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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

1 under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350. In our opinion, the answer is
2 yes.

3 2. This affidavit embraces and supplements the explanation of the international
4 status of freedom of religion or belief set forth in the Affidavit of Professor Jordan J. Paust,
5 ¶¶ 3-5. As set forth more fully below, freedom of religion or belief is a well-established
6 norm of customary international law, which protects both freedom of private religion and
7 belief and freedom to express and practice one's religion or belief through peaceable means.
8 The international norm extends to both religious and non-religious forms of belief and is one
9 of the core protections of the international human rights system. The conduct alleged by the
10 plaintiffs in this case, including arrest and imprisonment without process, and torture and
11 other ill-treatment as a result of the plaintiffs' peaceful adherence and practice of belief
12 violates the international norm protecting freedom of religion or belief and is actionable
13 under the ATCA.
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16 17 **I. NORMS ACTIONABLE UNDER THE ATCA**

18 3. To be actionable under the Alien Tort Claims Act, an international norm must be
19 "specific, universal, and obligatory." *Martinez v. City of Los Angeles*, 141 F.3d 1373,
20 1383 (9th Cir. 1998), quoting *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*,
21 25 F.3d 1467 (9th Cir. 1994). Courts determine whether a particular norm meets this
22 standard "by consulting the works of jurists, writing professedly on public law; or by the
23 general usage and practice of nations; or by judicial decisions recognizing and enforcing that
24 law." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992),
25 quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (Story, J.).
26

27 4. Universality under the ATCA does not require that the norm have achieved the
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1 status of a peremptory or *jus cogens* norm of international law. The norm must simply have
 2 achieved the status of customary international law and must be sufficiently specific to be
 3 objectively interpreted and applied. *See, e.g.*, H.R. Rep. No. 102-367 (1991) at 3-4
 4 (acknowledging that the ATCA allows “suits based on . . . norms that already exist or may
 5 ripen in the future into rules of customary international law”), *quoted in Kadic v. Karadzic*,
 6 70 F.3d 232, 241 (2d Cir. 1995), and *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7
 7 (D.D.C. 1998). *See also The Paquete Habana*, 175 U.S. 677, 694 (1900) (standard ripens
 8 into settled rule of international law by “general assent” of civilized nations). To
 9 demonstrate specificity of a norm, plaintiffs need not demonstrate “that every aspect of what
 10 might comprise a standard . . . [is] universally agreed upon.” *Xuncax v. Gramajo*, 886 F.
 11 Supp. 162, 187 (D. Mass. 1995). Plaintiffs need demonstrate only “a general recognition”
 12 that the specific conduct alleged is prohibited. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709
 13 (N.D. Cal. 1988). Moreover, the universal and obligatory status of a norm is not undermined
 14 by the fact that many nations may violate their international obligations in practice. As the
 15 Second Circuit said in *Filartiga*:

18 The fact that the prohibition of torture is often honored in the
 19 breach does not diminish its binding effect as a norm of
 20 international law. As one commentator has put it, “The best
 21 evidence for the existence of international law is that every
 22 actual State recognizes that it does exist and that it is itself
 23 under an obligation to observe it. States often violate
 24 international law, just as individuals often violate municipal
 25 law; but no more than individuals do States defend their
 26 violations by claiming that they are above the law.”

23 *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 n. 15 (2d Cir. 1980), *quoting* J. Brierly, THE
 24 OUTLOOK FOR INTERNATIONAL LAW, 4-5 (Oxford 1944).

26 **II. THE CUSTOMARY INTERNATIONAL LAW NORM OF FREEDOM OF** 27 **RELIGION OR BELIEF**

1 5. The international norm protecting freedom of religion or belief clearly is
2 sufficiently “specific, universal, and obligatory” to be actionable under the ATCA. As
3 discussed below, the right to hold and peacefully express the religious or other beliefs of
4 one’s choice are among the core animating principles set forth in the Universal Declaration
5 of Human Rights, the International Covenant on Civil and Political Rights, and other
6 international human rights instruments. Arrests, detention, torture, and other physical abuse
7 solely as a result of an individual’s private adherence to, membership in, or peaceful practice
8 of, their religion or belief would violate this international norm.
9

