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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Jane Doe I, Jane Doe II, Helene Petit, Martin Larsson, Leeshai Lemish, and Roland Odar Plaintiffs, v. LIU QI, and DOES 1-5, inclusive Defendants.	Civil Action No. C 02 0672 CW EMC AFFIDAVIT OF INTERNATIONAL LAW PROFESSORS AND RELIGIOUS FREEDOM EXPERTS REGARDING THE RIGHT TO FREEDOM OF RELIGION OR BELIEF

1.

The undersigned are professors who specialize in international law, international human rights, and/or the right to freedom of religion or belief. A list of credentials for the undersigned is attached to this affidavit in Appendix A. Counsel for the Plaintiffs requested our expert opinion regarding whether the allegations in the complaint state violations of the customary international norm protecting freedom of religion or belief that are actionable under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350. In our opinion, the answer is yes.

2. This affidavit embraces and supplements the explanation of the international status of freedom of religion or belief set forth in the Aff

idavit of Professor Jordan J. Paust, ¶¶ 3-5. As set forth more fully below, freedom of religion or belief is a well-established norm of customary international law, which protects both freedom of private religion and belief and freedom to express and practice one's religion or belief through peaceable means. The international norm extends to both religious and non-religious forms of belief and is one of the core protections of the international human rights system. The conduct alleged by the plaintiffs in this case, including arrest and imprisonment without process, and torture and other ill-treatment as a result of the plaintiffs' peaceful adherence and practice of belief violates the international norm protecting freedom of religion or belief and is actionable under the ATCA.

I. NORMS ACTIONABLE UNDER THE ATCA

3.

To be actionable under the Alien Tort Claims Act, an international norm must be "'specific, universal, and obligatory.'" Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998), quoting In re Estate of Ferdinand E. Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994). Courts determine whether a particular norm meets this standard "'by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-15 (9th Cir. 1992), quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (Story, J.).

4. Universality under the ATCA does not require that the norm have achieved the status of a peremptory or *jus cogens* norm of international law. The norm must simply have achieved the status of customary international law and must be sufficiently specific to be objectively interpreted and applied.

See, e.g., H.R. Rep. No. 102-367 (1991) at 3-4 (acknowledging that the ATCA allows "suits based on . . . norms that already exist or may ripen in the future into rules of customary international law"), *quoted in Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), and *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998). *See also The Paquete Habana*, 175 U.S. 677, 694 (1900) (standard ripens into settled rule of international law by "general assent" of civilized nations). To demonstrate specificity of a norm, plaintiffs need not demonstrate "that every aspect of what might comprise a standard . . . [is] universally agreed upon." *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995). Plaintiffs need demonstrate only "a general recognition" that the specific conduct alleged is prohibited. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988). Moreover, the universal and obligatory status of a norm is not undermined by the fact that many nations may violate their international obligations in practice. As the Second Circuit said in *Filartiga*:

> The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual

> State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law.

Filartiga v. Pena-Irala, 630 F.2d 876, 884 n. 15 (2d Cir. 1980), *quoting* J. Brierly, The Outlook for International Law, 4-5 (Oxford 1944).

II. THE CUSTOMARY INTERNATIONAL LAW NORM OF FREEDOM OF RELIGION OR BELIEF

5. The international norm protecting freedom of religion or belief clearly is sufficiently "specific, universal, and obligatory" to be actionable under the ATCA. As discussed below, the right to hold and peacefully express the religious or other beliefs of one's choice are among the core animating principles set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international human rights instruments. Arrests, detention, torture , and other physical abuse solely as a result of an individual's private adherence to, membership in, or peaceful practice of, their religion or belief would violate this international norm.

6. Freedom of religion or belief, together with other rights to opinion and expression, are foundational rights of the modern international human rights system which are designed to protect individual autonomy from impermissible interference by the state. Freedom of religion appeared in early modern-day international instruments. *E.g.*, Augsburg Peace Treaty of 1555, *cited in* U.N. Covenant On Civil And Political Rights, CCPR Commentary § 1, at 309 n. 1 (Manfred Nowak, ed., N. P. Engel 1993) [hereinafter CCPR Commentary]. Freedom of religion or belief now is protected by a wide range of fundamental multilateral and regional human rights instruments, including Article 18 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc A/810 at 71 (1948) [hereinafter "Universal Declaration" or "UDHR"], and Article 18 of the International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L. M. 360 (1967) (entered into force Mar. 23, 1976).

