*, it would offer no protection to Defendant, because his speech was "directed to inciting or producing imminent lawless action and…likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Defendant's speech here, which explicitly advocated violence against Falun Gong practitioners in widespread media outlets while a persecutory campaign against Falun Gong was being waged throughout the PRC, constitutes incitement.

Whether advocacy of violence constitutes incitement hinges on two considerations: (1) the imminence of the violence, and (2) the likelihood of producing violence. *See People v. Rubin*, 96 Cal.App.3d 968, 978 (Cal. Ct. App. 1979).[21] In *Rubin*, the defendant advocated on television that viewers kill or injure members of the American Nazi Party at a demonstration they were to hold five weeks later. *Id*. The court noted that the question of the imminence of an event is "related to [the event's] nature," and found that the Nazi demonstration, which had attracted national attention, "could be said to have been proximate and imminent." *Id*. Here, Defendant's propaganda calling for and instigating violent persecution were broadcast in the labor camps and prisons where security guards were subjecting Plaintiffs to torture and persecution. SAC ¶¶ 18, 19, 34, 50, 96, 99; *see* Marsh Decl. at Exh. J. This propaganda, together with the fact that the mass campaign of torture and persecution against Falun Gong was ongoing and contemporaneous with Defendant's advocacy, renders the violent action even more proximate and imminent than in *Rubin*.

The court in *Rubin* also found that the "serious reportage by respectable news media" of the defendant's advocacy of violence resulted in a reasonable likelihood of producing violent action. *Id*. at 979. Here, the advocacy of violence was presented on television in the form of

[21] Whether or not the advocacy engaged in by Defendant incited imminent acts of torture and other violations of law is a factual issue to be decided by the fact-finder at trial. *See Rubin*, 96 Cal.App.3d at 976.

respectable news media, just as in *Rubin*. Moreover, the fact that Defendant did not merely advocate violence to the general public but also provided instructions on how to "transform" Falun Gong practitioners through torture, greatly increased the likelihood that torture and other forms of violence would occur. The past uses of *douzheng* as a means of mobilizing violence also indicate the likelihood that Defendant's propaganda would have its desired affect. Marsh Decl. at Exh. K.

The First Amendment does not protect Defendant's incitement of violence against Plaintiffs.

C. Defendant's Conduct Is Not Protected Speech Under International Law.

Defendant's speech is also unprotected under international law, because the use of mass media to aid and abet or in other ways facilitate the alleged violations is not protected under international law.

In *Prosecutor v. Nahimana*, the ICTR considered the liability of three defendants who produced content across a range of media, including radio broadcasts and journals, for crimes including incitement to commit genocide and crimes against humanity. Case No. ICTR-99-52-A, Judgment (Nov. 28, 2007). The ICTR trial court stated that "the power of the media to create and destroy fundamental human values comes with great responsibility" and "[t]hose who control the media are accountable for its consequences." *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 979 (Dec. 3, 2003). The Appeals Chamber upheld these incitement to genocide convictions, reasoning both that broadcasts undertaken in the midst of the genocide which called on listeners "to wipe [Tutsis] from human memory," as well as journal articles published in the immediate run-up to the genocide which threatened the elimination of the Tutsis, were sufficient to trigger liability. *Nahimana*, Appeals Judgment, ¶¶ 755–58, 763–75. The Appeals Chamber stated that it was irrelevant whether the defendants' hate speech amounted to independent crimes under international law. *Id*. ¶ 985. Rather, whether the speech fulfilled the elements of the international crime of persecution was the relevant inquiry. *Id*. ¶ 987.

The defendants' conduct in *Nahimana* is remarkably similar to the conduct of Defendant here: the widespread dissemination of media that advocates fear, hatred, and violence toward a particular group, in the midst of a persecutory campaign against that group. *See supra* Section III.B. Indeed, Defendant's conduct here goes even further, because he not only produced and disseminated media advocating hatred and violence but provided instruction and training manuals on torture and media used during the mental torture of Plaintiffs. *Supra* Section III.B.

These cases stand for the proposition that international law provides no protection to the use of mass media that acts to incite or in other ways facilitate violations of *jus cogens* norms, including genocide. *Nahimana,* as well as the ICTR prosecutions in *Akayesu* and the Nuremberg prosecution of Julius Streicher, which are explained below, all dealt with violations of *jus cogens* norms. *See Restatement (Third) of the Foreign Relations Law of the United States* § 702 cmt. n (1987) (hereinafter "*Restatement*") (noting the prohibition against genocide is a *jus cogens* norm); *infra* Section VI.A.1. (noting the prohibition against crimes against humanity is a *jus cogens* norm). Speech when used as part of the mass mobilization to violate other *jus cogens* norms like torture should receive no greater protection.

