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UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF CONNECTICUT

CHEN GANG, DOES 1-3, ZOU WENBO, AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

ZHAO ZHIZHEN & DOES, 1-5 INCLUSIVE,

Defendants.

Case No. 3:04cv01146(RNC)

Assigned to the Honorable Robert N. Chatigny, U.S.D.J.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

Action Filed: July 13, 2004
FAC Filed: Sept. 2, 2004
SAC Filed: August 16, 2011

On the Brief
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I. AMENDMENT IS FREELY GRANTED AND IS WARRANTED HERE

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend a pleading shall be freely given when justice so requires, and Defendant Zhao has failed to meet his burden to show futility or prejudice. *See Block v. First Blood Assocs.,* 988 F.2d 344, 350 (2nd Cir.1993); *Fox v. Board of Trustees,* 764 F.Supp. 747, 757 (N.D.N.Y.1991) (citing *Foman,* 371 U.S. 178, 182 (1962)) ("The obvious intent of that language is to evince a bias in favor of granting leave to amend"). In light of the court's wide discretion to grant a motion to amend the complaint, Defendant cannot meet his burden simply by rearguing all of the arguments he has presented to this court throughout the duration of this case. Defendant reargues a variety of points that were not addressed in the court's dismissal of the previous complaint nor implicated by the proposed changes in the Third Amended Complaint (TAC). *See, e.g.,* Defendant's Opposition to Motion to Amend (Def. Opp.), Dkt. No. 132 at 27, 30. Given that Plaintiffs drafted their previous complaint in accordance with pre-*Kiobel* doctrine, they request the opportunity to plead additional factual allegations in light of *Kiobel*. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2nd Cir. 2012) (holding that that the plaintiffs must have an opportunity to plead additional factual allegations in light of *Morrison*, to support their claim that the transactions at issue took place in the United States).

II. DEFENDANT'S MISCHARACTERIZATIONS SHOULD BE IGNORED

Defendant contends that the TAC proceeds by mere "speculation and presumption". Def. Opp. at 9. Yet this contention is itself unsupported and in fact relies almost entirely upon Defendant's own "speculation" as to the purported "real" facts of the case (i.e. a version more favorable to Defendant). In contrast to Defendant's arguments that ignore or rewrite the facts alleged by Plaintiffs, Plaintiffs rely upon the plausibly alleged, detailed facts set forth in their TAC: that Defendant directly and collaboratively participated in, caused, furthered and intended significant harms in China and the U.S.

A. Mischaracterization of the term *douzheng* and other relevant terminology

While now acknowledging the use of *douzheng* in "Chinese Communist parlance for decades," Def. Opp. at 38, Defendant continues to dispute the meaning of that and other Chinese Communist Party terms that have, and that Plaintiffs allege as having, specific relevant meanings

and immediate, foreseeable impact. Far from abiding by the rule that "allegations in the Complaint must be accepted as true", *Ganino v. Citizens Utilities Co.*, 228 F. 3d 154, 165 (2nd Cir. 2000), Defendant instead purports to tell the Court what the "term 'douzheng' […] actually means." Def. Opp. at 29.

Defendant's disputation of material facts must be ignored even at the Motion to Dismiss stage, and all the more so at the present Motion to Amend stage. Plaintiffs allege that the relevant Chinese terms used by Defendant (e.g. *douzheng*, *jiepi*, *chuli*, and *zhuanhua*) specifically convey the use of violence. For instance, Plaintiffs have alleged that Defendant's calls for the douzheng of Falun Gong are in fact calls to "totally eradicate" and suppress Gong believers via widespread or systematic false imprisonment, forced conversion, and torture, etc. TAC ¶2, 12, 38-39.[1]

These definitions and descriptions of the operation of the relevant terms constitute allegations of material fact, and as such are entitled to be construed in the light most favorable to Plaintiffs.

As stated in a prior filing to this Court, were the Court to find the disposition of the current Motion contingent on a preliminary factual determination of the actual meaning of the terms noted above, Plaintiffs would reiterate their request for an evidentiary hearing on this issue and are prepared to provide expert testimony on the precise meaning and operation of these terms within the context they were used. Defendant has had ample notice of this request, given that it was raised orally at the hearing on March 15, 2012, Dkt. No. 110, where Defendant declined to participate in a hearing on this matter. To insist now on Defendant's own version of these facts is not only inconsistent, it asks the Court to adopt a determination of fact without a hearing in a manner that would be highly prejudicial to Plaintiffs.

B. Inconsistent mischaracterizations of Defendant's speech either as "fact" or as mere "invective"

Contrary to Defendant's mischaracterizations of his speech as being either mere "invective" or as true and accurate "facts", Def. Opp. at 3, the TAC plausibly sets forth the ways in which Zhao's propaganda instigated, furthered, and resulted in violent suppression in China and severe, at times violent, rights deprivations, i.e. persecution, in China and in the U.S.

[1] The use of *zhuanhua*, which defines a key objective of such douzheng campaigns, refers to the "transformation" of target groups through violence and propaganda aimed at forcing members of such groups to renounce their religious beliefs. TAC ¶2. *See* Def. Opp. at 7-8, for the relevant definitions of *chuli* and *jiepi.* Finally, the authority enjoyed by Defendant and the circumstances in which he used the above terms were such that they constituted direct, immediate orders to conduct the violent acts described throughout the TAC.

In China, Defendant's propaganda instigated the violent persecution of Falun Gong via the Communist Party terminology noted above. *See* TAC §V.B. Defendant's propaganda was also disseminated to lend legitimacy to the violent suppression of Falun Gong in China through characterizations of believers as subhuman, demonic, psychopathic murderers and terrorists, and to deprive Falun Gong believers of consideration as rights-bearing citizens, entitled to the same civil (and human rights) accorded to the Chinese people under the Chinese constitution. *See, e.g., id*. ¶12 (Since 2001, Defendant and the CACA he founded, directed and controlled, developed brainwashing training material that emphasize both the need to (inter alia) to deprive Falun Gong of their rights in their local communities and the widespread denial of civil and human rights to Falun Gong adherents via harassment, threats, and ostracism based on their group identity.); *id.* ¶3 (Defendant additionally instigated civilians throughout China to isolate, hunt down and deprive of human rights and civil rights any Falun Gong adherents they could find). *See also id*. ¶¶4, 105-107, 111, 118-19, 246, 248.

As the newly alleged facts included in the TAC makes clear, Falun Gong believers in the U.S. including Plaintiffs were also deprived of their rights as a direct result of the anti-Falun Gong activities carried out by Zhao directly and in concert with and through the CACA and others in the United States. *See* TAC §VI.E. These include a campaign of violence and intimidation by local communities, (*id.* ¶¶184-92), and dehumanization and demonization of Falun Gong, resulting in their inability to enjoy their basic rights to self-expression, assembly, affiliation and practice of their religion. *Id.* ¶¶193-202. *See also id.* ¶¶119-20, 225-226, §§VI.C.1-2, F-H.