7. The Universal Declaration, the foundational instrument of the modern international human rights regime, was adopted overwhelmingly by the U.N. General Assembly, including China, in 1948. Although the UDHR itself is not a legally binding treaty, many of its provisions are recognized as having attained the status of customary international

law.[1] Article 18 of the Universal Declaration provides as follows:

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

8. The principles set forth in the UDHR, including the protection of freedom of religion or belief, were codified by the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), G.A. Res. 2220A (XXI), U.N. GAOR, 21st Sess., pt.1, Annex, at 165, U.N. Doc. A/6546 (1966), into binding treaty law. Thus, Article 18 of the ICCPR provides in relevant part as follows:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

9. The fact that China has signed but not ratified the ICCPR does not mean that the norm is not applicable to China, since China's signature obligates it to uphold the object and purpose of the treaty, and freedom of religion or belief is widely recognized as a norm of customary international law.[2] The U.N. Human Rights Committee, which is the U.N. treaty body officially responsible for overseeing and interpreting the ICCPR, has recognized freedom of thought, conscience, and religion in the Covenant as a norm of customary international law. *See* General Comment No. 24(52), ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), *available at* http://www1.umn.edu/humanrts/gencomm/hrcom24.htm (visited June 19, 2002). Moreover, as of June 2002, a substantially larger number of countries have ratified the ICCPR (148 countries), than are parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force 26 June 1987) (129 countries),[3] though torture has been recognized as a customary international law norm actionable under the ATCA. *E.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

10. The customary international law status of freedom of religion or belief is further evidenced by the numerous international and regional instruments recognizing the norm. In addition to the Universal Declaration and ICCPR, addressed above, the U.N. Charter obligates all member states, including China, to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . religion." U.N.

Charter, art. 55(c); *see also id.* art. 1(1). Freedom of religion or belief is protected by Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 312 Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998, respectively [hereinafter European Convention]; Article 12 of the American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 8, § 1, 9 I.L.M. 673 (entered into force July 18, 1978), and Article 8 of the African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59 (1981). The international norm is further recognized in nonbinding instruments such as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR, Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981) [hereinafter "Declaration on Religious Intolerance"], and the Conference on Security and Cooperation in Europe Final Act (Helsinki Final Act), 14 I.L.M. 1292 (1975), which was signed by representatives of the United States, the Soviet Union, and eastern and western European states. In 1986, the U.N. Commission on Human Rights also established the office of the Special Rapporteur on Freedom of Religion or Belief, further evidencing the importance of religious freedom among the human rights protected by the U.N. system.

11.

The United States not only recognizes the international freedom of religion or belief, but has played a primary role in defining and implementing the norm around the world. The United States proposed the language that ultimately was adopted nearly unchanged as Article 18 of the UDHR, *see* CCPR Commentary § 4, at 311-12, and was a leader in the negotiations over Article 18 of the ICCPR. The ICCPR is one of the few international human rights treaties that the United States has signed and ratified, indicating the support of the U.S. government for the rights and protections provided by that treaty. More recently, the United States has taken affirmative steps to promote religious freedom globally through the adoption of the International Religious Freedom Act of 1998 (IRFA), Pub. L. 105-292, Oct. 27, 1998, 112 Stat. 2787.

12.

In adopting the IRFA, Congress recognized that "[f]reedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments," which "should never be arbitrarily abridged by any government." 22 U.S.C. §§ 6401(a)(2) and (3). Congress further provided that it is the policy of the United States "to condemn violations of religious freedom." *Id.* § 6401(b)(1). The Act defines the international right to religious freedom according to Articles 18 of the UDHR and ICCPR, and other international human rights instruments. *Id.* § 6402(13). The United States further recognizes that violations of the norm include detention, interrogation, imprisonment, forced religious conversion, beating, torture, mutilation, or murder, if committed on account of an individual's religious belief or practice, or any arbitrary restrictions on or punishment for assembling for peaceful religious activities, speaking freely about one's religious beliefs, or changing one's religious affiliation. *Id.* §§ 6402(13)(A) and (B).

III. THE SCOPE OF FREEDOM OF RELIGION OR BELIEF

13. Freedom of religion or belief enjoys an unusually protected status in international law. The rights protected by Article 18 of the ICCPR are among the few rights designated in the treaty as "non-derogable," which means that a state cannot suspend compliance with the article as the result of a public emergency.