10 6. Freedom of religion or belief, together with other rights to opinion and
11 expression, are foundational rights of the modern international human rights system which
12 are designed to protect individual autonomy from impermissible interference by the state.
13 Freedom of religion appeared in early modern-day international instruments. *E.g.*, Augsburg
14 Peace Treaty of 1555, *cited in* U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR
15 COMMENTARY § 1, at 309 n. 1 (Manfred Nowak, ed., N. P. Engel 1993) [hereinafter CCPR
16 COMMENTARY]. Freedom of religion or belief now is protected by a wide range of
17 fundamental multilateral and regional human rights instruments, including Article 18 of the
18 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp.
19 No. 16, U.N. Doc A/810 at 71 (1948) [hereinafter “Universal Declaration” or “UDHR”], and
20 Article 18 of the International Covenant on Civil and Political Rights (ICCPR), adopted Dec.
21 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360 (1967) (entered into force Mar. 23, 1976).
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23

24 7. The Universal Declaration, the foundational instrument of the modern
25 international human rights regime, was adopted overwhelmingly by the U.N. General
26 Assembly, including China, in 1948. Although the UDHR itself is not a legally binding
27 treaty, many of its provisions are recognized as having attained the status of customary
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1 international law.¹ Article 18 of the Universal Declaration provides as follows:

2 Everyone has the right to freedom of thought, conscience and
3 religion; this right includes freedom to change his religion or
4 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.

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

10 1. Everyone shall have the right to freedom of thought,
11 conscience and religion. This right shall include freedom to
12 have or to adopt a religion or belief of his choice, and freedom,
13 either individually or in community with others and in public
or private, to manifest his religion or belief in worship,
observance, practice and teaching.

14 2. No one shall be subject to coercion which would impair his
15 freedom to have or to adopt a religion or belief of his choice.

16 ¹ The *Filartiga* court recognized the Declaration's customary international law status:

17 although there is no universal agreement as to the precise extent of the 'human rights and
18 fundamental freedoms' guaranteed to all by the Charter, there is at present no dissent from
19 the view that the guaranties include, at a bare minimum, the right to be free from torture. *This*
20 *prohibition has become part of customary international law, as evidenced and defined by the*
21 *Universal Declaration of Human Rights*, General Assembly Resolution 217 (III)(A) (Dec. 10,
22 1948) which states, in the plainest of terms, 'no one shall be subjected to
23 torture.'...Accordingly, it has been observed that the Universal Declaration of Human Rights
24 "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,'
25 but is rather an authoritative statement of the international community." E. Schwelb, *Human*
26 *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).

27 *Filartiga*, 630 F.2d at 882-883 (emphasis added). See also *United States v. Schiffer*, 836 F. Supp.
28 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.

1 3. Freedom to manifest one's religion or beliefs may be subject
 2 only to such limitations as are prescribed by law and are
 3 necessary to protect public safety, order, health, or morals or
 4 the fundamental rights and freedoms of others.

5 9. The fact that China has signed but not ratified the ICCPR does not mean that the
 6 norm is not applicable to China, since China's signature obligates it to uphold the object and
 7 purpose of the treaty, and freedom of religion or belief is widely recognized as a norm of
 8 customary international law.² The U.N. Human Rights Committee, which is the U.N. treaty
 9 body officially responsible for overseeing and interpreting the ICCPR, has recognized
 10 freedom of thought, conscience, and religion in the Covenant as a norm of customary
 11 international law. See General Comment No. 24(52), ¶ 8, U.N. Doc.
 12 CCPR/C/21/Rev.1/Add.6 (1994), available at
 13 <http://www1.umn.edu/humanrts/gencomm/hrcom24.htm> (visited June 19, 2002). Moreover,
 14 as of June 2002, a substantially larger number of countries have ratified the ICCPR (148
 15 countries), than are parties to the Convention Against Torture and Other Cruel, Inhuman or
 16 Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR
 17 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force 26 June 1987)
 18 (129 countries),³ though torture has been recognized as a customary international law norm
 19 actionable under the ATCA. *E.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

20 10. The customary international law status of freedom of religion or belief is further
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 23 ² China signed the ICCPR in October 1998. Under the Vienna Convention on the Law of Treaties,
 24 this signature obligates China to refrain from acts that would defeat the object and purpose of the
 25 treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 332, 336,
 26 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.

27 ³ Ratification information is available at Multilateral Treaties Deposited with the Secretary General, at
 28 <http://untreaty.un.org> (visited June 19, 2002).