C. Failure to acknowledge facts alleging injuries suffered by US plaintiffs and caused by Defendant.

Defendant asserts that Plaintiffs do not allege any injuries in the U.S. that he proximately caused or any injuries at all outside of one battery. However, as Plaintiffs allege in the TAC, Defendant Zhao's anti-Falun Gong materials[2] widely distributed by CACA's "boots on the ground," the CACA website, and CCTV simulcast broadcasts of WRT programs broadcast under Zhao's direction — and accessed by Chinese U.S. residents routinely as their main source of information about China — instigated members of these U.S.-based Chinese communities to

[2] These include the materials Zhao authored, scripted, and produced no less than those he developed and disseminated collaboratively with others.

threaten, intimidate, dehumanize, and violently target Falun Gong believers residing in the US, thereby depriving them of their domestic and international rights. *See* TAC ¶182, 213. Defendant's responsibility is set forth in section VI of the TAC. Sections VI. B-D describe: his direct calls for the suppression of U.S. Falun Gong; his use of and collaboration with the CACA Board, Website staff, Delegations and US branch offices; and his collaboration with Chinese Media Apparatus operating in China and the United States to repress the Falun Gong believers residing on U.S. soil. In addition, section VI.E is devoted solely to the ways in which Defendant caused the *Sosa* violations that took place on U.S. soil.

Adherents in the U.S. have been continually verbally and often physically assaulted at the immediate instigation of materials and personnel representing the CACA under Zhao's direction and control, and particularly the CACA's library of content specifically targeting the United States. TAC ¶¶186-89. Several documentaries scripted by Zhao as part of his Light and Science Series have been broadcast 24/7 on WRT in China and (simulcast) on CCTV channel four in the United States with constant repetition of the same message, i.e., Falun Gong believers are garbage, demonic, no less lethal than viral epidemics, no less dangerous than 911 terrorists. *Id.* ¶¶93-100, 170-71. This coupled with the reiteration of the same misinformation about Falun Gong on the CACA website, by CACA delegations in the US and Party sources in China has instigated violent acts, threats, intimidation and other rights violations against Falun Gong in the US. *See id.* §§VI.C, E.

As a result of the widespread dissemination of materials by Zhao and his affiliates in the United States, Falun Gong adherents are commonly viewed as subhuman or demonic threats to society; they are frequently ostracized, stigmatized, subject to hate speech, intimidation, and violence and are barred from participating in civic activities such as parades, festivals and even the free use of public space. TAC § VI.E, ¶202.

4. Mischaracterizations of Plaintiffs and their religion that are unsupported, incompatible with the TAC and inappropriate.

Notwithstanding Plaintiffs' clear assertions that Falun Gong is a peaceful religion, *see*, *e.g.* TAC ¶¶1, 145, 196, Defendant has continually attempted to discredit Plaintiffs and their good-faith pleadings by means of denigration and unsupported mischaracterizations of their religious belief system.

Defendant repeats anti-Falun Gong invective that serves no other purpose but to demean and even to demonize the religion practiced by the Plaintiffs in this matter. *See*, *e.g.*, Def. Opp. at 1 ("evil cult led by Li Hongzhi"), 38 ("a cult that is prohibited by law in China"). Indeed, on the very first page of his submission, Defendant's counsel repeats the unsupported assertion that all Falun Gong believers are members of an "evil cult" and "suicide bomb[ers]"[3]—with the implication that this Court should deny them a fair hearing on the basis of their religious status. Defendant's subsequent argument is wholly premised upon the Court's acceptance of this false and demeaning characterization of a persecuted minority group.

Such language constitutes an inappropriate topic and method of argument with regard to the present proceedings. Accordingly, Plaintiffs respectfully request that Defendant refrain from all future denigration of Plaintiffs' religion.

III. PLAINTIFFS CLAIMS ARE NOT BARRED BY KIOBEL

A. Defining the Kiobel Presumption Against Extraterritoriality

Defendant's representations of the *Kiobel* presumption against extraterritoriality are neither persuasive, accurate nor fully presented. Def. Opp. at 17-20. Contrary to Defendant's argument, *Kiobel* does not flatly eliminate ATS jurisdiction for any and all "violations" of the laws of nations occurring partly or even largely outside of the United States. *Id*. at 17. To the contrary, the majority opinion ruled that ATS plaintiffs must meet a fact-sensitive test of whether "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659, 1669 (2013). Defendant cannot simply ignore this language, which forms the concluding section of the Supreme Court's opinion. As with the case-specific analysis in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court in *Kiobel* set out a test to be applied to the facts of an ATS claim arising out of ostensibly extraterritorial acts. All nine justices in *Kiobel* understood that ATS claims should be evaluated on a claim-by-claim basis; even if several disagreed on what standard should govern extraterritorial ATS claims, all agreed that the existence of a presumption does not end the judicial inquiry. A blanket rejection of all

[3] The appearance of this unsupported claim shows that Defendant's unfounded demonization of Falun Gong has not changed in the slightest. *See*, *e.g.* U.S House, Committee on Foreign Affairs, Subcommittee on Africa, Global Health, and Human Rights, *China's Latest Crackdown on Dissent*, Hearing, May 13, 2011 ("In China thousands of practitioners of the peaceful religion have been killed.").

extraterritorial claims would confuse a canon of statutory interpretation (whether the presumption even applies to the ATS) with the *application* of the statute-specific presumption to particular claims once the presumption is adopted.

Kiobel dismissed petitioners' claims in that case because "all the relevant conduct took place outside the United States." *Kiobel*, 133 S.Ct. at 1669. The Court explicitly left open how the presumption would apply to a case in which some of the conduct occurs in the US and some abroad.[4] *Id.* (articulating the "touch and concern" standard); *id*. (Kennedy, J., concurring) ("The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."); *id*. (Alito, J., concurring) (the Court's "['touch and concern'] formulation obviously leaves much unanswered"); *id.* at 1673 (Breyer, J., concurring) (the majority's standard "leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome'"). Justice Kennedy's concurrence – which represented the fifth vote for what would otherwise have been at most a plurality approach – emphasized that *Kiobel* is not limited to domestic claims but leaves open the possible application of the ATS for "human rights abuses committed abroad" in cases not covered by the "reasoning and holding" of *Kiobel. Id.* at 1669. The mandamus decision in *Balintulo v. Daimler AG*, 727 F.3d 174 (2nd Cir. 2013), on which Defendant relies, Def. Opp. at 17, explicitly declines to address the post-*Kiobel* viability of ATS claims such as the ones in this case, where Defendant conspired or aided and abetted violations that took place at least in part within the United States. *Id.* at 191 (noting that "the [*Kiobel*] Court had no reason to explore, much less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States") (emphasis original).[5]

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[4] The *Kiobel* majority never questioned the continuing viability of *Sosa* and foundational cases upon which *Sosa* relied, where at least some of the relevant conduct occurred outside of the United States. *See* 133 S. Ct. at 1663-65. *See also Sosa*, 542 U.S. at 732 (endorsing *Filártiga v. Pena-Irala*, 630 F.2d 876 (1980), which recognized ATS claim against a defendant who had committed torts in Paraguay); *id*. (endorsing *In re Estate of Marcos Human Rights Litig*., 25 F.3d 1467 (9th Cir. 1994), which recognized ATS claim for torts committed in the Philippines); *see also Kiobel*, 133 S. Ct. at 1665 (citing *Estate of Marcos*).

