

UNITED STATES OBLIGATIONS UNDER INTERNATIONAL LAW
AND THE FALUN GONG V. JIANG ZEMIN LAWSUIT: A
JUSTIFIED REACTION TO A THREAT TO PUBLIC SECURITY OR
GENOCIDE? YOU DECIDE

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Conflicting public perceptions of the Falun Gong:

“Falun Gong is a notorious, evil cult built on a pack of lies and deceptive heretical fallacies. It controls the mind[s] of its practitioners and manipulates them spiritually.”¹

“Falun Gong is a meditation system that teaches truthfulness, compassion and tolerance. It emphasizes the cultivation of one’s heart and mind, and has five sets of gentle physical movements that harmonize the body with the outside universe.”² “Similar to yoga and Tai-chi, it is designed to improve health and reduce stress.”³

Falun Gong teachings and member actions have caused over 1,700 deaths.⁴ This includes hundreds of member suicides.⁵

748 Falun Gong members have died at the hand of government authorities while in police or administrative

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¹ See *Falun Gong Claims Are ‘Groundless,’* AUSTL. FIN. REV., June 25, 2003, available at LEXIS, Asia Pacific Library [hereinafter *Falun Gong Claims*].

² See *Faces of Faith*, HEARST CORP., Sept. 13, 2003, available at LEXIS, U.S. News Library. Falun Gong’s theme from its website is “Truthfulness Benevolence Forbearance.” See *Falun Dafa: A Brief Introduction*, available at <http://www.falundafa.org/eng/overview.htm> (last visited Feb. 25, 2005).

³ See *Why does President Jiang Zemin of China persecute Falun Gong?*, at <http://www.liberal-international.org/humanrights/articles/falungong.html> (last visited July 21, 2003) [hereinafter *Why does President Jiang Zemin of China persecute*].

⁴ See Philip Kennicott, *China’s Spiritual Outlaws: Falun Gong Bring Their Cause to Capitol Hill*, WASH. POST, July 23, 2003, at C1.

⁵ See *Falun Gong cult followers cruel in killing the innocent*, XINHUA NEWS AGENCY, July 14, 2003, available at LEXIS, Asia Pacific Library [hereinafter *Falun Gong cult followers*].

custody.⁶

Falun Gong teachings drove a member to murder 17 innocent people by poison.⁷

Tens of thousands of Falun Gong practitioners have been detained in Chinese administrative detention facilities to force them to renounce their spiritual beliefs.⁸ Torture is commonplace in these facilities.⁹

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⁶ See John Li, *China vs. Falun Gong: After four years of repression, it's time to let go*, INT'L HERALD TRIB., July 22, 2003, at 8 [hereinafter *After four years of repression*].

⁷ See *Falun Gong cult followers*, *supra* note 5.

⁸ See HUMAN RIGHTS WATCH, DANGEROUS MEDITATION: CHINA'S CAMPAIGN AGAINST FALUN GONG, at III, at <http://www.hrw.org/reports/2002/china/> (last visited Feb. 25, 2005).

⁹ See *infra* notes 192-97.

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I. INTRODUCTION

According to some media sources and groups, Falun Gong is a peaceful meditation group that has been viciously attacked by the Chinese government. According to the Chinese government, many Falun Gong practitioners are the spawn of a heretical cult leader, and the group collectively could raze Chinese society if given the opportunity to evangelize. On July 22, 1999, the Chinese government marked Falun Gong as an “evil cult,” banned it, organized a crackdown movement that included a campaign to garner public support for the crackdown, and implemented a policy conceived to “re-educate” Falun Gong members to reverse the group’s indoctrination.¹⁰

The events involving Falun Gong over the past four years in China have knocked at the door of the U.S. judicial system. Falun Gong filed a lawsuit in October 2002 against former Chinese leader Jiang Zemin in federal court for acts of genocide and other human rights violations pursuant to the jurisdiction of the Alien Tort Claims Act (ATCA).¹¹ More than three dozen members of Congress filed an *amicus curiae* brief in support of Falun Gong, while the Bush Administration filed an

¹⁰ See *Three years after ban, Falungong still a thorn in Beijing’s side*, AGENCE FRANCE PRESSE, July 21, 2002, available at LEXIS, Asia Pacific Library [hereinafter *Three years after ban*]. Falun Gong is not alone in that other less mainstream groups have also been deemed “cults.” *Possible Labour Camp Detentions of Chinese Christian Group Members Reported*, FIN. TIMES INFO., Sept. 3, 2002, available at LEXIS, Asia Pacific Library, BBC File; *China boasts crackdown against another Christian sect*, AGENCE FRANCE PRESSE, Jan. 11, 2002, available at LEXIS, Asia Pacific Library.