1 evidenced by the numerous international and regional instruments recognizing the norm. In
2 addition to the Universal Declaration and ICCPR, addressed above, the U.N. Charter
3 obligates all member states, including China, to promote “universal respect for, and
4 observance of, human rights and fundamental freedoms for all without distinction as to . . .
5 religion.” U.N. Charter, art. 55(c); *see also id.* art. 1(1). Freedom of religion or belief is
6 protected by Article 9(1) of the European Convention for the Protection of Human Rights
7 and Fundamental Freedoms, 312 Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocols
8 Nos. 3, 5, 8, and 11, which entered into force on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990,
9 and Nov. 1, 1998, respectively [hereinafter European Convention]; Article 12 of the
10 American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 8, § 1, 9
11 I.L.M. 673 (entered into force July 18, 1978), and Article 8 of the African [Banjul] Charter
12 on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 59 (1981). The international norm
13 is further recognized in nonbinding instruments such as the Declaration on the Elimination of
14 All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res.
15 36/55, 36 U.N. GAOR, Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981) [hereinafter
16 “Declaration on Religious Intolerance”], and the Conference on Security and Cooperation in
17 Europe Final Act (Helsinki Final Act), 14 I.L.M. 1292 (1975), which was signed by
18 representatives of the United States, the Soviet Union, and eastern and western European
19 states. In 1986, the U.N. Commission on Human Rights also established the office of the
20 Special Rapporteur on Freedom of Religion or Belief, further evidencing the importance of
21 religious freedom among the human rights protected by the U.N. system.
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25 11. The United States not only recognizes the international freedom of religion or
26 belief, but has played a primary role in defining and implementing the norm around the
27 world. The United States proposed the language that ultimately was adopted nearly
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1 unchanged as Article 18 of the UDHR, *see* CCPR COMMENTARY § 4, at 311-12, and was a
2 leader in the negotiations over Article 18 of the ICCPR. The ICCPR is one of the few
3 international human rights treaties that the United States has signed and ratified, indicating
4 the support of the U.S. government for the rights and protections provided by that treaty.
5 More recently, the United States has taken affirmative steps to promote religious freedom
6 globally through the adoption of the International Religious Freedom Act of 1998 (IRFA),
7 Pub. L. 105-292, Oct. 27, 1998, 112 Stat. 2787.

9 12. In adopting the IRFA, Congress recognized that “[f]reedom of religious belief
10 and practice is a universal human right and fundamental freedom articulated in numerous
11 international instruments,” which “should never be arbitrarily abridged by any government.”
12 22 U.S.C. §§ 6401(a)(2) and (3). Congress further provided that it is the policy of the United
13 States “to condemn violations of religious freedom.” *Id.* § 6401(b)(1). The Act defines the
14 international right to religious freedom according to Articles 18 of the UDHR and ICCPR,
15 and other international human rights instruments. *Id.* § 6402(13). The United States further
16 recognizes that violations of the norm include detention, interrogation, imprisonment, forced
17 religious conversion, beating, torture, mutilation, or murder, if committed on account of an
18 individual’s religious belief or practice, or any arbitrary restrictions on or punishment for
19 assembling for peaceful religious activities, speaking freely about one’s religious beliefs, or
20 changing one’s religious affiliation. *Id.* §§ 6402(13)(A) and (B).

23 24 **III. THE SCOPE OF FREEDOM OF RELIGION OR BELIEF**

25 13. Freedom of religion or belief enjoys an unusually protected status in
26 international law. The rights protected by Article 18 of the ICCPR are among the few rights
27 designated in the treaty as “non-derogable,” which means that a state cannot suspend
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1 compliance with the article as the result of a public emergency. ICCPR, art. 4(2). See also
 2 General Comment No. 22(48), ¶ 1, U.N. Doc. A/48/40, pt. I (20 July 1993) [hereinafter
 3 “General Comment No. 22”], (“The fundamental character of these freedoms is also reflected
 4 in the fact that this provision cannot be derogated from, even in time of public emergency”),
 5 *available at* <http://www1.umn.edu/humanrts/gencomm/hrcomms.htm> (visited June 19,
 6 2002). Moreover, although many states have qualified their obligations under other
 7 provisions of the ICCPR through reservations or declarations, no ratifying states have entered
 8 substantial or significant reservations to Article 18.⁴ Furthermore, the exceptions allowed to
 9 the public expression of religion or belief under Article 18(3) are more restrictive than other
 10 exceptions in the Covenant. CCPR COMMENTARY § 4, at 312.

11
 12 14. The principle set forth in Article 18 was explicitly intended to be legally binding.
 13 A Soviet proposal to make freedom of thought and religion “a mere legal proviso in
 14 accordance with ‘the dictates of public morality’ was defeated in the negotiating process.
 15 CCPR COMMENTARY § 4, at 312, *citing* E/CN.4/272; E/CN.4/SR.117, 10.