[5] Defendant also fails to note that *Balintulo* is actually a denial of mandamus, and any discussion of *Kiobel* is dicta. Def. Opp. at 17. Furthermore, Defendants rely on cases that provide no precedential authority and are in fact inapposite in this case. Defendant's motion is rife with citations to cases such as *Sarei v. Rio Tinto, P.L.C.,* 722 F.3d 1109, 1110 (9th Cir. 2013), cases without any alleged US conduct. While Defendant notes at least thirteen cases dismissed at least in part on *Kiobel* extraterritorial grounds, he fails to mention that none of these cases allege US conduct. Moreover, at least seven cases were brought by one plaintiff, filing in various forums against the Queen of England and other high-profile defendants. *See, e.g., Oluwashina Kazeem Ahmed–Al–Khalifa v. Queen Elizabeth II,* No. 5:13–CV–00103, 2013 WL 2242459 at *2 (N.D.Fla. May 21, 2013) ("[Plaintiff] seems to be seeking a forum

Courts since *Kiobel* have recognized the precedential value of the Court's "touch and concern" language, particularly in cases where some of the conduct occurs outside of the US. *See Sexual Minorities Uganda v. Lively*, --- F.Supp.2d ----, 2013 WL 4130756 at *15 (D.Mass. 2013) (allowing claims to proceed where "Plaintiff alleges that in concert with others Defendant—through actions taken both within the United States and in Uganda—has attempted to foment […] an atmosphere of harsh and frightening repression against LGBTI people in Uganda."); *Kaplan v. Central Bank of Islamic Republic of Iran*, --- F.Supp.2d ----, 2013 WL 4427943 at *16 (D.D.C. 2013) (recognizing that, in the touch and concern language, "the Court appeared to leave room for future cases in which the conduct took place outside the United States"); *Mwani v. Laden*, --- F.Supp.2d ----, 2013 WL 2325166 at *4 (D.D.C. 2013) (allowing claims by foreign plaintiffs against a foreign defendant for injuries that incurred abroad to proceed in part because "overt acts in furtherance of that conspiracy took place within the United States").

B. The Kiobel Presumption Does Not Incorporate the Morrison Focus Test

Defendants' analysis mistakenly assumes that the extraterritoriality analysis under *Kiobel* would be the same as that in *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869 (2010). *Kiobel* does not apply the *Morrison* presumption against extraterritoriality, because that presumption (1) ordinarily applies only to substantive law enacted by Congress; (2) either applies to the statute or not so that (unlike in *Kiobel*) application on the high seas defeats the presumption; (3) does not apply to jurisdictional statutes; (4) considers Congressional intent to determine whether a conduct-regulating statute applies abroad, (5) does not concern the circumstances in which federal courts will recognize federal common law causes of actions based on international law and (6) is not ordinarily applied on a case-by-case basis. Instead, in *Kiobel,* the majority opinion applied the "principles" underlying the presumption in what Chief Justice Roberts conceded is an atypical application of the usual presumption against the extraterritorial application of U.S. statutes. 133 S.Ct. at 1664. Thus, the manner in which these principles apply in other ATS settings, outside the "mere corporate presence" cases, is still to be determined.

Second, by referencing the "focus" test, Defendant appears to have adopted the view of

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that will allow these frivolous and meritless complaints to go forward. Success in that regard appears unlikely.") (compiling cases).

Justice Alito, whose two-person concurrence is the only part of *Kiobel* to even mention such a test, which in his view required "domestic conduct [] sufficient to violate an international law norm". 133 S. Ct. at 1170. The *Kiobel* majority cites *Morrison* to ascertain whether the presumption applies to a statute in the first place, but does not quote from any of the guidance in *Morrison* to discern whether a particular claim displaces the presumption. Rather, *Kiobel* provides a new test: whether "the claims touch and concern the territory of the United States […] with sufficient force to displace the presumption against extraterritorial application." 133 S. Ct. at 1669. Moreover, the Alito view conflicts with *Sosa,* 542 U.S. at 754, 763; yet nothing in *Kiobel* purports to narrow *Sosa*. Nonetheless, Plaintiffs could meet even Justice Alito's minority standard: the domestic conduct furthered by the Defendant violates Sosa norms, including persecution as a crime against humanity; and as indicated in the TAC these violations arose from the same acts that gave rise to harms previously alleged by Plaintiffs.

Third, even if that test were deemed useful as part of a "touch and concern" analysis, the "focus" of the First Congress in passing the ATS was to fulfill U.S. responsibility to vindicate the law of nations, including ensuring that the United States would provide redress when U.S. residing aliens were subjected to violations of international law. In his treatise *Law of Nations,* which laid the foundations of modern international law, Emmerich de Vattel stated this rule clearly: "[A]s soon as he admits [foreigners], he [the sovereign] engages to protect them as his own subject, and to afford them perfect security, as far as depends on him. Accordingly we see that every sovereign who has given an asylum to a foreigner, considers himself no less offended by an injury done to the latter, than he would be by an act of violence committed on his own subject."[6]

C. The Claims in this Case Touch and Concern the United States.

Extraterritoriality appears to be a merits question, *see Kiobel*, 133 S. Ct. at 1664.[7] *Kiobel* confirmed that the ATS is a "strictly jurisdictional" statute and, as such, "does not directly

[6] *See* Emerich de Vattel, *Law of Nations* §703. *See also id.* at 99 ("[The state retains jurisdiction with respect to] [t]he empire, or the right of sovereign command, by which the nation directs and regulates at its pleasure every thing that passes in the country [tout ce que se passe dans le païs].").

[7] Even treating it a jurisdictional question would not foreclose a fact- sensitive inquiry, as there other jurisdictional standards requiring assessment of particular facts. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg*., 545 U.S. 308 (2005) (arising under jurisdiction); *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (corporate citizenship); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*., 513 U.S. 527, 534 (1995) (maritime jurisdiction).

regulate conduct or afford relief." *Id*. Rather, conduct in ATS cases is regulated by common law causes of action, *id.* at 1664, and as such the "presumption against extraterritoriality applies to *claims under* the ATS"; it does not apply to the ATS itself, *id*. at 1669 (emphasis added). *See also id*. at 1665 ("[T]he question is whether *a cause of action under the ATS* reaches conduct within the territory of another sovereign.") (emphasis added). In *Morrison*, the Supreme Court explained that asking whether the presumption against extraterritoriality applies implicates "what conduct [a statute] prohibits," which is "a merits question"; it does not relate to the court's "power to hear [the] case." 130 S. Ct. at 2877. Whether the Kiobel presumption is viewed as a merits question or a jurisdictional question, the claims in this case touch and concern the United States with sufficient force.