¹¹ The ATCA grants original jurisdiction in district courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2005).

amicus curiae brief to dismiss the case.¹² The lawsuit was dismissed in September 2003 by the U.S. district court, which held that Jiang Zemin's head-of-state immunity barred the lawsuit.¹³ The dispute, however, seems far from over.¹⁴ This article endeavors to impartially present the merits of the case by navigating the highly propagandized media positions and encourages the reader to draw his or her own conclusions regarding the claims.

The lawsuit directly implicates international law and state sovereignty. International law provides that a government has a right of self-determination and a right to preserve societal stability within its own borders, without interference from other countries. Nevertheless, international accord tempers these rights by providing that leaders should and can be brought to justice when they commit heinous crimes against their citizens.¹⁵ While the court presents a very well-reasoned dismissal opinion, it may only be possible to properly assess jurisdiction and sovereign immunity under international law by considering the merits of the case. Countries have an obligation to hold leaders responsible for human rights violations that rise to the level of genocide and universal jurisdiction crimes – a scenario in which claims of sovereign immunity claims would be invalid.

In Part II, this article considers Falun Gong and its interactions with the Chinese government. From this part, one can formulate an informed opinion about the relative justification for the ban. Part III presents the claimed human rights abuses. Part IV considers the crime of genocide against the backdrop of twentieth century genocide cases, as well as instances of universal jurisdiction crimes that could arguably abrogate state sovereignty and head-of-state immunity claims. Part V elucidates the parameters of jurisdiction under international law. The analysis in Parts III and IV will introduce the jurisdiction discussion, as well as elucidate the district court's final decision to dismiss the case,

¹² See Frank J. Murray & Steve Sexton, *Falun Gong case gets support; Bipartisan team opposes Bush*, WASH. TIMES, June 12, 2003, at A4. Defendants did not respond to the complaint and the U.S. government intervened pursuant to "attend to the interest of the United States." 28 U.S.C. § 517 (2005).

¹³ The lawsuit was dismissed on December 12, 2003. Plaintiffs A, B, C v. Zemin, 2003 U.S. Dist. LEXIS 16209 (N.D. Ill. Sept. 12, 2003) [hereinafter Zemin]; see Mike Robinson, *Judge Throws out Falun Gong suit against former Chinese Leader*, ASSOCIATED PRESS, Sept. 15, 2003, available at LEXIS, U.S. News Library.

¹⁴ Counsel for Falun Gong has not ruled out options for keeping the case alive and pressing for ways to get this issue into the American public discourse. See Robinson, *supra* note 13.

¹⁵ See generally Michael J. Kelly, *Can Sovereigns Be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milosevic Trial*, 76 ST. JOHN'S L. REV. 257 (2002).

pursuant to its obligations under international law, which establish the relative levels of human rights abuses that qualify for closer, international scrutiny.

II. THE CHINESE GOVERNMENT'S TREATMENT OF FALUN GONG

A. Chinese Government and Jiang Zemin v. Falun Gong

1. History of Falun Gong

The founder of Falun Gong is Mr. Li Hongzhi,¹⁶ a Chinese national and permanent resident of the United States. He began teaching principles of Falun Gong across China in the early 1990s, and published the primary treatise on Falun Gong, *Falun Gong: Law Wheel Qigong*, in 1993.¹⁷ Some describe Falun Gong as a slow motion, martial arts-like, meditative practice that emphasizes living a moral and honest life¹⁸ to cultivate a healthy mind-body connection.¹⁹ Others suggest that it could be classified as a spiritual movement,²⁰ a religious order²¹ or a philosophy.²² It has claimed peak membership of 80 million within China²³ and 30 million elsewhere.²⁴

In the current media melee, the Chinese government forewarns its citizens that Falun Gong is an “evil cult,”²⁵ while Falun Gong emphasizes that the Chinese government persecutes and tortures Falun Gong practitioners for their beliefs.²⁶ Chinese Ambassador to

¹⁶ See Falun Dafa: Truthfulness, Benevolence, Forbearance, at http://www.falundafa.org/eng/index_en.htm (last visited Feb. 25, 2005).