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

19 15. Article 18 protects both religious and non-religious forms of belief. Although
 20 the English version of the text (“religion or belief”) might be read as limited to religious
 21 belief, the authoritative French version (“une religion ou une conviction”) makes clear that
 22 non-religious beliefs are included. CCPR COMMENTARY § 14, at 316. As the negotiating
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24 ⁴ Mexico is the only state to have submitted a substantive reservation or declaration of
 25 interpretation to Article 18. Mexico simply submitted an “interpretive statement” to the effect that
 26 “public religious acts” must be done in places of worship and that educational institutions for the
 27 training of religious ministers have no official recognition -- limitations on freedom of religion that
 28 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.

1 history, or *travaux préparatoires*, of the ICCPR indicates, this question was the subject of
2 extensive discussions. When some members in the General Assembly maintained that Article
3 18 should address only religious belief, others insisted that Article 18 was intended to
4 provide for complete freedom of thought, conscience, and religion, and therefore,
5 necessitated protection of non-religious beliefs. See Marc J. Bossuyt, GUIDE TO THE
6 ‘*TRAVAUX PRÉPARATOIRES*’ OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL
7 RIGHTS 362 (Martinus Nijhoff 1987) [hereinafter “*TRAVAUX PRÉPARATOIRES*”], citing Third
8 Committee, 15th Sess. (1960), A/4625, § 51; A/C.3/SR.1024, § 17 (WAN); A/C.3/SR.1025, §
9 22 (RA); § 27 (RA); § 56 (SU); A/C.3/SR.1026, § 2 (E), § 6 (F), § 14 (YV); § 18 (CL), § 23
10 (J). When asked by one delegation whether the word “belief” was meant to have a non-
11 religious connotation, the representative of the Secretary-General referred the Committee to
12 the Study of Discrimination in the Matter of Religious Rights and Practices, which indicated:
13 “In view of the difficulty of defining ‘religion’, the term ‘religion or belief’ is used in this
14 study to include, in addition to various theistic creeds, such other beliefs as agnosticism, free
15 thought, atheism and rationalism.” *TRAVAUX PRÉPARATOIRES* at 362; A/C.3/SR.1027, § 34
16 (SEC); see also CCPR COMMENTARY § 14, at 316. It was on the basis of this study that the
17 Sub-Commission had prepared draft Principles on freedom and non-discrimination in the
18 matter of religious rights and practices which were sent to governments for their comments.
19 Part 1, paragraph 4 of those draft Principles read: “Anyone professing any religious or non-
20 religious belief shall be free to do so openly without suffering any discrimination on account
21 of his religion or belief.” *TRAVAUX PRÉPARATOIRES*, at 362; A/4625, § 51.

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25 16. The Human Rights Committee has confirmed that “Article 18 protects theistic,
26 non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief,”
27 and that “[t]he terms belief and religion are to be broadly construed.” General Comment No.
28

1 22 ¶ 2. For example, the Committee recognized a claim by an Italian Fascist who was
2 convicted for attempting to reorganize the dissolved Fascist Party as falling within the scope
3 of Article 18. Report of the Human Rights Committee, G.A. 39th Sess., Supp. No. 40
4 (A/39/40) (1984), No. 117/1981, § 13.3 (the Committee ultimately found the intervention
5 permissible under Article 18(3), presumably because the Fascist Party advocated national,
6 racial or religious hatred).
7