Speech has also constituted the basis for aiding and abetting liability under international law. In *Prosecutor v. Akayesu*, the ICTR convicted the defendant of aiding and abetting sexual violence as a crime against humanity "by facilitating the commission of such sexual violence through his words." Case No. ICTR-96-4-T, Judgment, ¶ 694 (Sept. 2, 1998). Here, Defendant, by producing and disseminating media that facilitated torture and the other human rights abuses suffered by Plaintiffs, is similarly liable for aiding and abetting regardless of whether portions of his conduct were carried out through speech. *See supra* Section III.B.

The prosecutions in *Nahimana* and *Akayesu* have a fifty-year pedigree in international law. The Nuremberg Tribunal, in prosecuting various members of the Nazi Party for crimes of genocide, punished the publisher Julius Streicher for his role in inciting the persecution of the Jews in Germany. 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 547 (1948). In articles and other publications, only some of them written by

the defendant himself, Streicher called for the persecution of the Jewish people, whom he depicted as "a parasite, an enemy, and an evil-doer, a disseminator of diseases" and "swarms of locusts which must be exterminated completely." *Id*. at 548. The tribunal convicted Streicher of crimes against humanity based upon his disseminaton of such propaganda through which the defendant "infected the German mind with the virus of anti-Semitism" and "injected poison" into the minds of thousands of Germans, causing them to follow the Nazi policy of Jewish persecution and extermination. *Id.* at 547–48.

International law thus provides no protection to Defendant's use of mass media to aid and abet and in other ways facilitate the alleged violations of international law.

V. DEFENDANT IS NOT ENTITLED TO FEDERAL COMMON LAW IMMUNITY.

No rule of federal common law immunity bars this suit. Defendant's actions and position are beyond the bounds of those that have traditionally qualified for immunity under the common law. Defendant has not occupied any position entitling him to immunity; he is not entitled to immunity for the acts he committed beyond the scope of his authority; and, in any event, foreign officials are not entitled to immunity for violations of *jus cogens* norms such as those alleged by Plaintiffs.

A. The Positions Defendant Has Held Do Not Entitle Him to Federal Common Law Immunity.

None of the positions that Defendant has occupied—at the CACA, WTV, or WTRB—entitles him to federal common law immunity protections.

First, as co-founder and a director of the CACA, a private not-for-profit association, Defendant does not merit federal common law immunity. Defendant took significant actions in his capacity as a co-founder and director of the CACA. Defendant was essential to the development, production, and distribution of instruction manuals on the "transformation" of Falun Gong practitioners through torture and other illegal means. SAC ¶¶ 4, 19, 48, 82, 92. Defendant, directly or through his subordinates, distributed media materials used during the

mental torture of Plaintiffs. SAC ¶¶ 21, 24, 27, 96, 110. Defendant oversaw the production of propaganda necessary to bring about the *douzheng* Falun Gong practitioners. SAC ¶¶ 18, 25, 27, 41, 51, 59, 68, 71, 72, 92, 100, 102, 105, 125, 129. All of these actions are independently sufficient to support Defendant's liability. Defendant does not dispute that the CACA is not a state instrumentality. He is therefore not entitled to immunity for these acts.

Second, as president of WTV, Defendant is not a government official and does not otherwise merit federal common law immunity. Defendant himself has acknowledged that a "TV station president is not a government official." SAC ¶ 35. As a non-state actor, he may not cloak himself in the immunity reserved for foreign state actors under federal common law. There is no authority that expands the reach of federal immunity so as to include non-state actors. Rather, derivative immunity for non-state actors, even when closely affiliated with heads of state, has been denied. *See Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 305 (S.D.N.Y. 2001).

Even if Defendant's position as president of WTV were an official one, he would not be entitled to immunity under federal common law. The Supreme Court held in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), that a subsidiary of an instrumentality is not itself entitled to instrumentality status under the FSIA. Only direct ownership of an instrumentality by the foreign state satisfies the statutory requirement that a majority of the entity's shares or other ownership interest be owned by a foreign state or political subdivision thereof. *Id*. at 473. WTV is a subsidiary of the state media instrumentality WRTB, and as such would not be entitled to immunity under the FSIA. Therefore, Defendant's argument that he is entitled to immunity as "an official of [an]...instrumentality" is without merit. MTD at 38.