¹⁷ See LI HONGZHI, *FALUN GONG: LAW WHEEL QIGONG* 89 (1993), available at <http://www.falundafa.org/eng/books.htm> (trans. 2003 (last visited Feb. 25, 2005) [hereinafter LI HONGZHI 3].

¹⁸ See HUMAN RIGHTS WATCH, *supra* note 8, at II.

¹⁹ See Erin Clopak, *China's Crackdown on Falun Gong*, 9 HUM. RTS. BR. 17 (Fall 2001). “Similar to yoga and Tai-chi, [Falun Gong] is designed to improve health and reduce stress.” See *Why does President Jiang Zemin of China persecute, supra* note 3.

²⁰ See Zemin, *supra* note 13, at 1.

²¹ See Kelly A. Thomas, *Falun Gong: An Analysis of China's National Security Concerns*, 10 PAC. RIM L. & POL'Y 471, 472 (Mar. 2001).

²² See LI HONGZHI 3, *supra* note 17, at iii.

²³ See *Three years after ban, supra* note 10.

²⁴ See *Falun Gong & Falun Dafa: What it is, What it does, and why the Chinese government is so terrified of it*, available at <http://www.religioustolerance.org/falungong.htm> (last visited Feb. 25, 2005) [hereinafter *Falun Gong & Falun Dafa*].

²⁵ See *Three Years After Ban, supra* note 10; *Falun Gong Claims, supra* note 1.

²⁶ See HUMAN RIGHTS WATCH, *supra* note 8, at III.

the U.S. Yang Jiechi has stated that Falun Gong selectively chooses which tenets to portray to the West so as to make the group appear more benign.²⁷ A closer examination of the various categories of Falun Gong's tenets and evolution based on official teachings can serve to elucidate Ambassador Yang's comment.

By analyzing the progression of Falun Gong's official teachings, it appears that followers travel a spiritual cycle; they transcend a first stage as *students* and *practitioners*, who should live an honest and healthy lifestyle and do the regimen of exercises;²⁸ to a second stage as *disciples*, who can develop supernatural powers if they devoutly follow Mr. Li Hongzhi;²⁹ to a third stage as *advocates* who should oppose the Chinese government at all costs.³⁰ Ambassador Yang's comment appears to argue that Falun Gong has ignored the fact that the Chinese government claims to be reacting to "harmful" group advocacy instead of doctrinal beliefs.

The following overview of Falun Gong's central tenets is not destined to question the veracity of the teachings, but rather to provide a fair assessment of the dispute by presenting the Chinese government's claims that the teachings have incited illegalities and societal harm. Alternatively, while there are many Chinese government media releases suggesting a relationship between the above tenets and alleged member wrongdoing, many of the claims could be circumstantial and may not be systematic and widespread, particularly with a group membership that has apparently been as high as 80

²⁷ See *Falun Gong Trying to "Cheat Western Public Opinion," Chinese envoy says*, BBC, July 26, 2001, available at LEXIS, Asia Pacific Library [hereinafter *Cheat Western Public Opinion*]. For example, in the Falun Gong-sponsored infomercial that is telecasted by local television stations on a regular basis throughout the United States, the program depicts the Chinese government's persecution of the group and teaches the exercises while underscoring its peaceful nature without describing member actions that have caused so much travail in China.

²⁸ These were the terms employed to describe practitioners and this was the general posture of Mr. Hongzhi's first book, published in 1993. See generally LI HONGZHI 3, *supra* note 17.

²⁹ Mr. Hongzhi began to employ these terms in his second major work, where he emphasized spirituality much more, the existence of other spiritual dimensions, and disciple dependency on his powers. See generally LI HONGZHI, *ZHUAN FALUN: TURNING THE LAW WHEEL* (North American Practitioners trans. 2003), available at <http://www.falundafa.org/eng/books.htm> (last visited Feb. 25, 2005) [hereinafter LI HONGZHI].