8 **B. Private Belief is Absolutely Protected**

9 17. Article 18 of the ICCPR divides freedom of religion or belief into private
10 freedom of belief and public freedom to manifest one's beliefs. During the debate on Article
11 18(1), the Commission on Human Rights stressed that private freedom of thought,
12 conscience and religion was 'absolute', 'sacred', and 'inviolable,' and that no legal
13 restrictions could be imposed on a person's inner thoughts or moral consciousness. Only
14 external manifestations of religion or belief could be legitimately limited. *TRAVAUX*
15 *PRÉPARATOIRES*, at 355; A/2929, Ch. VI, § 106; E/CN.4/SR.116, p. 5 (AIWO), p. 9 (RL), p.
16 13 (SU); E/CN.4/SR.117, p. 6 (F); E/CN.4/SR.319, p. 8 (RL). The U.N. Human Rights
17 Committee agrees that Article 18 does "not permit any limitations whatsoever on the
18 freedom of thought and conscience or on the freedom to have or adopt a religion or belief of
19 one's choice. These freedoms are protected unconditionally." General Comment No. 22, ¶
20 3. Thus, the right to privately hold the beliefs of one's choice is absolutely protected from
21 coercive influence by the state, without exception, and is not subject to the limitations set
22 forth in Article 18(3). Article 18 accordingly obligates state parties to refrain from
23 interfering with an individual's spiritual and moral existence, including through the use of
24 coercion, threats, or other unallowable means against the will of the person concerned or
25 without his or her implicit approval. CCPR COMMENTARY § 10, at 314-15.
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1 18. The prohibition against coercion in Article 18(2) derives from an Egyptian
2 proposal prohibiting persons from being subjected “to any form of coercion which would
3 impair his freedom to maintain or to change his religion or belief.” *Id.* § 17, at 317, *citing*
4 E/CN.4/L.187. This obligation prohibits state parties from dictating or forbidding adherence
5 to or membership in a particular belief. CCPR COMMENTARY § 18, at 318. Article 18(2)
6 broadly bars coercion that would “impair” freedom of belief, in order to stress that informal
7 forms of coercion are prohibited, as well as physical coercion. The term “impair” (“porter
8 atteinte”) was deliberately chosen over the word “deprive” in order to stress the wide scope
9 of coercion that was prohibited, *TRAVAUX PRÉPARATOIRES*, at 362; A/4625, § 52;
10 A/C.3/SR.1025, § 3 (PI); A/C.3/SR1027, § 12 (I); *see also* CCPR COMMENTARY § 18, at
11 318, and the Committee stressed that the word “coercion” (“contrainte”) should encompass
12 both physical and indirect means of coercion. *TRAVAUX PRÉPARATOIRES*, at 362; A/4625, §
13 52; A/C.3/SR.1025, § 47 (IL); A/C.3/SR.1025, § 3 (PI); A/C.3/SR1027, § 12 (I). The Human
14 Rights Committee has confirmed this interpretation: “Article 18(2) bars coercion that would
15 impair the right to have or adopt a religion or belief, including the use of threat of physical
16 force or penal sanctions to compel believers . . . to recant their religion or belief or to convert.
17 . . . The same protection is enjoyed by holders of all beliefs of a non-religious nature.”
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21 General Comment No. 22 ¶ 5.

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

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

4 20. Article 18(1) also protects manifestation and expression of one's beliefs "in
 5 community with others and in public," although such public forms of expression are limited
 6 by the narrow permissible exceptions in Article 18(3). The ICCPR, the UDHR, the European
 7 Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter
 8 "ECHR"], and the 1981 U.N. Declaration on Religious Intolerance all recognize that
 9 protected public manifestations include worship, observance, practice, and teaching of one's
 10 belief. *See* ICCPR, art. 18(1); UDHR, art. 18; ECHR, art. 9(1); Declaration on Religious
 11 Intolerance, art. 1(1). The Human Rights Committee has held that "[t]he freedom to manifest
 12 religion or belief . . . encompasses a broad range of acts." General Comment No. 22 ¶ 4.
 13 Although the ICCPR does not define "practice", the U.N. Declaration on Religious
 14 Intolerance includes in this term freedom to assemble in connection with a religion, to
 15 establish and maintain charitable or humanitarian institutions, and to make or use articles
 16 associated with the rites or customs of a religion or belief. U.N. Declaration on Religious
 17 Intolerance, art. 6; *see also* CCPR COMMENTARY § 25, at 321. For example, the European
 18 Commission on Human Rights has recognized the distribution of leaflets by pacifists as a
 19 protected practice of belief. *See Arrowsmith v. the United Kingdom*, (1981) 3 E.H.R.R.
 20 218.⁵

21
 22
 23 21. Freedom of religion or belief are uniquely protected forms of expression. In
 24 addition to being non-derogable, the limitations on public expression of religion or belief set
 25 forth in Article 18(3) are narrower than other deviations allowed in the Covenant. In order to
 26

27 _____
 28 ⁵ The complaint was ultimately dismissed because the leaflets were found not to clearly communicate a pacifist message.

1 satisfy Article 18(3), interference must be (1) prescribed by law; (2) serve one of the listed
 2 purposes; and (3) be necessary for attaining that purpose. *See also* American Convention,
 3 *supra* art. 12(2)-(3); European Convention, *supra* art. 9(2). The requirement that the
 4 interference be “prescribed by law” means that the interference must be contained in a formal
 5 law or be part of a specific, unwritten norm of common law. CCPR COMMENTARY § 32, at
 6 325. The more stringent requirement, “prescribed by law” (“*prévues par la loi*”) was
 7 deliberately adopted over the weaker duty (“pursuant to law”) proposed in the original
 8 French and American drafts. *Ibid.* The requirement that the interference be “necessary”
 9 implies that it must be *proportional* in severity and intensity to the purpose it serves in a
 10 particular case. The intervention may not become the general rule. CCPR COMMENTARY §
 11 33, at 325.