ICCPR, art. 4(2). See also General Comment No. 22(48), ¶ 1, U.N. Doc. A/48/40, pt. I (20 July 1993) [hereinafter "General Comment No. 22"], ("The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency"), *available at* http://www1.umn.edu/humanrts/gencomm/hrcomms. htm (visited June 19, 2002) . Moreover, although many states have qualified their obligations under other provisions of the ICCPR through reservations or declarations, no ratifying states have entered substantial or significant reservations to Article 18.[4] Furthermore, the exceptions allowed to the public expression of religion or belief under Article 18(3) are more restrictive than other exceptions in the Covenant. CCPR Commentary § 4, at 312.

14. The principle set forth in Article 18 was explicitly intended to be legally binding. A Soviet proposal to make freedom of thought and religion "a mere legal proviso in accordance with 'the dictates of public morality' was defeated in the negotiating process. CCPR Commentary § 4, at 312, *citing* E/CN.4/272; E/CN.4/SR.117, 10.

A. The International Norm Applies to Both Religious and Non-Religious Beliefs

15. Article 18 protects both religious and non-religious forms of belief. Although the English version of the text ("religion or belief") might be read as limited to religious belief, the authoritative French version ("une religion ou une conviction") makes clear that non-religious beliefs are included. CCPR Commentary § 14, at 316. As the negotiating history, or *travaux préparatoires*, of the ICCPR indicates, this question was the subject of extensive discussions. When some members in the General Assembly maintained that Article 18 should address only religious belief, others insisted that Article 18 was intended to provide for complete freedom of thought, conscience, and religion, and therefore, necessitated protection of non-religious beliefs. *See* Marc J. Bossuyt, Guide to the '*Travaux Préparatoires*' of the International Covenant on Civil and Political Rights 362 (Martinus Nijhoff 1987) [hereinafter "*Travaux Préparatoires*"], *citing* Third Committee, 15th Sess. (1960), A/4625, § 51; A/C.3/SR.1024, § 17 (WAN); A/C.3/SR.1025, § 22 (RA); § 27 (RA); § 56 (SU); A/C.3/SR.1026, § 2 (E), § 6 (F), § 14 (YV); § 18 (CL), § 23 (J). When asked by one delegation whether the word "belief" was meant to have a non-religious connotation, the representative of the Secretary-General referred the Committee to the Study of Discrimination in the Matter of Religious Rights and Practices, which indicated: "In view of the difficulty of defining 'religion', the term 'religion or belief' is used in this study to include, in addition to various theistic creeds, such other beliefs as agnosticism, free thought, atheism and rationalism." *Travaux Préparatoires* at 362; A/C.3/SR.1027, § 34 (SEC); *see also* CCPR Commentary § 14, at 316. It was on the basis of this study that the Sub-Commission had prepared draft Principles on freedom and non-discrimination in the matter of religious rights and practices which were sent to governments for their comments. Part 1, paragraph 4 of those draft Principles read: "Anyone professing any religious or non-religious belief shall be free to do so openly without suffering any discrimination on account of his religion or belief." *Travaux Préparatoires*, at 362; A/4625, § 51.

16. The Human Rights Committee has confirmed that "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief," and that "[t]he terms belief and

religion are to be broadly construed." General Comment No. 22 ¶ 2. For example, the Committee recognized a claim by an Italian Fascist who was convicted for attempting to reorganize the dissolved Fascist Party as falling within the scope of Article 18. Report of the Human Rights Committee, G.A. 39th Sess., Supp. No. 40 (A/39/40) (1984), No. 117/1981, § 13.3 (the Committee ultimately found the intervention permissible under Article 18(3), presumably because the Fascist Party advocated national, racial or religious hatred).

B. Private Belief is Absolutely Protected

17. Article 18 of the ICCPR divides freedom of religion or belief into private freedom of belief and public freedom to manifest one's beliefs. During the debate on Article 18(1), the Commission on Human Rights stressed that private freedom of thought, conscience and religion was 'absolute', 'sacred', and 'inviolable,' and that no legal restrictions could be imposed on a person's inner thoughts or moral consciousness. Only external manifestations of religion or belief could be legitimately limited. *Travaux Préparatoires*, at 355; A/2929, Ch. VI, § 106; E/CN.4/SR.116, p. 5 (AIWO), p. 9 (RL), p. 13 (SU); E/CN.4/SR.117, p. 6 (F); E/CN.4/SR.319, p. 8 (RL). The U.N. Human Rights Committee agrees that Article 18 does "not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally." General Comment No. 22, ¶ 3. Thus, the right to privately hold the beliefs of one's choice is absolutely protected from coercive influence by the state, without exception, and is not subject to the limitations set forth in Article 18(3). Article 18 accordingly obligates state parties to refrain from interfering with an individual's spiritual and moral existence, including through the use of coercion, threats, or other unallowable means against the will of the person concerned or without his or her implicit approval. CCPR Commentary § 10, at 314-15.