³⁰ See LI HONGZHI, *ESSENTIALS FOR FURTHER ADVANCEMENT II*, at 16, 18, 25, 27, available at <http://www.falundafa.org/book/eng/jjyz2.htm> (last visited Feb. 25, 2005) [hereinafter LI HONGZHI 2]; *Hong Kong paper alleges CIA behind Falun Gong*, BBC, Feb. 26, 2001, available at LEXIS, Asia Pacific Library [hereinafter *CIA behind Falun Gong*].

million within China. According to Falun Gong's official teachings, the group has very honorable and benign intentions; by following the regimen of exercises and teachings, practitioners not only will evolve spiritually but will also develop very profound "abilities."³¹ The Chinese government calls these promises deceptive and claims that its reaction to member advocacy to defend their beliefs is justified for the good of the collective society.

2. Stage One

The first stage of Falun Gong teachings might be defined as the period in which Mr. Li Hongzhi united religious, spiritual, and philosophical beliefs that have a longstanding history in China. Falun Gong has associated itself with Buddhist and Taoist traditions³² and predicates its teachings heavily on "Buddha Law," which it calls "the most wondrous and highest science."³³ Buddha Law is the "universe's most fundamental nature, to be True, to be Good, and to Endure."³⁴ Disciples believe in Karma and previous lives,³⁵ in fostering ethical human relations, and in attaining a calm mind; the teachings, however depart significantly from Buddhism and Taoism.³⁶ Falun Gong also promotes a modern variant of the ancient Chinese practices of exercise, deep breathing, and meditation – collectively known as *qigong* – which enthusiasts claim promotes physical, mental, and spiritual well-being by enhancing the flow of vital energy through the body.³⁷

The progressive aspiration of the Falun Gong disciple is to cultivate character by releasing negative thoughts to reach a higher level of spirituality.³⁸ This profound yet subtle process is invisible to

³¹ See, e.g., *Falun Buddha Fa: Teaching the Fa at the Conference in Europe*, available at <http://www.falundafa.org/book/eng/pdf/europe1998a.pdf> (last visited Mar. 17, 2005).

³² See *Falun Gong & Falun Dafa*, *supra* note 24.

³³ See LI HONGZHI, *supra* note 29, at 1.

³⁴ See *id.* at 7.

³⁵ See *id.* at 73, 76.

³⁶ See LI HONGZHI 3, *supra* note 17, at 20.

³⁷ See HUMAN RIGHTS WATCH, *supra* note 8, at I. A member stated, "The Falun Dafa (or Falun Gong) is the basic law of humanity in a language understandable to human beings, its appearance is unprecedented in human history." *China: Hong Kong, Macao, Taiwan Press at Falun Gong Re-education Camp*, BBC, June 12, 2001, available at LEXIS, Asia Pacific Library. *Qigong* is an ancient Chinese practice of controlling energy flow. See LI HONGZHI 3, *supra* note 17, at 1-3.

³⁸ See LI HONGZHI, *supra* note 29, at 15.

others.³⁹ *Cultivating* is the evolutionary process through which disciples transcend one's original body so that "[t]he molecular composition of the human body is transformed into high-energy matter."⁴⁰ By performing the regimen of *qigong* exercises,⁴¹ and by living virtuously in thought and deed,⁴² one can attain heightened levels of cultivation, thereby reaching higher dimensions that are distinct from that in which one's body presently resides. In short, cultivating to higher levels increases one's *gong*.⁴³

The height to which one can cultivate depends entirely upon one's ability to endure and bear hardships in the physical world.⁴⁴ A Falun Gong member's ultimate goal is to reach *consummation*, which may mean that the disciple must endure hardship to attain that full evolution.⁴⁵ When reaching this highest level of *consummation*, one must "let go of all worldly attachments (including the attachment to the human body) and have made it through the process of letting go of life and death."⁴⁶

3. Stage Two

While the foundation of Mr. Li Hongzhi's teachings rely almost entirely on principles and religious practices with a long history in China, he says that any derivative of his teachings should be denounced.⁴⁷ He enforces this with a fairly strict regimen of rules mandating exclusive and steadfast devotion to his *Dafa*.⁴⁸ Indeed, there are a number of important attributes that Mr. Li Hongzhi emphasizes which he directly provides to disciples. First, he places a "Law Wheel" in the lower abdomen of disciples⁴⁹ and assists them in opening the "third eye"⁵⁰ to new levels.⁵¹ The third eye is the gateway

³⁹ *Id.*

⁴⁰ See LI HONGZHI 3, *supra* note 17, at 24.

⁴¹ See *id.* at 49-51.

⁴² See *id.* at 30-44, 49.

⁴³ *Gong* is described as "cultivation energy." See *id.* at 92.