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 14 22. The substantive exceptions of “public safety, order, health, or morals or the
 15 fundamental rights and freedoms of others” are exhaustive and “must be strictly interpreted.”
 16 General Comment No. 22 ¶ 8. As the Human Rights Committee has stated:

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

23 General Comment No. 22 ¶ 8. Even restrictions on religious expression which otherwise
 24 would be allowable under the substantive provisions of Article 18(3), such as time, place and
 25 manner restrictions, are subject to strict necessity and proportionality requirements.
 26 Accordingly, prosecutions for violations of time, place and manner limitations where the
 27 defendants have been afforded full due process have been found to violate the right to
 28 freedom of religion where the punishment was disproportionate to the crime. *Cf.*

1 *Manoussakis & Others v. Greece*, (1996) 23 E.H.R.R. 387 (criminal prosecution for violation
2 of Greek law requiring written permission to hold religious congregations violated Article 9
3 of the European Convention, since the severity of punishment was not proportionate to the
4 legitimate aim pursued); *Case of Larissis and Others v. Greece* (1999) 27 E.H.R.R. 329
5 (conviction for proselytizing civilians was insufficiently tailored and violated Article 9).
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7 23. The Article 18(3) limitations are narrower than those in other clauses of the
8 Covenant in several respects. For example, although “public safety” appears to be a broad
9 term that implies the permissibility of restrictions for national security purposes, the term was
10 intended to be much narrower. CCPR COMMENTARY §§ 33, 36, at 325, 326. Other
11 provisions in the Covenant specifically list national security or public emergencies as
12 permissible grounds for interference. Compare ICCPR arts. 12(3), 14(1), and 19(3)
13 (authorizing restrictions for reasons of national security); arts. 21 and 22(2) (authorizing
14 restrictions for national security or public safety). See also CCPR COMMENTARY § 36, at
15 326.⁶ By contrast, Article 18(3) does not allow infringement of the exercise of freedom of
16 religion or belief for either of these reasons. Thus, “public safety” does not allow
17 interference in the event of a political or military threat to the entire nation. Instead,
18 interference under Article 18(3) is permissible only when, during the manifestation of one’s
19 religion or beliefs, a specific danger arises threatening the security of persons or things (such
20 as when hostile religious groups confront one another). *Id.* § 36, at 326. Accordingly,
21 propaganda for war which is disseminated in the name of religion or belief may be
22 prohibited, *id.* § 36, at 327, but peaceable assembly for purposes of engaging in rituals
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26 ⁶ The TRAVAUX PRÉPARATOIRES indicate that it was noted that these terms were not consistent.
27 TRAVAUX PRÉPARATOIRES, A/2929, Chapt. VI, § 114. A proposal was made to rationalize the
28 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

1 related to a system of belief cannot be prohibited under Article 18(3).

2 24. The Article 18(3) limitation for the “protection of order” is deliberately narrower
3 than the concept of “public order” (“*l’ordre public*”) under French civil law, which appears
4 in Articles 12, 14, 19, 21, and 22 of the Covenant. In the debates over this limitations clause,
5 it was noted that inclusion of the French concept, which is akin to the concept of “public
6 policy” in English common law systems, could allow far-reaching derogations from the
7 rights guaranteed by the clause. *TRAVAUX PRÉPARATOIRES*, at 365-66; A/2929, Ch. VI, § 113;
8 E/CN.4/SR.319, p. 9 (GB); E/CN.4/SR.319, p. 12 (GB), p. 14 (RL). Accordingly, the
9 concept “protection of order” was deliberately chosen instead of the broader “*ordre public*,”
10 in order to indicate that the exception was limited to the prevention of public disorder.
11 *TRAVAUX PRÉPARATOIRES*, at 365-66; A/2929, Ch. VI, § 113; CCPR COMMENTARY §§ 34, 38,
12 at 325, 327. “This means that freedom of religion and belief may not be restricted for all of
13 the reasons stemming from the concept of *ordre public* under French civil law, but rather
14 only to avoid disturbances to the order in the narrow sense.” *Id.* § 38, at 327. Religious
15 assemblies accordingly may be subjected to regulation in order to allow for the protection of
16 traffic flow and to prevent disturbances of the peace. *Id.* § 40, at 328. The principle of
17 proportionality measures whether a specific interference is permissible. *Id.* § 39, at 327;
18 General Comment No. 22 ¶ 8.

19 25. The limitation for health and morals is common to other rights protected by the
20 Covenant, and allows restrictions on freedom of religion or belief for such things as
21 publications regarding health-threatening substances or pornography. CCPR COMMENTARY
22 § 41, at 328. Religious convictions may be restricted which interfere with state health
23 measures such as mandatory vaccinations. *Id.* § 42, at 328.