18. The prohibition against coercion in Article 18(2) derives from an Egyptian proposal prohibiting persons from being subjected "to any form of coercion which would impair his freedom to maintain or to change his religion or belief." *Id.* § 17, at 317, *citing* E/CN.4/L.187. This obligation prohibits state parties from dictating or forbidding adherence to or membership in a particular belief. CCPR Commentary § 18, at 318. Article 18(2) broadly bars coercion that would "impair" freedom of belief, in order to stress that informal forms of coercion are prohibited, as well as physical coercion. The term "impair" ("porter atteinte") was deliberately chosen over the word "deprive" in order to stress the wide scope of coercion that was prohibited, *Travaux Préparatoires*, at 362; A/4625, § 52; A/C.3/SR.1025, § 3 (PI); A/C.3/SR1027, § 12 (I); *see also* CCPR Commentary § 18, at 318, and the Committee stressed that the word "coercion" ("contrainte") should encompass both physical and indirect means of coercion. *Travaux Préparatoires*, at 362; A/4625, § 52; A/C.3/SR.1025, § 47 (IL); A/C.3/SR.1025, § 3 (PI); A/C.3/SR1027, § 12 (I). The Human Rights Committee has confirmed this interpretation: "Article 18(2) bars coersion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers . . . to recant their religion or belief or to convert. . . . The same protection is enjoyed by holders of all beliefs of a non-religious nature." General Comment No. 22 ¶ 5.

19. Thus, under Article 18's protection of private belief, every individual must have both the right and the *de facto* possibility to join or leave a religious society or other belief system. CCPR Commentary § 15, at 317. Efforts to prohibit membership in, or adherence to, a belief system violate this international norm. Furthermore, detention of persons due to their privately held religion or belief constitutes arbitrary and impermissible detention, and thus violates both the norm protecting freedom of religion or belief and the separate international law norm prohibiting arbitrary detention.

C. Public Manifestations of Belief are Subject Only to Specified Narrow Limitations

20. Article 18(1) also protects manifestation and expression of one's beliefs "in community with others and in public," although such public forms of expression are limited by the narrow permissible exceptions in Article 18(3). The ICCPR, the UDHR, the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter "ECHR"], and the 1981 U.N. Declaration on Religious Intolerance all recognize that protected public manifestations include worship, observance, practice, and teaching of one's belief. *See* ICCPR, art. 18(1); UDHR, art. 18; ECHR, art. 9(1); Declaration on Religious Intolerance, art. 1(1). The Human Rights Committee has held that "[t]he freedom to manifest religion or belief . . . encompasses a broad range of acts." General Comment No. 22 ¶ 4. Although the ICCPR does not define "practice", the U.N. Declaration on Religious Intolerance includes in this term freedom to assemble in connection with a religion, to establish and maintain charitable or humanitarian institutions, and to make or use articles associated with the rites or customs of a religion or belief. U.N. Declaration on Religious Intolerance, art. 6; *see also* CCPR Commentary § 25, at 321. For example, the European Commission on Human Rights has recognized the distribution of leaflets by pacifists as a protected practice of belief. *See Arrowsmith v. the United Kingdom*, (1981) 3 E.H.R.R. 218.[5]

21. Freedom of religion or belief are uniquely protected forms of expression. In addition to being non-derogable, the limitations on public expression of religion or belief set forth in Article 18(3) are narrower than other deviations allowed in the Covenant. In order to satisfy Article 18(3), interference must be (1) prescribed by law; (2) serve one of the listed purposes; and (3) be necessary for attaining that purpose. *See also* American Convention, *supra* art. 12 (2)-(3); European Convention, *supra* art. 9(2). The requirement that the interference be "prescribed by law" means that the interference must be contained in a formal law or be part of a specific, unwritten norm of common law. CCPR Commentary § 32, at 325. The more stringent requirement, "prescribed by law" ("prévues par la loi") was deliberately adopted over the weaker duty ("pursuant to law") proposed in the original French and American drafts. *Ibid.* The requirement that the interference be "necessary" implies that it must be *proportional* in severity and intensity to the purpose it serves in a particular case. The intervention may not become the general rule. CCPR Commentary § 33, at 325.