Third, Defendant is not entitled to federal common law immunity protection as the head of the municipal media instrumentality, WRTB. Defendant is not a "foreign official" for the purpose of federal common law immunity. Federal common law immunity has been afforded only to a limited range of foreign dignitaries that has included diplomats, individuals on missions, and other high-ranking foreign representatives. *See, e.g. Schooner Exchange v. McFaddon*, 11 U.S. 116, 138–39 (1812) (foreign sovereigns and ministers); *Matar v. Dichter*, 563 F.3d 9 (2d

Cir. 2009) (director of state security agency); *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971) (foreign diplomats). Defendant cites no case extending common law immunity to those in a position comparable to his, because his position not does qualify him as an official under federal common law immunity.[22]

As a municipal media instrumentality head, Defendant does not fit within any of these immunities. He does not qualify as a head-of-state, an ambassador, foreign minister, diplomat, an individual on an official mission, or a high-ranking official. Rather, as head of the municipal instrumentality WRTB, he functioned as a low level functionary. Thus, no federal common law immunity covers his status.

B. Defendant Is Not Entitled to Federal Common Law Immunity for Acts Beyond the Scope of His Authority.

Even if any of Defendant's positions entitled him to federal common law immunity, the Supreme Court made clear in *Samantar* that foreign officials are not presumptively entitled to immunity for all acts committed under color of law. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010). Immunity is inappropriate here because Defendant committed *ultra vires* acts outside the scope of his authority.

Federal common law immunity extends to an individual officer "for acts committed in his official capacity" but not to "an official who acts beyond the scope of this authority." *Samantar*, 130 S. Ct. at 2291 n.17 (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1980)); *Hilao v. Marcos*, 25 F.3d 1467, 1471; *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir. 1992). Thus, the proper question is not whether Defendant acted under color of law with other state actors, as Defendant asserts, but whether he acted beyond the scope of his authority by

[22] The *Restatement* relied on by the Court in *Samantar*, 130 S. Ct. at 2290, supports a restricted definition of "officer" for the purposes of common law immunity. The Restatement describes government agencies as those that "hav[e] the nature of a government department or ministry." *Restatement (Second) of Foreign Relations Law* § 66 Comment a (1964-65) (hereinafter "*Restatement (Second)*"). Nothing produced by Defendant, gives rise to an inference that the WRTB has such a nature. Furthermore, officers of these agencies are only immune if the "effect of exercising jurisdiction would be to enforce a rule of law against the state." *Restatement (Second)* § 66(f). There is no indication that the state will, or could be, implicated by the exercise of jurisdiction here.

aiding and abetting and in other ways furthering the human rights violations alleged by Plaintiffs. *See Hilao*, 25 F.3d at 1471; *Trajano*, 978 F.2d at 498; *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 753 (2010) ("[T]here is no contradiction in finding that Defendants acted under color of law but that their actions were individual and not official actions."); *Liu Qi*, 349 F. Supp. 2d 1258.[23]

Defendant's only support for the proposition that his acts were within the scope of his authority is based on his misreading of the SAC. Nowhere in the SAC do Plaintiffs allege that Defendant's aiding and abetting and furthering of the crimes alleged herein were authorized by the state.[24] The SAC makes clear that Defendant's alleged acts were not authorized and were carried out *ultra vires* and in violation of PRC law and policy. SAC ¶¶ 4, 18, 20, 48–9, 50, 112*; see also* CHINA'S THIRD PERIODIC REPORT TO THE UN COMMITTEE AGAINST TORTURE, ADDENDUM, CAT/C/39/Add.2, arts. 4, 10, 11 (Jan. 5, 2000) (stating that the PRC has expanded laws against torture and strengthened penalties for violations of such laws, and further stating that the PRC has launched educational campaigns against torture and investigations into police misconduct); *Doe v. Liu Qi*, Statement of the Government of the People's Republic of China on "Falun Gong" Unwarranted Lawsuits, No. C 02 0672 CW (EMC) (stating that the "[p]rohibition of torture has always been a consistent position of the Chinese Government" and that acts of torture, extrajudicial killing or due process violations are unlawful and unauthorized).

Defendant's reliance on *Matar* and *Keller* is equally unpersuasive. The court opted to cede jurisdiction in *Matar* after the United States granted Israel's request for a suggestion of immunity. *Matar*, 563 F. 3d at 15. Here, there has been no suggestion of immunity. Moreover,

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[23] *See* Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. OF LEGAL STUD. 143, 172 (2010). More generally, "both U.S. and international law make individuals liable for engaging in certain types of conduct *precisely because* they act under color of law…. [I]t makes no sense for the very criteria that define a violation (such as a requirement that the defendant act under color of law) to shield the defendant from legal consequences." *See* Chimene I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE. L.J. ONLINE 1, 3, 6 (2010), http://www.yjil.org/docs/pub/o-36-keitner-officially-immune.pdf.