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28 taken on the proposal. *TRAVAUX PRÉPARATOIRES*, A/2929, Chapt. VI, § 112; *see also* *TRAVAUX*

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

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

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

23 General Comment No. 22 ¶ 10. In short, arrest without charges, detention, and/or subjection
 24 to torture and cruel, inhuman or degrading treatment or punishment solely for the peaceful
 25 practice of a religion or belief in public places would not satisfy any of the Article 18(3)
 26 exceptions and would violate the international norm protecting freedom of religion or belief.

27 **V. THE UNITED STATES RECOGNIZES CHINA’S SUPPRESSION OF FALUN
 28 GONG AS VIOLATING THE INTERNATIONAL RIGHT TO FREEDOM OF**

PRÉPARATOIRES, A/4625, § 53.

RELIGION OR BELIEF

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2 28. Since 1999, China annually has been designated by the U.S. State Department
3 and the U.S. Commission on Religious Freedom as one of a handful of states deemed the
4 world's worse violators of religious freedom. In its May 2002 report on International
5 Religious Freedom, the Commission again recommended that China be designated as a
6 "country of particular concern," noting that "the Chinese government has intensified its
7 repression of religious and spiritual groups that operate outside of state control, including . . .
8 Falun Gong adherents (or practitioners)." United States Commission on International
9 Religious Freedom [hereinafter "USCIRF"], *Annual Report of the United States Commission*
10 *on International Religious Freedom* (May 2002) at 26, available at <<http://www.uscirtf.gov>>
11 (visited June 25, 2002); See also Press Release, USCIRF, Commission Nominates Nine
12 Countries for State Dept Designation As Worst Religious-Freedom Violators (Aug. 16,
13 2001), available at <http://www.uscirtf.gov/prPages/pr0086.php3> (visited June 19, 2002)
14 (highlighting China's suppression of Falun Gong as one of the main grounds for China's
15 designation). In its 2001 Report, the Commission noted that thousands of Falun Gong
16 practitioners reportedly had been arrested, detained, and abused by the Chinese authorities,
17 and that 162 followers reportedly had died as a result of torture and mistreatment while in
18 custody. USCIRF, *Annual Report of the United States Commission on International*
19 *Religious Freedom* (May 2001), at 36, available at <http://www.uscirtf.gov> (visited June 25,
20 2002). The 2000 Report likewise found that as a result of a "nationwide crackdown on the
21 Falun Gong spiritual movement, . . . [l]eaders were sentenced to long prison terms and
22 thousands of practitioners were detained. A few followers were even beaten to death or died
23 suddenly while in custody." USCIRF, *Report of the United States Commission on*
24 *International Religious Freedom* (May 2000) at 18, available at <http://www.uscirtf.gov>
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1 (visited June 25, 2002).

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

5 The Government intensified its repression of groups that it
6 determined to be "cults," and of the FLG in particular. Various
7 sources report that thousands of FLG adherents have been
8 arrested, detained, and imprisoned, and that approximately 200
9 or more FLG adherents have died in detention since 1999;
10 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.

11 U.S. Department of State, *Country Reports on Human Rights Practices 2001: China* (March
12 2002) [hereinafter *U.S. State Dept. 2001 Report*], available at
13 <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm> (visited June 19, 2002). The findings
14 of the United States State Department and the Commission on Religious Freedom have been
15 confirmed by international NGOs. See, e.g., HUMAN RIGHTS WATCH, DANGEROUS
16 MEDITATION: CHINA'S CAMPAIGN AGAINST FALUNGONG 1 (2002) (concluding that "none of
17 the tens of thousands of Falungong practitioners detained, arrested, or convicted have been
18 held in connection with violent actions or threats of violence. Instead, their 'crime' is their
19 belief in Falungong and their efforts to promote the practice. As such, their treatment
20 violates fundamental rights").

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

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5 **VI. CONCLUSION**

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7 31. In light of the foregoing, it is our expert opinion that severe interference with the
8 right to freedom of religion or belief through measures such as arrest and imprisonment
9 without process; torture; or other ill-treatment to induce an individual to renounce his or her
10 belief or practice violates customary international law. Under the facts as alleged in this
11 case, the conduct against plaintiffs would violate the freedom of religion or belief.
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14 AFFIRMED:

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16 S/
17 _____
18 SARAH H. CLEVELAND
19 ANTHONY D’AMATO
20 JOAN FITZPATRICK
21 DAVID LITTLE
22 KAREN MUSALO
23 MICHAEL J. PERRY
24 RONALD C. SLYE
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2 **ATTESTION REGARDING SIGNATURES**

3 I, Joshua Sondheimer, declare under penalty of perjury under the Laws of the
4 United States that affirmations as to the contents of the foregoing Affidavit of International
5 Law Professors and Religious Freedom Experts Regarding the Right to Freedom of Religion
6 or Belief, and concurrence in the filing of this document, have been obtained from each of
7 the above-named signatories.
8

9 Dated: July 3, 2002

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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.