22. The substantive exceptions of "public safety, order, health, or morals or the fundamental rights and freedoms of others" are exhaustive and "must be strictly interpreted." General Comment No. 22 ¶ 8. As the Human Rights

Committee has stated:

> Restrictions are not allowed on grounds not specified here, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.

General Comment No. 22 ¶ 8. Even restrictions on religious expression which otherwise would be allowable under the substantive provisions of Article 18(3), such as time, place and manner restrictions, are subject to strict necessity and proportionality requirements. Accordingly, prosecutions for violations of time, place and manner limitations where the defendants have been afforded full due process have been found to violate the right to freedom of religion where the punishment was disproportionate to the crime. *Cf. Manoussakis & Others v. Greece*, (1996) 23 E.H.R.R. 387 (criminal prosecution for violation of Greek law requiring written permission to hold religious congregations violated Article 9 of the European Convention, since the severity of punishment was not proportionate to the legitimate aim pursued); *Case of Larissis and Others v. Greece* (1999) 27 E.H.R.R. 329 (conviction for proselytizing civilians was insufficiently tailored and violated Article 9).

23. The Article 18(3) limitations are narrower than those in other clauses of the Covenant in several respects. For example, although "public safety" appears to be a broad term that implies the permissibility of restrictions for national security purposes, the term was intended to be much narrower. CCPR Commentary §§ 33, 36, at 325, 326. Other provisions in the Covenant specifically list national security or public emergencies as permissible grounds for interference. *Compare* ICCPR arts. 12(3), 14(1), and 19(3) (authorizing restrictions for reasons of national security); arts. 21 and 22(2) (authorizing restrictions for national security or public safety). *See also* CCPR Commentary § 36, at 326.[6] By contrast, Article 18(3) does not allow infringement of the exercise of freedom of religion or belief for either of these reasons. Thus, "public safety" does not allow interference in the event of a political or military threat to the entire nation. Instead, interference under Article 18(3) is permissible only when, during the manifestation of one's religion or beliefs, a specific danger arises threatening the security of persons or things (such as when hostile religious groups confront one another). *Id.* § 36, at 326. Accordingly, propaganda for war which is disseminated in the name of religion or belief may be prohibited, *id.* § 36, at 327, but peaceable assembly for purposes of engaging in rituals related to a system of belief cannot be prohibited under Article 18(3).

24. The Article 18(3) limitation for the "protection of order" is deliberately narrower than the concept of "public order" ("*l'ordre public*") under French civil law, which appears in Articles 12, 14, 19, 21, and 22 of

the Covenant. In the debates over this limitations clause, it was noted that inclusion of the French concept, which is akin to the concept of "public policy" in English common law systems, could allow far-reaching derogations from the rights guaranteed by the clause. *Travaux Préparatoires*, at 365-66; A/2929, Ch. VI, § 113; E/CN.4/SR.319, p. 9 (GB); E/CN.4/SR.319, p. 12 (GB), p. 14 (RL). Accordingly, the concept "protection of order" was deliberately chosen instead of the broader "*ordre public*," in order to indicate that the exception was limited to the prevention of public disorder. *Travaux Préparatoires*, at 365-66; A/2929, Ch. VI, § 113; CCPR Commentary §§ 34, 38, at 325, 327. "This means that freedom of religion and belief may not be restricted for all of the reasons stemming from the concept of *ordre public* under French civil law, but rather only to avoid disturbances to the order in the narrow sense." *Id.* § 38, at 327. Religious assemblies accordingly may be subjected to regulation in order to allow for the protection of traffic flow and to prevent disturbances of the peace. *Id.* § 40, at 328. The principle of proportionality measures whether a specific interference is permissible. *Id.* § 39, at 327; General Comment No. 22 ¶ 8.

25.

The limitation for health and morals is common to other rights protected by the Covenant, and allows restrictions on freedom of religion or belief for such things as publications regarding health-threatening substances or pornography. CCPR Commentary § 41, at 328. Religious convictions may be restricted which interfere with state health measures such as mandatory vaccinations. *Id.* § 42, at 328.

26. Finally, unlike other provisions in the Covenant, Article 18(3) does not allow restriction of public forms of religious expression or belief to protect the general rights and freedoms of others, but only to protect "fundamental rights and freedoms" ("*des libertés et droits fondamentaux*"). *See Id.* §§ 34, 43, at 325, 329. This limitation was included in early drafts of the article, and was not further discussed in the T*ravaux Préparatoires.* The reference to fundamental rights was intended to include rights that are deemed fundamental under a state's domestic legal system, as well as the rights set forth in the two U.N. human rights Covenants (the ICCPR and ICESCR). *Id.* §§ 43-44, at 329. For example, manifestations of religion or belief which advocate racial hatred or infringe on rights to education, to marry, to gender equality, or of minorities, may be prohibited. *Id.* § 45, at 329.