As set forth in Plaintiffs' Motion for Leave to Amend, U.S. courts have long recognized legal principles that allow liability for claims originating abroad which nonetheless have important effects with the United States. "[I]t is settled law […] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *United States v. Aluminum Co. of Am*., 148 F.2d 416, 443 (2nd Cir. 1945), referenced in Plaintiffs' Motion to Amend (MtA) at 11. This principle – allowing claims to proceed based on effects in the United States (or where failure to apply laws extraterritorially will have negative effects in the United States) — has been uniformly applied across legal contexts, including tort, criminal law, unfair competition, antitrust, and Racketeer Influenced and Corrupt Organizations (RICO) cases, where it is typically referred to as the *direct, substantial, and reasonably foreseeable effects* test. *See* MtA at 12 (collecting cases). In this case, Defendant has actively sought – and repeatedly acknowledged his aim – to give rise to substantial effect within the U.S., and specifically to eradicate a U.S. minority group, Falun Gong. *See*, *e.g.*, TAC ¶171. Falling short of this goal, Defendant was nonetheless able to cause severe and prolonged deprivations of rights as well as acts of intimidation and violence (*see*, *e.g.*, *id.* ¶¶186-89). These and related detrimental effects more than justify application of the ATS.

Although Plaintiffs analogized several cases based upon this principle to the wide range of newly alleged facts set forth in the TAC, Defendant has elected to ignore all of these cases, the tests they require and the relevance of the newly alleged facts, including virtually all of

Plaintiffs' allegations demonstrating that the injuries that resulted directly from Defendant's (collaborative and other types of) conduct in China were also specifically directed towards and felt in the United States. See MtA at 11-16; *see also* TAC §VI.E.[8]

The application of the "direct, substantial, and reasonably foreseeable effect" test in this case is similar to that applied in *Caribbean Broadcasting System, Ltd.v. Cable & Wireless P.L.C.,*148 F.3d 1080 (D.C. Cir. 1998), in which the court reversed the district court's denial of a motion to amend by the owner of a foreign radio station against a foreign competitor for its anti-competitive actions in the Caribbean. The court found that plaintiffs sufficiently alleged that the relevant conduct had a "direct, substantial, and reasonably foreseeable effect" on US companies that are customers in that advertising market, even if plaintiffs themselves were foreign. *Id*. at 1086 (holding that, in this case, "the location of the suppliers is not relevant to whether the plaintiff has alleged an effect upon U.S. domestic or import commerce"). Similarly in this case, that many of the plaintiffs are foreign does not diminish the fact that Defendant's repressive campaign against Falun Gong had a direct, substantial, and reasonably foreseeable effect on the rights and welfare of US residents and citizens. Defendant's campaign against plaintiffs caused actual harm of a similar nature to US residents across the country, in particular the crimes against humanity enumerated in the TAC ¶¶181 -202, §VI. E.

Defendants similarly ignore cases allowing claims to proceed based on primarily foreign conduct specifically directed to give rise to injuries on US territory. *See* MtA at 11-21, analysis of *Mwani v. Bin Laden*, CIV.A. 99-125 JMF, 2013 WL 2325166 (D.D.C. May 29, 2013), a case which allowed claims to proceed against a foreign plaintiff for foreign injuries to foreign defendants because 1) defendant allegedly acted with the intent of "harming this country and its citizens", and 2) although defendant never entered the United States, "***overt acts in furtherance of that conspiracy took place within the United States.***" *Id*. at *2-4 (emphasis added). The TAC details at length how Defendant acted with the intent of harming this country and its citizens and residents; especially anyone affiliated with the Falun Gong religion in Chinese communities in the United States. *See* TAC §§VI.B-G. Moreover the extension into the U.S. of violent religious persecution against an American minority group – particularly one dedicated to

[8] The piecemeal application of labels such as speculative, general, and conclusory to specific allegations without attention to context and their significance in relation to the section in which they appear, does not demonstrate that they are conclusory. See *infra* at § VII.B.

absolute pacifism and non-violence – is a threat both to the practical interests of this nation and its most fundamental values of tolerance and pluralism. *See id.* ¶¶145, 147-52, 161-66, 178-79. International law similarly allows for US courts to adjudicate claims involving conduct occurring abroad which includes the intent to affect the state and its residents, and actual effects in the state arising therefrom. *See* discussion of cases in MtA at 21-23. As noted in the Motion to Amend, Defendant Zhao not only intended to extend his persecutory campaign against Falun Gong into the United States, but it was foreseeable that the campaign would be felt in US Chinese communities. Moreover, as described above, US citizens and residents, including Plaintiffs, were subjected to persecution as a crime against humanity and other abuses in the United States as the proximate result of Defendant Zhao's global campaign. Under international legal principles, Defendant's repressive campaign touches and concerns the United States with sufficient force.

In spite of the relevance of both U.S. and international law to the issue before the court, Defendant has ignored these cases, the principles they enunciate and the TAC facts they implicate. As a result, he has failed to refute the ways in which several claims touch and concern the United States under the TAC, including:

1. *Persecution as a Crime Against Humanity (CAH)*

As Plaintiffs set forth in their MTA and as could be set forth in far more detail in supplemental pleadings or in an Opposition to a Motion to Dismiss, persecution as a CAH touches and concerns the US with sufficient force: first, the same nexus of facts orchestrated by Defendant and his cohorts in China gave rise to persecution in the U.S. (*see*, *e.g.* TAC ¶¶4, 119, §VI.E) and in China (*see*, *e.g. id.* ¶¶12, 32, 34, 105-06, 117); second, domestic and foreign conduct was carried out specifically to subject Plaintiffs and the group they represent in China and in the U.S. to the very same effects, i.e., persecution as a CAH, and such effects did in fact arise. Plaintiffs allege that they "have been deprived of their fundamental rights to religious freedom and the freedoms of belief, association, assembly, and self-expression" through specific acts of violence, intimidation, threats, and demonization orchestrated by Defendant and carried out by or with his subordinates and affiliates in the United States and in China. *See id.* ¶¶184-89; *see also id.* ¶¶3, 4, 12, 105-107, 111, 118-119, 246, 248. Moreover, Defendant intended these U.S. effects and sought to bring them about. *See, e.g., id.* ¶¶130-34; 204-212.