[24] Defendant's citations to the SAC do not accurately reflect the Plaintiffs' position. Paragraphs 24 and 25, which Defendant cites for his proposition, make clear that the CCP, as distinct from the state, initiated and carried out the propaganda campaign. Moreover, insofar as Defendant has disavowed that his acts were in an official capacity, *see Gang v. Zhizhen*, No. 3:04-cv-01146 (RNC), Declaration of Zhao Zhizen ¶ 20 (Docket Entry no. 44), Defendant's current claim, that these acts *were* undertaken in an official capacity, or that a judgment against him would bind the state, lacks credibility.

the defendants in *Matar* and *Keller* were charged with acts which, according to the involved foreign states or the United States, fell within their lawful official authority. *Matar*, 563 F. 3d at 11, 14; *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 821 (6th Cir. 2002). Here, the acts alleged in the SAC violate PRC law and policy, and the PRC has not stated that it authorized the acts alleged.[25] Defendant is thus not entitled to foreign common law immunity for these acts.

C. Foreign Officials Are Not Entitled to Federal Common Law Immunity for *Jus Cogens* Violations.

Defendant asserts that a foreign official is immune even if the act constitutes a *jus cogens* violation. MTD at 39. This is inaccurate. While this circuit has held that there is no general *jus cogens* exception to FSIA immunity, it has deferred to the Executive's suggestion of immunity when a foreign officer commits *jus cogens* violations. *Matar*, 563 F.3d at 13.[26]

In the absence of an Executive determination, courts have declined to extend immunity protection to foreign officers for *jus cogens* violations precisely because a sovereign state cannot define these acts as official.[27] *See, e.g., Hilao*, 25 F.3d at 1471; *Trajano*, 978 F.2d at 498. Thus, in *Talisman*, the district court held that all states may exercise universal jurisdiction over acts

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[25] The immunity entitlement of the state itself may be extended to an individual for acts authorized by the state if "the effect of exercising jurisdiction would be to enforce a rule of law against the state" or where the lawsuit would directly affect an interest of the foreign state or compel the state to act. *Samantar*, 130 S. Ct. at 2290–92. Similarly, lawsuits against individual officials may be dismissed where the state is a necessary or indispensable party under Fed. R. Civ. P 19(a)(1)(b). *Id*. Here, the PRC would not be bound by a judgment issued against Defendant. Plaintiffs do not make any claim for damages or seek any relief from the PRC, and the PRC is neither an indispensable nor necessary party to this litigation.

[26] Defendant's reliance on *Herbage v. Meese*, 747 F. Supp. 60, 67 (D.D.C. 1990), is not persuasive. *Herbage* did not hold that "individuals acting in their official capacities as agents of a foreign government are entitled to immunity 'no matter how heinous the alleged illegalities.'" MTD at 39. *Herbage* actually states that "[t]he [statutory authority of the] FSIA is absolute *in this regard*, no matter how heinous the alleged illegalities," referring to acts committed within the defendant's official capacities. 747 F. Supp. at 67 (emphasis added). However, as *Samantar* made clear, the statutory limits of FSIA do not apply to individual officials, in part because the officer (unlike the state) may or may not operate within the authority of the state.

[27] Defendant's reliance on the *Kadic* court's opinion, stating that "we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state" to support non-immunity for *jus cogens* violations under federal common law is equally unpersuasive and in fact supports Plaintiffs' argument. The court's statement does not suggest or imply that the act *must* be "wholly unratified," only that such an act is unlikely to be properly characterized as an act of state. *See also infra* at note 29.

committed in violation of *jus cogens* norms because these violations are fundamentally different from other international law violations. 582 F. Supp. 2d at 306.

Defendant is not entitled to foreign common law immunity.

VI. NO PRUDENTIAL CONSIDERATION OR JUSTICIABILITY DOCTRINE BARS THE ADJUDICATION OF THIS ACTION.

The backend of the MTD is a miscellany of prudential and justiciability arguments that Defendant claims bar adjudication of this suit. MTD at 41–48. None are availing.[28]

A. The Act of State Doctrine Does Not Bar Adjudication of This Suit.

This circuit has counseled that "it would be a rare case in which the act of state doctrine precluded suit" in actions brought under the ATS. *Kadic*, 70 F.3d at 250. That rare case is not now before this court. First, adjudicating this suit will not require this court to pass on any official act of state. Second, the factors laid out in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), do not bar adjudication of this suit.