27. The net result with respect to public manifestation of belief is that countries that have established an official or state religion or religions are prohibited from discriminating against adherents of other religions or nonbelievers or impairing or restricting the practice of such faiths. General Comment No. 22 ¶ 9. As the Human Rights Committee has observed:

> If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of the ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedom under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

General Comment No. 22 ¶ 10. In short, arrest without charges, detention, and/or subjection to torture and cruel, inhuman or degrading treatment or punishment solely for the peaceful practice of a religion or belief

in public places would not satisfy any of the Article 18(3) exceptions and would violate the international norm protecting freedom of religion or belief.

V. THE UNITED STATES RECOGNIZES CHINA'S SUPPRESSION OF FALUN GONG AS VIOLATING THE INTERNATIONAL RIGHT TO FREEDOM OF RELIGION OR BELIEF

28. Since 1999, China annually has been designated by the U.S. State Department and the U.S. Commission on Religious Freedom as one of a handful of states deemed the world's worse violators of religious freedom. In its May 2002 report on International Religious Freedom, the Commission again recommended that China be designated as a "country of particular concern," noting that "the Chinese government has intensified its repression of religious and spiritual groups that operate outside of state control, including . . . Falun Gong adherents (or practitioners)." United States Commission on International Religious Freedom [hereinafter "USCIRF"], *Annual Report of the United States Commission on International Religious Freedom* (May 2002) at 26, *available at* <http://www.uscirf.gov> (visited June 25, 2002); *See also* Press Release, USCIRF, Commission Nominates Nine Countries for State Dept Designation As Worst Religious-Freedom Violators (Aug. 16, 2001), *available at* http://www.uscirf.gov/prPages/pr0086.php3 (visited June 19, 2002) (highlighting China's suppression of Falun Gong as one of the main grounds for China's designation). In its 2001 Report, the Commission noted that thousands of Falun Gong practitioners reportedly had been arrested, detained, and abused by the Chinese authorities, and that 162 followers reportedly had died as a result of torture and mistreatment while in custody. USCIRF, *Annual Report of the United States Commission on International Religious Freedom* (May 2001), at 36, *available at* http://www.uscirf.gov (visited June 25, 2002). The 2000 Report likewise found that as a result of a "nationwide crackdown on the Falun Gong spiritual movement, . . . [l]eaders were sentenced to long prison terms and thousands of practitioners were detained. A few followers were even beaten to death or died suddenly while in custody." USCIRF, *Report of the United States Commission on International Religious Freedom* (May 2000) at 18, *available at* http://www.uscirf.gov (visited June 25, 2002).

29. The State Department's annual Country Reports on human rights conditions in China have also repeatedly noted China's suppression of Falun Gong as a violation of religious freedom. As the report released in March 2002 states:

> The Government intensified its repression of groups that it determined to be "cults," and of the FLG in particular. Various sources report that thousands of FLG

> adherents have been arrested, detained, and imprisoned, and that approximately 200 or more FLG adherents have died in detention since 1999; many of their bodies reportedly bore signs of severe beatings or torture or were cremated before relatives could examine them. The atmosphere created by the nationwide campaign against FLG had a spillover effect on unregistered churches, temples, and mosques in many parts of the country

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U.S. Department of State, *Country Reports on Human Rights Practices 2001: China* (March 2002) [hereinafter *U.S. State Dept. 2001 Report*], *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm (visited June 19, 2002). The findings of the United States State Department and the Commission on Religious Freedom have been confirmed by international NGOs. *See, e.g.*, Human Rights Watch, Dangerous Meditation: China's Campaign Against Falungong 1 (2002) (concluding that "none of the tens of thousands of Falungong practitioners detained, arrested, or convicted have been held in connection with violent actions or threats of violence. Instead, their 'crime' is their belief in Falungong and their efforts to promote the practice. As such, their treatment violates fundamental rights").