2. *Crimes Against Humanity*

In the same fashion, CAH touches and concerns the US with sufficient force because the same nexus of facts gave rise to CAH in China and in the US (although the CAH causing injuries in China manifests in more forms than in the US), and because domestic and foreign conduct was carried out specifically to subject Plaintiffs and the groups they represent to these crimes. Just a few of the specific facts alleged in the TAC to support this claim include that Defendant "organized dozens of hate rallies and disseminated hundreds of violence-inducing speeches, posters, videos," including the simultaneous transmission in the U.S. of his anti-Falun Gong materials from China, and that these activities directly and immediately led to acts of "beatings[,] dehumanizing insults," and ostracism from the community, and finally that specific acts of violence were also the direct result of Defendant's conduct both personally as noted above and via U.S.-based CACA affiliated organizations. TAC §VI. E. In both China and the U.S., Defendant called for, directed, and aided the above conduct, carried out for the sole purpose of "attack[ing] his 'enemies' in the peaceful Falun Gong religion." *See, e.g., id.* §V, VI.

3. Life, Liberty, Security, Assembly and Association/Thought Conscience/Religion

The same conduct, discussed *supra*, constitutes specific interference with the rights of life, liberty, security, and assembly and association, as well as corresponding internationally protected norms of freedom of belief, conscience and expression. Plaintiffs were unable to freely enjoy any of these rights in China or in the U.S. under the atmosphere of intimidation, violence, and insecurity created by Defendant's collaborative and direct conduct. *See e.g.*, TAC §VI. E, ¶¶204-212, 244-248.

IV. US CLAIMS ALSO TOUCH AND CONCERN THE US BECAUSE DEFENDANT PROXIMATELY CAUSED THE U.S. INJURIES.

As Plaintiffs' MtA makes clear, Zhao's conduct proximately caused US Falun Gong believers including Plaintiffs and the class they represent to suffer, *inter alia,* persecution as a crime against humanity, CAH, deprivations of Life, Liberty, Security, Assembly and Association and Freedom of Thought, Conscience and Religion.

Contrary to Defendant's mischaracterization of TAC allegations, the TAC does allege that he substantially assisted the violations and that he did so intentionally under the "purpose" standard set forth in *Talisman v. Presbytarian Church of Sudan*, 582 F.3d 244, 247 (2nd Cir. 2009). For example, the conduct Zhao carried out himself and in concert with others was

specifically aimed at suppressing Falun Gong believers in the U.S. *See*, *e.g.*, TAC §§VI.B-C, ¶¶204-17. His own explicit statements repeatedly make this clear. *See, e.g., id.* ¶¶207-10. While some of this conduct was carried out collaboratively with and through colleagues and employees at CACA, the CACA website, and other Party-controlled entities including the entire propaganda apparatus (*see*, *e.g.*, *id.* §VI.D), much of this conduct was carried out by Zhao himself, as set forth especially in the TAC at §§VI.B-C. For further detail regarding his substantial assistance and furtherance of the alleged abuses as well as his alleged *mens rea,*[9] see MtA at 23-24.

The TAC allegations of Defendant's explicit intent to bring about the successful implementation of the conspiracy/JCE common plan, in the form of depriving rights to Falun Gong adherents in the U.S. such as the U.S.-based Plaintiffs in this matter, are summarized in the MtA at 18-20. For further detail regarding overt acts Zhao engaged in furtherance of the deprivation of rights of Falun Gong adherents in the U.S., see MtA at 19. The ways in which he directly and in collaboration with CACA and others attempted to and effectively instigated the alleged incidents of violence and other rights deprivations is set forth summarily in the MtA at 20-21. *See* TAC §§VI.C-H.

Defendant argues that because Zhao did not occupy "a position in the state security or prison hierarchy," and is "not a government official," he was not in any possible position of "command or superior responsibility." Def. Opp. at 30 n.9. Given the number of liability theories alleged by Plaintiffs, command responsibility is not dispositive.

Nonetheless Plaintiffs do sufficiently allege command responsibility in their TAC. *Inter alia,* Defendant's brief ignores the authoritative role of the Chinese Communist Party in the *douzheng* campaign against Falun Gong, as well as Zhao's use of his high rank within the Party and propaganda apparatus to intentionally suppress Falun Gong. As alleged in TAC §V.A, Zhao was an agenda-setting propagandist within the CCP, and an influential member of the Department of

[9] Defendant's comparison of the case at bar to *Liu Bo Shan*, 421 Fed. App'x 89 (2011) is inapposite. The assistance provided here is more substantial for several reasons. First, the Defendant here is more powerful, and his activities have a broader effect on the persecution – his propaganda was broadcast nationwide in China and throughout the Chinese diaspora in the United States. Insofar as both audiences look to Chinese media for their news and information, Defendant's propaganda that was broadcast on major Chinese television stations and websites was virtually unavoidable. Second, the defendant in *Liu Bo Shan* committed one isolated act that (without intent) furthered abuse; the Defendant here is engaged in a plethora of activity, all designed to further a widespread, violent persecutory campaign. Third, Plaintiffs here are not merely arguing "but for" causation or "encouragement and support;" rather, Plaintiffs argue that Defendant devoted his activities to a widespread, concerted effort dedicated to furthering the persecution of the plaintiffs, and that he was part of the initial anti-Falun Gong conspiracy or JCE, and that his actions contributed significantly to the persecutory campaigns in both China and the United States.

Propaganda, which exercises total control over all public media in China. *Id.* ¶¶46-49.[10] Zhao directed and exercised editorial control over the making of several polemics calling for a violent political crackdown against Falun Gong, *id.* ¶¶54-55, 176-79, and used his personal influence and authority within the Party media/propaganda apparatus, the CACA and CACA branches to further the persecution and other alleged abuses in the United States and in China. *Id.* §§VI.A, B, H. Zhao played a key role in the initiation of the violent campaign, and used his rank within the Party and the media apparatus to broadcast and disseminate his anti Falun Gong message in China and in the United States. *Id.* §VI. D, ¶¶55, 128-130.[11]

V. U.S. INJURIES, PROXIMATELY CAUSED BY DEFENDANT, VIOLATE *SOSA* NORMS

Defendant contends "Plaintiffs fail to allege with specificity any violations of international law that occurred in the United States." Def. Opp. at 25. However**,** widespread persecution of a religious minority constitutes a crime against humanity that unquestionably violates international norms. The Rome Statute defines Crimes against Humanity to include "[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"). Persecution that rises to the level of a crime against humanity has repeatedly been held to be actionable under the ATS. *See Talisman,* 582 F.3d at 256; *Flores v. Southern Peru Copper Corp.,* 414 F.3d 233, 244 n. 18 (2nd Cir. 2003); *Kadić v. Karadžić,* 70 F.3d 232, 236 (2nd Cir.1995).