1. This case does not require the court to pass on an official act of state.

"[T]he factual predicate for application of the act of state doctrine … [is] the *official* act of a foreign sovereign." *W.S. Kirkpatrick & Co., Inc., v. Enviro. Tectonics. Corp., Inter.*, 493 U.S. 400, 405 (1990) (emphasis added). This factual predicate does not exist in this case.[29]

First, violations of *jus cogens* norms such as torture and crimes against humanity can never be official acts. *Sarei v. Rio Tinto*, *PLC*, 2011 WL 5041927, at *17 (9th Cir. Oct. 25, 2011) ("*Sarei IV*") (internal quotations omitted); *see also Kadic*, 70 F. 3d at 250; *Filartiga*, 630 F. 2d at 889–90; *Talisman*, 244 F. Supp. 2d at 345. The prohibition of torture is indisputably a *jus cogens* norm of international law. *See Hilao*, 103 F.3d at 777; *Talisman*, 244 F. Supp. 2d at 345; *Restatement (Third)* § 702 cmt. n. The TVPA, Defendant's only asserted basis on which the act

[28] These arguments are truncated based on Defendant's similarly cursory treatment of them. Should the court require further briefing on these or any other issues, plaintiffs are willing to oblige.

[29] Actions of military officers and police are not automatically acts of state. *Trajano*, 978 F.2d at 496. Widespread abuses cannot be assumed to be acts of state without evidence. *Kadic*, 70 F.3d at 250.

of state doctrine applies, was passed with the express understanding that the "act of state doctrine cannot shield former officials from liability," because "no state commits torture as a matter of public policy." S. Rep. 102-249, at 8 (1991). The prohibition of crimes against humanity is also a *jus cogens* norm. *See Sarei v. Rio Tinto*, 487 F. 3d 1193, 1202 (2008) ("*Sarei III*") (en banc). Prohibition of prolonged and arbitrary detention should also be considered a *jus cogens* norm. *Restatement (Third)* § 702 cmt. n.

Second, *ultra vires* acts, such as torture, taken contrary to the law and policy of the PRC and wholly unratified by the PRC, are not acts of a foreign sovereign. *Kadic*, 70 F. 3d at 250; *Filartiga*, 630 F.2d at 889; *Trajano*, 978 F.2d at 498 n.10; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992). Torture and violations of due process are contrary to the law and policy of the PRC. The government has "categorically denied" that the "alleged violations of human rights" have even occurred, while stating that "any such violations would be contrary to Chinese law." *Liu Qi*, 349 F. Supp. 2d at 1306; *see also* CHINA'S THIRD PERIODIC REPORT TO THE UN COMMITTEE AGAINST TORTURE, ADDENDUM, CAT/C/39/Add.2, arts. 4, 10, 11 (Jan. 5, 2000). Plaintiffs allege that the acts of torture, crimes against humanity, and arbitrary arrest and detention were committed *ultra vires*. SAC ¶¶ 12, 18, 20, 28, 34, 48-50, 106, 111, 120, 125, 129.

The act of state doctrine is inapplicable in this case.

2. *Sabbatino* does not require dismissal on act of state grounds.

Sabbatino also does not require the court to dismiss Plaintiffs' claims even if they are found not to be *jus cogens* norms. As a procedural matter, the burden of proving the applicability of the doctrine rests on Defendant. *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d Cir. 2000). Defendant has not carried this burden. Defendant cites no relevant case which has been dismissed on act of state grounds.[30] Of the factors laid out in *Sabbatino*, only the third, the

[30] *Liu Qi* does not command the outcome of this case. To the extent that *Liu Qi* depended on the proposition that "the act of state doctrine is not rendered inapposite simply because international law or *jus cogens* norms are violated," *Liu Qi,* 349 F. Supp. 2d at 1306, this is an incorrect statement of the law. To the extent that the court in *Liu Qi* believed it was confronted with a question of "first impression" with respect to state ratification of *ultra vires*

continued existence of the foreign government, counsels in favor of the application of the act of state doctrine.

The first factor, "the degree of codification or consensus concerning a particular area of international law," *Sabbatino*, 376 U.S at 428, weighs against barring this case. Crimes such as torture and crimes against humanity are *jus cogens* norms from which "no derogation is permitted." *Sarei IV*, 2011 WL 5041927, at *17. All of Plaintiffs' claims are based on causes of action under the ATS that meet *Sosa*'s strict requirements. *Sosa*, 542 U.S. at 732; *see supra* Section II.C.1–3. They thus do not implicate the act of a foreign state.