⁴⁴ See LI HONGZHI, *supra* note 29, at 39.

⁴⁵ See *id.* at 41-42, 74.

⁴⁶ See LI HONGZHI 2, *supra* note 30, at 16.

⁴⁷ See LI HONGZHI, *supra* note 29, at 51, 83-84, 112, 125. Mr. Hongzhi has stated that other *qigong* masters have possessing spirits that are wrecking our ordinary world. See *id.* at 59.

⁴⁸ See LI HONGZHI 3, *supra* note 17, at apps. I-IV.

⁴⁹ See LI HONGZHI, *supra* note 29, at 21, 70.

⁵⁰ "Third Eye" "is sometimes translated as the 'celestial eye,' this term (*tianmu*) is used flexibly and can refer to the 'Third Eye' system or a particular component of that system, such as the pineal gland." See LI HONGZHI 3, *supra* note 17, at 93.

to supernatural abilities.⁵² Gong potency,⁵³ and the endurance of suffering⁵⁴ will intensify one's supernatural powers.

According to Mr. Li Hongzhi, some of the supernatural abilities that Falun Gong members have attained include: clairaudience telepathy, precognition,⁵⁵ and telekinesis;⁵⁶ as well as the abilities to "remotely view" distant places and times, to know the future, to reverse the aging process,⁵⁷ to remain young forever,⁵⁸ to levitate or fly,⁵⁹ to heal oneself and others of ailments,⁶⁰ and to disappear on command.⁶¹ However, a disciple never can reveal or unveil these supernormal abilities and experiences to anyone else or Mr. Li Hongzhi could take the powers away.⁶²

Mr. Li Hongzhi must also protect disciples throughout the cultivation process. He has "countless Law Bodies," which are invested with his "enormous divine Law-power" and serve to protect disciples from spiritual and physical dangers.⁶³ In fact, a disciple may not be able to attain true cultivation without his Law Bodies protection, or "maybe [the disciple's life] would be at risk."⁶⁴ Dangers can emerge from both the physical world and other dimensions; Mr. Li Hongzhi has provided examples of how he saves disciples from threatening circumstances every day.⁶⁵ "[T]here are things that come from other dimensions that interfere with our ordinary world."⁶⁶ "Man is going bad and demons are everywhere."⁶⁷ If a disciple becomes controlled by a foreign spirit, Mr. Li Hongzhi must cleanse that

⁵¹ See *id.* at 6-8.

⁵² See LI HONGZHI, *supra* note 29, at 12, 26.

⁵³ See LI HONGZHI 3, *supra* note 17, at 4.

⁵⁴ See LI HONGZHI, *supra* note 29, at 39.

⁵⁵ See LI HONGZHI 3, *supra* note 17, at 4.

⁵⁶ See *id.* at 25.

⁵⁷ See LI HONGZHI, *supra* note 29, at 20. Mr. Hongzhi reports that many practitioners who have followed related historical principles/teachings have lived for several hundred years. See LI HONGZHI 3, *supra* note 17, at 24.

⁵⁸ See LI HONGZHI, *supra* note 29, at 38.

⁵⁹ See *id.* at 164-65.

⁶⁰ See *id.* at 32-35, 115.

⁶¹ See *id.* at 131.

⁶² See LI HONGZHI 3, *supra* note 17, at 5.

⁶³ See LI HONGZHI, *supra* note 29, at 67-68. See generally *id.* at 85.

⁶⁴ See *id.* at 112.

⁶⁵ See *id.* at 67-68.

⁶⁶ See *id.* at 4, 94-95, 178.

⁶⁷ See *id.* at 59.

disciple.⁶⁸

The Chinese government maintains that the actions of Falun Gong disciples have mirrored Mr. Li Hongzhi's teachings.⁶⁹ Accordingly, the Chinese government has claimed that the third stage in Falun Gong's evolution has resulted in member actions that are violative of public safety and criminal laws and disruptive to the family, society, and community within China. The Falun Gong generally has denied or ignored these accusations.