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). To properly plead persecution as a crime against humanity, Plaintiff must allege both the

[10] The Party's Department of Propaganda exercises total control over all public media in China, especially journalism, and vigilantly exercises ideological supervision over all journalistic output. *Affidavit of Professor Eugene Perry Link, Jr.* ¶2. Because of Zhao's undeniable success in rising to a high position within the Party-controlled media system, he had clearly developed "an ability to manipulate words with more attention to whether they are politically correct than to whether they are true." *Id.* ¶4. Moreover, Zhao's superiors in the Chinese Communist Party required that he utilize this ability, and his editorial control over various forms of media, to protect their political power and the hegemony of the Communist Party as a whole. *Id.* ¶7.

[11] Several of the Defendant's collaborators have been marginalized, ousted from the Party and/or subjected to criminal sanctions. The Spanish National High Court has issued an arrest order against Jiang Zemin; Bo Xilai has been sentenced to life imprisonment; and Zhou Yongkang is at the center of a high profile criminal investigation. Further, policies and tactics relevant to this case have been abolished, including the Re-education through Labor system.

proper *actus reus*—denial of fundamental rights—and *mens rea*—the intentional targeting of an identifiable group. *Sexual Minorities Uganda*, 2013 WL 4130756 at *8. Defendant does not contest that persecution fits squarely within the definition of crimes against humanity and is an independent violation of the law of nations. Moreover, as noted *supra* in Section III.C, Plaintiffs have sufficiently alleged that such widespread violations took place within the United States.

The court can thus exercise subject matter jurisdiction over Plaintiffs' claims of persecution as a crimes against humanity. Plaintiffs' Opposition to the Motion to Dismiss (Opp. to MtD), Dkt. No. 97 at 12-15, explains how the other causes of action are based on violations of international law that meet the Supreme Court's subject matter jurisdiction requirements in ATS actions.

VI. THE FIRST AMENDMENT IS NOT RELEVANT TO THIS CASE

Defendant's First Amendment argument is not properly before the Court. Even if it were appropriate to raise First Amendment concerns during this phase of the litigation, Plaintiffs have previously responded to Defendant's arguments that the actions in this complaint that are directed at Chinese residents are protected "in all but the narrowest of circumstances under the First Amendment to the U.S. Constitution." Def. Opp. at 31.[12]

Defendant also argues that the First Amendment applies because "the new claims specifically identify speech that indisputably originates in China as allegedly inciting actions in the United States." Def. Opp. at 31. Even with U.S. effects, however, the First Amendment 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).[13] Speech that aids and abets the alleged criminal or illegal conduct[14] is beyond the protection of the First Amendment. See Plaintiffs' Opp. to MtD at 36. Speech that solicits illegal conduct is similarly not protected. *See, e.g.*, *U.S. v. White*, 610 F.3d 956, 960 (7th Cir. 2010) (speech "integral to solicitation" is unprotected regardless of its practical effect).

Even if the First Amendment were to apply to the US conduct, and even if it were

[12] See relevant discussion in Plaintiffs' Opp. to MtD at §IV.

[13] "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).

[14] Illegal acts include far more than a single battery. In addition to the criminal conviction of one of Zhao's CACA subordinates, other CACA subordinates have threatened Falun Gong believers in the U.S. including plaintiffs with violence, engaged in hate crimes under 18 USC §§241, 247, and other analogous acts.

necessary to analyze its content under *Brandenburg v. Ohio*, 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." 395 U.S. 444, 447 (1969). 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). 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*. 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, Defendant's speech – explicitly advocating violence against Falun Gong practitioners in widespread media outlets in the midst of a persecutory campaign against Falun Gong in the U.S. and in China – constitutes incitement. CCTV-4 and other CCP-controlled media channels broadcast Defendant's programs 24/7, and these stations are often the sole source of information for many Chinese diaspora communities who continue to regard CCP's media channels as authoritative. *See* TAC ¶¶170-75. CACA branch leaders working closely with local diaspora leaders also distributed Defendant's materials widely on a daily basis in centers of the Chinese community. *Id.* ¶¶148-50, 163-66, 199-202. This renders the violent action even more proximate and imminent than in *Rubin*. *See also United States v. Sattar,* 272 F. Supp. 2d 348, 373-74 (S.D.N.Y. 2003) (finding sufficient an indictment where the alleged solicitation consisted of a generally issued fatwa urging Muslims to "fight the Jews and to kill them wherever they are"); *United States v. Rahman*, 189 F.3d 88, 117 (2nd Cir. 1999) (upholding conviction of soliciting violence based on public speeches calling for an attack on military installations and the murder of an Egyptian president). The First Amendment does not protect Defendant's incitement of violence against Plaintiffs.

Defendant attempts to distinguish *Sexual Minorities Uganda,* 2013 WL 4130756, in which the court found the First Amendment no bar to claims against a U.S. Defendant for directing from the U.S. a campaign of repression against the LGBT community in Uganda. Defendant asserts that *Sexual Minorities Uganda* contains "far more specific allegations of illegal conduct" than those plead in the TAC. Def. Opp. at 37. But Plaintiffs have pled highly specific allegations of illegal conduct comparable to the *Sexual Minorities Uganda* claims of

"management of actual crimes—repression of free expression through intimidation, false arrests, assaults, and criminalization of peaceful activity and even the status of being gay or lesbian." 2013 WL 4130756 at *21. Defendants and his co-conspirators created a conspiracy/JCE to deprive Falun Gong practitioners of their rights. *See* TAC §§VI.A, E, G. For example, Defendant collaborated with CCP leaders and U.S. diaspora leaders to violently suppress and deny rights to Falun Gong practitioners including repression of free expression and peaceful protest through intimidation and assaults, and obstructing the free exercise of religion. *See, e.g., id*. §§VI.A, C.3, using his influence and authority within the Party/media apparatus to carry out the common plan both within and outside of China, *see, e.g.*, *id*. ¶¶78, 146, 180-82, 215, 226, and directing CACA branch offices in the US as "boots on the ground" for anti-Falun Gong activities. *See, e.g.*, *id.* §VI.C.3, ¶¶134, 213, 225.[15]

VII. THE OPPOSITION BRIEF FAILS TO DEMONSTRATE HOW A GRANT OF PLAINTIFFS' MTA WOULD PREJUDICE DEFENDANT; NOR HAS HE DEMONSTRATED FUTILITY.

A. Defendant fails to demonstrate prejudice.

The most important factor considered by Courts in the context of a MtA is whether the opposing party will be prejudiced; conversely if the court is persuaded that no prejudice will accrue, the amendment should be allowed. This determination – based on an inquiry into the hardship to the moving party if leave is denied, the reasons for the moving party's failure to include the material to be added in the original pleading, and the injustice resulting to the opposing party – weighs in favor of a grant of Plaintiffs' Motion to Amend.