The second factor, "implications for foreign relations," likewise weighs against dismissal on act of state grounds. *Sabbatino*, 376 U.S. at 428. The Executive has repeatedly denounced the treatment of Falun Gong in the PRC in numerous State Department reports on human rights. SAC ¶¶ 28–31. Congress, likewise, has denounced the treatment of Falun Gong in numerous resolutions. *See, e.g.*, H. Con. Res. 304, 108th Cong. (2004); *see also supra* Factual Background at 7. This suit is thus consistent with U.S. foreign relations with respect to the treatment of Falun Gong.[31]

The continued existence of the foreign government is the only factor that weighs in favor of the applicability of the act of state doctrine in this case. *Sabbatino*, 376 U.S. at 428. However, the Supreme Court has stated that the "act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Intern.*, 493 U.S. 400, 409 (1990). The "crucial element" of the

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acts, the court is unpersuasive in determining that such *ultra vires* acts could be "covertly" ratified. *Id.* at 1293–96. No principle of *Kadic* or *Filartiga* suggested as much. In fact, both implied that ratification must be public in order to render an unlawful act an act of state. *See Kadic,* 70 F. 3d at 250; *Filartiga*, 630 F. 2d at 889–90.

[31] Defendant's hypotheses regarding the potential implications of this case for foreign relations, more often than not phrased as rhetorical questions, are not persuasive. MTD at 42–44. Absent any authority, they are not entitled to any deference. Likewise, Defendant's suggestion that the rule of *Burnham v. Superior Court*, 495 U.S. 604 (1990), is no longer appropriate in an "age of globalism," MTD at 43 n.44, is an argument best addressed in an alternative venue. *See U.S. v. Higdon*, 638 F. 3d 233, 247 (3rd Cir. 2011) (noting no court "can tolerate a situation where a judge decides to follow his/her own custom and concepts of justice, rather than the precedent of the applicable appellate court or the United States Supreme Court.").

Sabbatino analysis is "the potential for interference with our foreign relations," *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976), which does not exist here, as discussed above. The *Sabbatino* factors thus weigh heavily against application of the act of state doctrine.

B. The Defendant Acted Under Color of State Law.

Defendant states that if he is not a "state actor," then Plaintiffs cannot "assert a TVPA claim" because "[w]here the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered 'state action.'" MTD at 42 n.42 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004–5 (1982)). However, Defendant's actions in concert with state actors meet the state action requirement under the TVPA and any other applicable ATS claims.[32] *See Kadic*, 70 F.3d at 245; *Aldana*, 416 F.3d at 1248.

When construing the state action requirement, courts look to jurisprudence under 42 U.S.C. § 1983 for guidance. *Kadic*, 70 F.3d at 245. The Supreme Court has articulated four tests to determine when private acts constitute state action. *See Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997). Satisfaction of any one of these tests can be sufficient to find state action. *See Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 303 (2001). Whether a private actor has acted under color of law is a highly factual inquiry.[33] *Howerton v. Bagica*, 708 F.2d 380, 383 (9th Cir. 1983). In the present case, two of these tests satisfy the state action requirement: (1) the "joint action" test, and (2) the "governmental nexus" test.

Under the joint action test, private actors who act in concert with the government or its agents can be considered state actors. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Kadic*, 70 F.3d at 245. A private party's participation with state officials in the alleged illegal conduct is sufficient to meet the state action requirement even where the private party's conduct is not the ultimate cause of the injury alleged. *Lugar v. Edomonson Oil Co., Inc.*, 457 U.S. 922, 939 (1982).

[32] Defendant does not contest the status of state-owned media and PRC police and security officials as state actors.

[33] The state action tests are not mutually exclusive and often overlap. *See Brentwood*, 531 U.S. 288.

Plaintiffs repeatedly allege that Defendant acted in concert with and participated in the persecutory campaign waged by state-owned media and PRC security and police officials (acting *ultra vires*). Defendant provided training manuals and instructions to police and security officials explaining how to best "transform" Falun Gong practitioners through torture and other illegal means, and his propaganda encouraged and instigated police and security officials to violently persecute Falun Gong practitioners. SAC at ¶¶ 4, 19, 48, 82, 92. He was a key player in the state-owned media's propaganda campaign, which was essential to the persecution of Falun Gong practitioners. SAC at ¶¶ 18, 25, 41, 100, 102, 105, 125, 129. *See also, supra* Section III.B–C. Thus, Defendant meets the state action requirement under the joint action test.