30. Finally, the United States has made clear that the protection of religious freedom applies equally to foreign nationals peacefully practicing their religion or belief. The most recent U.S. State Department Report on human rights practices in China observed that "Authorities also detained foreign practitioners. In November more than 30 foreigners and citizens resident abroad were detained in Beijing as they demonstrated in support of the FLG. They were expelled from the country; some credibly reported being mistreated while in custody." *U.S. State Dept. 2001 Report*; *see also Report of the United States Commission on International Religious Freedom* (May 2001), at 37 (noting that the crackdown on Falun Gong had been extended to foreign nationals).

VI. CONCLUSION

31. In light of the foregoing, it is our expert opinion that severe interference with the right to freedom of religion or belief through measures such as arrest and imprisonment without process

; torture; or other ill-treatment to induce an individual to renounce his or her belief or practice violates customary international law. Under the facts as alleged in this case, the conduct against plaintiffs would violate the freedom of religion or belief.

AFFIRMED:

S/

Sarah H. Cleveland
Anthony D'Amato
Joan Fitzpatrick
David Little
Karen Musalo
Michael J. Perry
Ronald C. Slye

ATTESTION REGARDING SIGNATURES

I, Joshua Sondheimer, declare under penalty of perjury under the Laws of the United States that affirmations as to the contents of the foregoing Affidavit of International Law Professors and Religious Freedom Experts Regarding the Right to Freedom of Religion or Belief, and concurrence in the filing of this document, have been obtained from each of the above-named signatories.

Dated: July 3, 2002

s/Joshua Sondheimer

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APPENDIX A

SUMMARY OF CREDENTIALS
AFFIDAVIT OF INTERNATIONAL LAW AND RELIGIOUS FREEDOM EXPERTS REGARDING THE RIGHT TO FREEDOM OF RELIGION OR BELIEF

SARAH H. CLEVELAND has been named the Marrs McLean Professor of International Law, effective as of September 2002, at the University of Texas School of Law. A member of the faculty since 1997, she

teaches and writes primarily in the areas of human rights, international law, constitutional law and foreign relations law. She has served as an investigator or legal adviser in human rights situations around the globe, including in Cuba, Kenya and Namibia, and has testified before the U.S. Congress on human rights and refugee issues. She is a graduate of Yale Law School, Brown University, and Oxford University, where she studied as a Rhodes Scholar. She served as a law clerk to Associate Justice Harry A. Blackmun.

ANTHONY D'AMATO is the Leighton Professor of Law at Northwestern University School of Law, where he teaches courses in international law, international human rights, analytic jurisprudence, and justice. He received his law degree from Harvard Law School and a Ph.D. from Columbia University. He is admitted to practice before the U.S. Supreme Court, the U.S. Tax Court, and several U.S. Circuit Courts of Appeal. Professor D'Amato was the first American lawyer to argue, and win, a case before the European Court of Human Rights in Strasbourg, and he has litigated a number of human rights cases around the world. He is the author of over 20 books and 110 articles, including several articles on the Alien Tort Claims Act and customary international law. He was the Chair of the American Society of International Law and for 14 years served on the Board of Editors of the *American Journal of International Law,* the pre-eminent U.S. journal on international law.

JOAN FITZPATRICK is the Jeffrey & Susan Brotman Professor of Law at the University of Washington, where she has taught since 1984. She is the author of six books and numerous articles on international human rights, refugee law, domestic incorporation of international law, and constitutional law. She is a member of the Board of Editors of the *American Journal of International Law*, and Vice President of the Procedural Aspects of International Law Institute. She worked for the Department of Justice in the 1970s, and contributed to the seminal memorandum submitted by the State Department in the case of Filartiga v. Pena-Irala. She is a member of the Advisory Council of the Center for Justice & Accountability.

DAVID LITTLE is the T.J. Dermot Dunphy Professor of the Practice in Religion, Ethnicity, and

International Conflict at Harvard Divinity School, and an Associate at the Weatherhead Center for International Affairs at Harvard University. Until 1999, he was Senior Scholar in Religion, Ethics and Human Rights at the United States Institute of Peace in Washington, DC. In that capacity, he directed the Working Group on Religion, Ideology, and Peace, which conducted a multi-year study with special reference to the U.N. Declaration on the Elimination of Intolerance and Discrimination. He was a member of the U.S. State Department Advisory Committee on Religious Freedom Abroad from 1996 to 1998. He has written extensively on issues of religious freedom and human rights, including a book titled *Human Rights and the Conflict of Cultures: Freedom of Religion and Conscience in the West and Islam* (with John Kelsay and Abdulaziz Sachedina) (1988).