As indicated above, Defendant has not met this prong of the analysis. Defendant had no reason to be surprised by Plaintiffs' request to amend in light of the Supreme Court's grant of certiorari in *Kiobel* and especially its shift from an examination of the initial issue, i.e. corporate liability, to the broader issue of the extra-territoriality under the ATS. *Muto mutandis*. Plaintiffs' failure to include facts that support a displacement of the *Kiobel* presumption is due solely to their irrelevance prior to the issuance of the *Kiobel* Opinion in May 2013. Counsel would also note that this Court was already deliberating a Motion to Dismiss before *Kiobel* was decided, and

[15] Defendant also attempts to distinguish *Sexual Minorities Uganda* by arguing that discovery would be more "problematic" for Defendant in the PRC. But the allegations set forth in the TAC include enough fact to reveal evidence of illegal agreement or "raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *Twombly,* 550 U.S. 544, 556 (2007).

at that time it would have been out of order to file a motion to amend based on what *Kiobel* may or may not opine.

Plaintiffs have completely annotated the TAC with detailed facts that support each and every allegation. As a result, Plaintiffs' discovery requests based on newly alleged facts would be minimal. Moreover, since the experts, lay witnesses and issues remain unchanged but for the expansion of the CAH claim to include acts carried out in the US with US effects, the trial will not be significantly complicated by the addition of the newly alleged facts.

B. Defendant has conflated the motion to amend and motion to dismiss standards.

As also indicated *supra*, Defendant has not demonstrated futility and has instead asked this Court to rely on motion to dismiss standards, but several courts agree that the substantive merits of a claim, i.e., the plausibility inquiry required for a motion to dismiss under 12(b)(6), should not be considered on a motion to amend. 6 FED. PRAC. & PROC. CIV. §1487 n.23 (3rd ed.) (collecting cases). Many sources that do address the merits have limited a so-called "merits inquiry" to ensuring that the proposed amendments (1) are not frivolous, (2) advance a legally sufficient claim, or (3) include allegations that cure the defects identified by the court in the original pleading. *Id*. n.24-25. As indicated in the MtA, and to a lesser extent here, Plaintiffs allegations are not frivolous; they are legally sufficient in that they allege claims under well-recognized legal frameworks; and they cure the sole defect identified by this Court in its dismissal of Plaintiffs' SAC, in that the allegations demonstrate that, among other claims, persecution as a CAH and CAH itself touch and concern the US with sufficient force to displace the *Kiobel* presumption (see argument above; see also MtA). Since our proposed amendments are not frivolous, do not advance a claim that is legally insufficient or fail to cure the defect, the court should grant leave.

Even if the Court were to evaluate the TAC under the "plausibility" standard, Defendant has misapplied that standard by, *inter alia*, singling out words or paragraphs in the TAC as conclusory without regard to the detailed allegations included in other paragraphs in the sections in which they appear. Contrary to Defendant's contentions, Plaintiffs have alleged sufficient facts to demonstrate the Defendant's liability for the human rights abuses suffered by Plaintiffs by virtue of aiding and abetting, conspiring in, and exercising command responsibility over their commission. *See* Plaintiffs' Opp. Br. to MtD at 15-16. *Muto mutandis*. The proposed TAC

similarly alleges sufficient facts to demonstrate the Defendant's liability for the abuses suffered by Falun Gong believers in the U.S. including Plaintiffs and the class they represent. *See, e.g.,* TAC §VI, and especially, *id.* §§VI.E (harms suffered by Plaintiffs as a result of Defendant's conduct), VI.F (Defendant's aiding and abetting liability), VI.G (Defendant's conspiracy/JCE liability), VI.H (Defendant's liability through subordinates *et al.*).[16]

VIII. DEFENDANT'S LEGAL CONCLUSIONS ARE CUMULATIVELY BASED ON DEFENDANT'S MISCHARACTERIZATIONS

Defendant relies upon his mischaracterizations of "*douzheng*", other relevant terminology, U.S. conduct and injuries, and Defendant's Communist Party authority (*see generally supra* §I.A), to argue that Plaintiffs' allegations cannot be the basis for a reasonable inference of liability. Def. Opp. at 29. The greater part of Defendant's argument depends on a step-by-step construction of his own version of the facts, which he presents as more "accurate" than that put forward by Plaintiffs in their TAC; he improperly asks the Court to subscribe to this roughly-sketched alternative version of the facts in order to deny the Motion to Amend.

Defendant's mischaracterization of his speech as benign, sarcastic, accurate or at worst, a form of mere invective, form the bases of several inaccurate claims including, e.g., that his speech is protected by the First Amendment, that the U.S. conduct or injuries do not give rise to violations of Sosa norms, that Defendant did not aid and abet the abuses alleged, and that the claims do not touch and concern the territory of the United States. Thus, based on his contention that Zhao's "Cultural Revolution-style" language is at best merely "sarcastic" (Def. Opp. at 29), Defendant ignores numerous relevant sections of the TAC that demonstrate how the Defendant's speech and conduct instigated and resulted in Plaintiffs' injuries including those on U.S. soil. *See, e.g.*, TAC §VI.F; MtA at 23-24.

Defendant's mischaracterization of the *U.S. effects* as no more than "a hostile attitude towards Falun Gong practitioners and the decline in public approval of the Falun Gong in the United States among Chinese-Americans" further allows Defendant to conclude that the US Falun Gong community including Plaintiffs was not subjected to the alleged physical attacks, intimidation, and disruption of religious services, peaceful protests/assemblies, and basic

[16] Moreover, it would be error for a court to deny a motion to amend "for failure to state a claim" without discussing "other principles governing motions to amend, e.g., that motions to amend should be granted freely in the interests of justice." *Grullon v. City of New Haven*, 720 F. 3d 133, 140 (2nd Cir. 2013).

personal security; in other words he denies that the TAC alleges such international law violations in the U.S. Def. Opp. at 27.

Defendant similarly attempts to replace highly specific allegations regarding Defendant's role in "transformation *via torture*" with mere generalized "speech [that] allegedly advocates deprogramming". Def. Opp. at 33-34. By doing so, he introduces irrelevant legal precedents regarding "abstract teaching of Communist theory" as if such cases were relevant to the specific "transformation via torture" aided and abetted by Defendant here. *See e.g. Noto v. United States*, 367 U.S. 290 (1961) (a 1961 case involving facts tangentially related to non-Chinese Communist indoctrination practices).

More generally, the Defendant's assertion that the TAC's claims are argued improperly "at a high level of generality" is based on a description of the complaint as he has rewritten it. Through mischaracterizations and discounting of major sections of the TAC, the Defendant proposes unsupported conclusions. Def. Opp. at 21.[17]

IX. NEWLY ADDED PLAINTIFFS AND STATE LAW CLAIMS

Defendant asserts that Plaintiffs have not satisfied the test to allow the new claims to relate back to the original complaint. However, he does not explain any statute of limitation concern, and even if he did, there is no statute of limitation covering crimes against humanity. *See, e.g., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970. Therefore, Plaintiffs' CAH claims do not need to comply with Federal Rule of Civil Procedure 15(c), which governs relation back.