Under the governmental nexus test, a private party can be considered a state actor when he enters into an agreement with the state or its agents that confers mutually derived and interdependent benefits on both. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Plaintiffs repeatedly allege specific facts showing the interdependent, mutually beneficial relationship between Defendant and state-owned media and PRC security forces. SAC ¶¶ 33, 34, 38, 39, 40, 46, 56. Plaintiffs allege that Defendant engaged in a "symbiotic exchange" with PRC mid-level state actors such that Defendant's actions legitimated security forces' actions, and the security forces' practice of detaining and torturing Falun Gong practitioners enhanced Defendant's platform and lent him institutional legitimacy. SAC ¶ 48. *See also, supra,* Section III.B–C. Thus, Defendant can be considered a state actor under the governmental nexus test.

Defendant's collaboration with state actors therefore meets state action requirements.

C. Defendant's Political Question, International Comity, Extraterritoriality, and *Forum non Conveniens* Arguments Are Unavailing.

Defendant's additional arguments based on the political question doctrine, international comity, extraterritoriality, and *forum non conveniens* are not successful.

Political Question. Defendant argues that this case presents a nonjusticiable political question, but he fails to carry his burden of demonstrating such a political question. The political question doctrine is a principle of intra-governmental comity that bars the judicial branch from

interfering in matters exclusively left to the political branches. *Baker v. Carr*, 369 U.S. 186 (1962). This case, in contrast, involves allegations of torts committed in violation of international law, a matter explicitly reserved to the judiciary by the ATS. 28 U.S.C. § 1350.

The Supreme Court has identified six factors that should be considered in determining whether a case presents a political question. *Carr*, 369 U.S. at 217. Defendant apparently concedes that only two of these factors warrant consideration, raising only (1) the impossibility of deciding this case without an initial policy determination more appropriately decided by the political branches, and (2) the impossibility of undertaking an independent judicial resolution of this case without expressing lack of respect due coordinate branches of government. MTD at 45. Defendant argues that these two factors weigh in favor of applying the political question doctrine merely because the case "touch[es] on foreign relations." It would, however, be "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Japan v. Whaling Assoc. v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986); *see also Kadic*, 70 F.3d at 249 ("the department to whom this [ATS] issue has been 'constitutionally committed' is none other than our own – the Judiciary."); *Alperin v. Vatican Bank*, 410 F.3d 532, 537 (9th Cir. 2005). A political question does not exist wherever a case provokes discomfort or controversy; rather, the doctrine applies only where there is a serious concern over the constitutional separation of powers.

Defendant also argues that the Executive Branch "has its own approach" to dealing with the PRC's "handling of Falun Gong," and that the State Department "does not regard these adjudications as productive." MTD at 44. Defendant relies solely on a State Department statement of interest cited in *Liu Qi*, 349 F. Supp. 2d at 1296–97. The State Department's statement of interest in that case is now eight years old and was issued under a different administration. The State Department has not filed a statement of interest in this case, a decision that weighs clearly in favor of not applying the political question doctrine. *See Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004); *Alperin*, 410 F.3d at 555–56 (9th Cir. 2005). Indeed, the political branches of government have repeatedly denounced the persecution of Falun

Gong practitioners. *See supra* Factual Background at 7. There is no nonjusticiable political question in this case.

International comity. "No conflict exists, for [the purposes of international comity], where a person subject to regulation by two states can comply with the laws of both." *Hartford Fire Inc. Co. v. California*, 509 U.S. 764, 799 (1993); *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 285 ("The absence of a conflict…is fatal."). Defendant points to no law of the PRC obligating him to aid and abet or otherwise assist in the torture and other human rights violations suffered by Plaintiffs. Indeed, to do so would be illegal under the law of the PRC. *Supra* at section VI.A.1. Additionally, even if there were a conflict, "the decision to dismiss depends on the degree of legitimate offense to the foreign sovereign." *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 282. Since there is no evidence in this case that amicable working relations will be offended by the adjudication of this case, and there cannot be any unique harm because the U.S. has already consistently condemned the treatment of Falun Gong in the PRC, dismissal on international comity grounds would be inappropriate. Finally, "the doctrine…is discretionary," and "[w]hen a court dismisses on the ground of comity, it should ordinarily consider whether an adequate forum exists in the objecting nation." *Id.*; *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178-79 (declining to exercise discretion on comity grounds in an ATS action). For reasons explained below, no forum exists in the PRC in which this action might be adjudicated. Thus, even if the doctrine of international comity came into play in this case, the court should in its discretion allow the action to be decided in this forum.