KAREN MUSALO is Resident Scholar at the University of California, Hastings College of the Law, where she teaches courses in refugee law and international human rights. She is an internationally recognized expert on refugee law, and has written and lectured extensively on the topic. Included among her many publications is the law school casebook, *Refugee Law and Policy, An International and Comparative Approach*; she is lead co-author and wrote the book's chapter on religious persecution as a basis for refugee status. She also wrote the seminal article on conscientious objection as a basis for asylum, *Swords Into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience*, 26 San Diego Law Review 849 (1989). Musalo is currently serving as an expert consultant to the United Nations High Commissioner for Refugees on the issue of religion-based refugee claims. She has also served as a consultant to the U.S. Commission on International Religious Freedom, addressing the impact of expedited immigration procedures on asylum seekers, including those whose claim for protection is based on religion.

MICHAEL J. PERRY has held the University Distinguished Chair in Law at Wake Forest University since 1997. From 1990 to 1997, he held the Howard J. Trienens Chair in Law at Northwestern University, where he taught for fifteen years (1982-1997). He has also taught at Yale University and the University of Tokyo. He is the author of over fifty articles and seven books on topics including on religion, human rights

and constitutional law. Professor Perry's new book, *Under God: Religious Faith and Liberal Democracy*, will be published next spring by the Cambridge University Press. He is presently working on a series of essays on various aspects of human rights.

RONALD C. SLYE is an associate professor at Seattle University School of Law, where he teaches public international law, international human rights law, poverty law, and property law. He is the author or co-author of numerous articles and books in those fields, and is currently writing a book on the legitimacy of amnesties for gross violations of human rights. He is a member of the Operating Committee of the Desmond Tutu Peace Foundation, and was a visiting professor at the Community Law Centre at the University of the Western Cape in South Africa. From 1997 to the present, he has been a consultant in public international law and human rights to the South African Truth and Reconciliation Commission. Professor Slye received a J.D. from Yale Law School in 1989, co-taught Yale's international human rights law clinic (1993-96), and served as the Associate Director of the Law School's Orville H. Schell, Jr. Center for International Human Rights.

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[1]

The *Filartiga* court recognized the Declaration's customary international law status:

although there is no universal agreement as to the precise extent of the 'human rights and fundamental freedoms' guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. *This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights*, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, 'no one shall be subjected to torture.'…Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." E. Schwelb, Human Rights and the International Community 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, supra. Indeed, several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law. Nayar, supra, at 816-17; Waldlock, "Human Rights in Contemporary International Law and the Significance of the European Convention," Int'l & Comp. L.Q., Supp. Publ. No. 11 at 15 (1965).

Filartiga, 630 F.2d at 882-883 (emphasis added). *See also United States v. Schiffer*, 836 F. Supp. 1164, 1171 (E.D. Pa. 1993)
(observing that, although not a treaty, the Declaration "serves as evidence of 'international common law,' or customary international law"), *citing Filartiga* 630 F.2d at 1170.

[2]
China signed the ICCPR in October 1998. Under the Vienna Convention on the Law of Treaties, this signature obligates China to refrain from acts
that would defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 332, 336, 8 I.L.M. 679, 686 (entered into force January 27, 1980). China's signature to the ICCPR, its ratification of the U.N. Charter and its vote for the Universal Declaration all indicate that China has acknowledged and accepted its customary international law obligations regarding freedom of religion.

[3]
Ratification information is available at Multilateral Treaties Deposited with the Secretary General, *at* http://untreaty.un.org (visited June 19, 2002).

[4]
Mexico is the only state to have submitted a substantive reservation or declaration of interpretation to Article 18. Mexico simply submitted an "interpretive statement" to the effect that "public religious acts" must be done in places of worship and that educational institutions for the training of religious ministers have no official recognition -- limitations on freedom of religion that presumably would be allowable under Article 18(3). Reservation information is maintained in the database of Multilateral Treaties Deposited with the Secretary-General, *available at* www. untreaty.un.org (visited June 19, 2002). *See also* CCPR Commentary §
1, at 310 n. 4.

[5]
The complaint was ultimately dismissed because the leaflets were found not to clearly communicate a pacifist message.

[6]
The Travaux Préparatoires indicate that it was noted that these terms were not consistent. Travaux Préparatoires, A/2929, Chapt. VI, § 114. A proposal was made to rationalize the differing language relating to 'national security,' 'public order', 'public health or morals', etc., in the Covenant, in order to make clear where differences in substance were intended, but no action was taken on the proposal. Travaux Préparatoires, A/2929, Chapt. VI, § 112; *see also* Travaux Préparatoires, A/4625, § 53.