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2 **JOAN FITZPATRICK** is the Jeffrey & Susan Brotman Professor of Law at the University
3 of Washington, where she has taught since 1984. She is the author of six books and
4 numerous articles on international human rights, refugee law, domestic incorporation of
5 international law, and constitutional law. She is a member of the Board of Editors of the
6 *American Journal of International Law*, and Vice President of the Procedural Aspects of
7 International Law Institute. She worked for the Department of Justice in the 1970s, and
8 contributed to the seminal memorandum submitted by the State Department in the case of
9 *Filartiga v. Pena-Irala*. She is a member of the Advisory Council of the Center for Justice &
10 Accountability.
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13 **DAVID LITTLE** is the T.J. Dermot Dunphy Professor of the Practice in Religion, Ethnicity,
14 and International Conflict at Harvard Divinity School, and an Associate at the Weatherhead
15 Center for International Affairs at Harvard University. Until 1999, he was Senior Scholar in
16 Religion, Ethics and Human Rights at the United States Institute of Peace in Washington,
17 DC. In that capacity, he directed the Working Group on Religion, Ideology, and Peace,
18 which conducted a multi-year study with special reference to the U.N. Declaration on the
19 Elimination of Intolerance and Discrimination. He was a member of the U.S. State
20 Department Advisory Committee on Religious Freedom Abroad from 1996 to 1998. He has
21 written extensively on issues of religious freedom and human rights, including a book titled
22 *Human Rights and the Conflict of Cultures: Freedom of Religion and Conscience in the*
23 *West and Islam* (with John Kelsay and Abdulaziz Sachedina) (1988).
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2 **KAREN MUSALO** is Resident Scholar at the University of California, Hastings College of
3 the Law, where she teaches courses in refugee law and international human rights. She is an
4 internationally recognized expert on refugee law, and has written and lectured extensively on
5 the topic. Included among her many publications is the law school casebook, *Refugee Law*
6 *and Policy, An International and Comparative Approach*; she is lead co-author and wrote the
7 book's chapter on religious persecution as a basis for refugee status. She also wrote the
8 seminal article on conscientious objection as a basis for asylum, *Swords Into Ploughshares:*
9 *Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for*
10 *Reasons of Conscience*, 26 San Diego Law Review 849 (1989). Musalo is currently serving
11 as an expert consultant to the United Nations High Commissioner for Refugees on the issue
12 of religion-based refugee claims. She has also served as a consultant to the U.S. Commission
13 on International Religious Freedom, addressing the impact of expedited immigration
14 procedures on asylum seekers, including those whose claim for protection is based on
15 religion.
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19 **MICHAEL J. PERRY** has held the University Distinguished Chair in Law at Wake Forest
20 University since 1997. From 1990 to 1997, he held the Howard J. Trienens Chair in Law at
21 Northwestern University, where he taught for fifteen years (1982-1997). He has also taught
22 at Yale University and the University of Tokyo. He is the author of over fifty articles and
23 seven books on topics including on religion, human rights and constitutional law. Professor
24 Perry's new book, *Under God: Religious Faith and Liberal Democracy*, will be published
25 next spring by the Cambridge University Press. He is presently working on a series of
26 essays on various aspects of human rights.
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2 **RONALD C. SLYE** is an associate professor at Seattle University School of Law, where he
3 teaches public international law, international human rights law, poverty law, and property
4 law. He is the author or co-author of numerous articles and books in those fields, and is
5 currently writing a book on the legitimacy of amnesties for gross violations of human rights.
6 He is a member of the Operating Committee of the Desmond Tutu Peace Foundation, and
7 was a visiting professor at the Community Law Centre at the University of the Western Cape
8 in South Africa. From 1997 to the present, he has been a consultant in public international
9 law and human rights to the South African Truth and Reconciliation Commission. Professor
10 Slye received a J.D. from Yale Law School in 1989, co-taught Yale's international human
11 rights law clinic (1993-96), and served as the Associate Director of the Law School's Orville
12 H. Schell, Jr. Center for International Human Rights.
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