Extraterritoriality. Defendant apparently attempts to feint that extraterritoriality concerns bar the adjudication of this suit. MTD at 46 n.47. This circuit has never held as much, and has consistently entertained ATS suits against foreign defendants by foreign plaintiffs for foreign conduct. *See, e.g.*, *Filartiga*, 630 F. 2d at 880. The D.C. Circuit, the only to have passed on the issue, has rejected this limit on the ATS, reasoning that "[e]xtraterritorial application of the ATS would reflect the contemporaneous understanding that…a transitory tort action arising out of activities beyond the forum state's territorial limits could be tried in the forum state." *Doe v.*

Exxon Mobil Corp., 654 F. 3d 11, 24–25 (D.C. Cir. 2011). Defendant's brief adds nothing to this analysis and should be rejected.

Forum non Conveniens. Defendant's *forum non conveniens* argument misconstrues the law in two ways. First, the doctrine of *forum non conveniens* does not apply where Congress has made provisions for U.S. courts to serve as forums for cases, notwithstanding the fact that the injury takes place abroad. The intent of Congress to provide such a forum here is clear. The ATS gives U.S. courts jurisdiction for actions by aliens for torts committed in violation of the law of nations. 28 U.S.C. § 1350. The language and nature of the ATS reflects the intent that it apply extraterritorially, as it has been applied in the Second Circuit on multiple occasions. *See, e.g., Kadic*, 70 F.3d 232; *Filartiga*, 630 F.2d 876. The TVPA unambiguously gives U.S. courts jurisdiction to decide cases involving foreign perpetrators acting on foreign soil. *See* H.R. Rep. No. 102-367, at 3-5; S. Rep. No. 102-249, at 4-5.

Second, a motion to dismiss on the grounds of *forum non conveniens* is ordinarily granted only where Defendant can show (1) that an adequate alternative forum exists, and (2) that the "private and public interests weigh heavily on the side of trial in the foreign forum." *Piper Aircraft v. Reyno*, 454 U.S. 235, 241, 254-55, 257-61 (1981). Defendant "bears the burden of persuasion on all elements of the *forum non conveniens* analysis." WRIGHT & MILLER § 3828.2. *See also Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947). Defendant fails to show an adequate alternative forum, including a showing that the courts of the alternative forum are competent and willing to hear the dispute, that dismissal will not deprive the plaintiffs of their day in court, and that the remedy provided by the foreign court would be adequate. *See Piper*, 454 U.S. at 254; *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985). Insofar as a proceeding in the PRC for these claims is not possible, Defendant cannot meet the first prong of the *forum non conveniens* test. *See, e.g.*, *Torture Account by Missing Rights Defense Lawyer Gao Zhisheng*, HUMAN RIGHTS IN CHINA (Feb. 8, 2009), http://www.hrichina.org/content/245; *Beijing Lawyers Beaten for Representing Falun Gong Case*, HUMAN RIGHTS IN CHINA (May 13, 2009),

http://hrichina.org/content/296;[34] U.S. DEPARTMENT OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (2006). Even if Defendant had properly addressed the "private and public interests," he still would not have met both prongs of the *forum non conveniens* test as set forth in *Piper*, 454 U.S. 235.

Finally, should the court find that Plaintiffs have incorrectly pled any claim, Plaintiffs seek leave to amend their complaint.

CONCLUSION

For the reasons set out in the above pleading, Plaintiffs hereby submit that Defendant's Motion to Dismiss be denied, and that the case proceed to consideration on its merits.

Respectfully submitted this 16th day of January 2012.

Signed,

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[34] Attorney Guo, a reputable criminal defense attorney in China was recently arrested and disbarred for his attempt to act as legal counsel to a Falun Gong practitioner in China. He is now in Canada and would be available to testify to this situation at trial. *See also Torture Account by Missing Rights Defense Lawyer Gao Zhisheng*, Human Rights in China (Feb. 8, 2009), http://www.hrichina.org/content/245; *Beijing Lawyers Beaten for Representing Falun Gong Case*, Human Rights in China (May 13, 2009), http://hrichina.org/content/296; U.S. Department of State, Annual Report on International Religious Freedom (2006). The reports cited represent only a small fraction of reports by Human Rights in China regarding attacks on lawyers attempting to defend the human rights of the Falun Gong.

CERTIFICATION

I hereby certify that on January 16, 2012, a copy of foregoing Plaintiffs' Opposition to Defendant's Motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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