Defendant further argues – against the facts of the TAC – that the only link between old and new plaintiffs is that "they are members of Falun Gong." Def. Opp. at 46. Yet Plaintiffs allege in the TAC that new Plaintiffs were also harmed by the same set of acts originally alleged against Defendant: namely, Defendant's campaign to violently suppress and deny rights to Falun Gong practitioners, orchestrated by Defendant in collaboration with other Party leaders both

[17] For example, Defendant ignores the relevant highly-detailed facts cited by Plaintiffs regarding Defendant's role in furthering the violations of Sosa norms on U.S. soil through the CACA as alleged in TAC §VI.C, E. Dismissing these facts as "speculation", Defendant contends that "Plaintiffs allege simply that the CACA website 'characterized' the CACACA as a branch office or affiliate." Def. Opp. at 9. In fact, Plaintiffs use several specific allegations to support the CACACA's role within the CACA organizational structure, including its direct participation in and furthering of the CACA's anti-Falun Gong mission through U.S. based anti-Falun Gong activities detailed in the TAC. *See*, *e.g.*, TAC ¶¶161-66.

directly and through control of the CACA and its website and collaboration with the Party's media apparatus. From the beginning, Defendant's campaign aimed for the global suppression of Falun Gong, *see* TAC ¶¶130-35; and as Falun Gong believers are primarily based in the United States, the newly alleged harms in the U.S. were the "[n]atural offshoot of the basic scheme" alleged in the original pleading. *Sokolski v. Trans Union Corp*., 178 F.R.D. 393, 398 (E.D.N.Y. 1998) (internal citation omitted). Providing more examples of the victims of Defendant's same basic conduct, TAC §VI, does no more than "amplify the facts alleged in the original pleading or set forth those facts with greater specificity," and relate to the same "basic scheme." *In re Chaus Sec. Litig.*, 801 F. Supp. 1257, 1264 (S.D.N.Y. 1992); *Green v. Wolf Corp*., 50 F.R.D. 220, 224 (S.D.N.Y. 1970) ("Rule 15(c) analysis should be focused upon the general wrong and conduct complained of in the original pleading").

Because amendments are targeted solely toward the newly significant issues raised by *Kiobel*, i.e. greater detail about alleged harms and acts in the United States as a result of the same conduct, Defendant "will not suffer undue prejudice as a result of these amendments." *LeBlanc v. Cleveland*, 248 F.3d 95, 100 (2nd Cir. 2001) (internal citation omitted). In fact, regardless of whether the court views the *Kiobel* presumption as one of jurisdiction or merits, these types of curative amendments are routinely found to relate back. *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, 241 F.3d 154, 163 (2nd Cir. 2001) ("amendments to cure subject matter jurisdiction relate back."); *Chaus*, 801 F. Supp. at 1263. This is particularly true where, as here, a court dismisses the complaint with leave to amend. *Chaus*, 801 F. Supp. at 1263 (citing 6A FED. PRAC. & PROC. CIV. §1497 (3rd ed.)) ("[I]f a motion under Rule 12(b)(6) is granted with leave to amend, the new pleading will speak from the time of the original complaint.").

X. OTHER MATTERS

Plaintiffs' allegations easily satisfy the basic elements of the §1985(3) claim. TAC ¶¶265-268. Contrary to Defendant's assertion, Plaintiffs have also alleged facts to show a "class-based, invidiously discriminatory animus" to deprive Plaintiffs of rights protected against private encroachment. Def. Opp. at 39. Defendant and his co-conspirators' demonization of Falun Gong and calls for the *douzheng* of the peaceful practice demonstrate that they acted out of a class-based animus. *See, e.g.*, TAC §VI.C.1. While Second Circuit law is still unsettled as to

the scope of rights protected against private encroachment under section 1985(3),[18] insofar as the Defendant's direct or collaborative conduct has interfered with U.S. Plaintiffs' right to *intrastate* travel, it is among those rights recognized in *Spencer v. Casavilla*, 903 F.2d 171, 176 (2nd Cir. 1990) (finding attackers of black man could be found to have violated his "right to travel from place to place within New York State without being subjected to a racially motivated attack.").[19] Plaintiffs have alleged that they have been assaulted, threatened by mobs and physically intimidated on public streets in Chinese communities across the United States as a result of Defendants and his co-conspirators' activities. *See* TAC ¶¶184-92. Such actions similarly violate Plaintiffs' right to travel freely to and within Chinese communities without being subjected to attacks, and support a claim under §1985(3).

Contrary to Defendant's contentions, Defendant was also on notice regarding such parallel municipal claims as assault, wrongful death and wrongful imprisonment. The first complaint filed by Plaintiffs on July 13, 2004 included assault and battery as parallel municipal claims, putting Defendant on notice that Plaintiffs were including claims of this sort. *Muto mutandis.* Plaintiffs' frequent reference to persecution as a CAH in their Opp. to MtD, also put Defendant on notice as to that claim.[20]

While Plaintiffs would submit that the ATS and TVPA claims are sufficiently pled, even if this Court were to dismiss the federal claims, the TAC alleges diversity jurisdiction. TAC ¶7.

Defendant's contentions regarding the First Amendment, immunity, jurisprudential matters (Act of State, Comity and the Political Question) are not properly before this court. In any event, they have been addressed by Plaintiffs in the Opp. to MtD. Defendant's contentions regarding "under color of law" violations are similarly addressed by Plaintiffs in their Opp. to MtD.

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[18] *See Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 590-91 (2nd Cir. 1988) (unable to decide whether §1985(3) forbids private conspiracies to deprive persons of the equal protection of state law); *Spencer v. Casavilla*, 44 F.3d 74, 79 (2nd Cir. 1994) (suggesting that interference with familial relationships could be protected by §1985(3)); *see also Scott v. Ross*, 140 F.3d 1275, 1284 (9th Cir. 1998) ("[w]ith few exceptions, claims brought pursuant to §1985(3) do not require state action").

[19] While on remand, the district court dismissed the claim because there was no evidence that defendants intended to interfere with his rights to travel, such as because the "defendants attacked [the deceased] because he had entered their neighborhood," *Spencer,* 44 F.3d at 79. Plaintiffs have alleged that Defendants intended for Falun Gong adherents to be demonized, ostracized, stigmatized, intimidated and subject to violence wherever found in Chinese American communities. *See* TAC ¶¶184-92.

[20] The SAC includes wrongful death as a parallel municipal claim in the heading, additionally putting Defendant on notice of claims of this sort.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Motion for Leave to File a Third Amended Complaint should be granted, and that the proposed Third Amended Complaint should be deemed filed as of the date of the Order granting the Motion.

Respectfully submitted on this December 9, 2013 by

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