4. Stage Three and the Clash with the Chinese Government

The first major conflict between Falun Gong members and the Chinese government took place on April 25, 1999, when over 10,000 Falun Gong members appeared unannounced and demonstrated outside of Zhongnanhai – the Chinese leadership compound in Beijing.⁷⁰ The primary purpose of the demonstration was to protest an academic journal article regarding societal risks posed by cults in China.⁷¹ The Falun Gong members presented their position and disassembled without any arrests being made.⁷² On June 20, *Renmin Ribao* (*People's Daily*), the Chinese Communist Party (CCP) newspaper, launched a number of opinions regarding cults without mentioning Falun Gong. The CCP stated that it is necessary for government and society to oppose “superstition and pseudo-science” if “rapid development and modernization [are] to be achieved.”⁷³ Other commentators addressed how dangerous Falun Gong had become to society.⁷⁴ The Chinese government has even recognized that the April 25 protest was the worst political incident since the 1989 Tiananmen Square protest, due to the size of the group and the threat it represented.⁷⁵

On July 22, 1999, the Chinese government marked Falun Gong as an “evil cult,”⁷⁶ organized a crackdown movement, instituted a

⁶⁸ *See id.* at 62, 65, 124.

⁶⁹ Mr. Hongzhi does admit that many disciples follow his every word. *See id.* at 156.

⁷⁰ *See* Clopak, *supra* note 19, at 17.

⁷¹ *See* Thomas, *supra* note 21, at 475.

⁷² *See id.*

⁷³ *See* HUMAN RIGHTS WATCH, *supra* note 8, at III.

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See Three years after ban, supra* note 10. Falun Gong is not alone in that other less mainstream and minority groups have also been deemed “cults.” *Possible Labour Camp Detentions of Chinese Christian Group Members Reported*, FIN. TIMES INFO., Sept. 3, 2002, available at LEXIS, Asia Pacific Library, BBC File; *China boasts*

campaign to garner public support for the crackdown, enacted criminal legislation to ban “heretical cult organizations,”⁷⁷ and even established a Falun Gong Control Office.⁷⁸ It pronounced the group to be an “anti-government, anti-society, family-wrecking organization.”⁷⁹ This was followed by police raids and arrests;⁸⁰ however, Falun Gong reciprocated this display of enforcement with even more defiance⁸¹ and an increasingly forceful and political message.⁸²

The event that presumably first turned the Chinese populace against Falun Gong was the self-immolation incident in Tiananmen Square, where five Falun Gong members apparently set themselves on fire to advocate their cause.⁸³ After this event, a Hong Kong news source quoted Mr. Li Hongzhi as stating, “At long last, there are Falun Gong practitioners who are willing to step forward and sacrifice their lives for the purpose of advocating the Fa [way].”⁸⁴

A Chinese news agency also reported that by 2001, 239 Falun Gong members had committed suicide, and that the organization in one way or another “caused the death of 1,660 practitioners and innocent people.”⁸⁵ The Chinese government claims that the number of suicides has now grown into the hundreds.⁸⁶ Xinhua News Agency recently reported that a Falun Gong member went on a month-long 17-person killing spree inspired by Falun Gong.⁸⁷

Hunger strikes can be a form of political objection to government policies; many religious and spiritual orientations also practice fasting.

crackdown against another Christian sect, AGENCE FRANCE PRESSE, Jan. 11, 2002, available at LEXIS, Asia Pacific Library.

⁷⁷ See Thomas, *supra* note 21, at 475-79. Participating in “heretical cult organizations” was listed as a crime in CRIM. LAW CODE art. 300 (1997). See *id.* at 479.

⁷⁸ See Zemin, *supra* note 13, at 1.

⁷⁹ See *Three years after ban*, *supra* note 10.

⁸⁰ See HUMAN RIGHTS WATCH, *supra* note 8, at III. The government’s reaction to the group was seemingly planned, contemplated, and designed to maintain the perception that the evolutionary improvements in human rights and the criminal justice system were continuing without suspension. Another 1989 Tiananmen Square massacre would have been disastrous for the government and country.

⁸¹ See *Three years after ban*, *supra* note 10.

⁸² Perhaps “no other group has been as effective in sustaining a campaign against Chinese officialdom for such a long time.” See *Three years after ban*, *supra* note 10.

⁸³ See *CIA behind Falun Gong*, *supra* note 30.

⁸⁴ See *id.*

⁸⁵ See *State agency reports 239 Falun Gong members committed suicide*, BBC, Mar. 3, 2001, available at LEXIS, Asia Pacific Library [hereinafter *239 Falun Gong members*].

⁸⁶ See Kennicott, *supra* note 4.

⁸⁷ See *Falun Gong Cult Followers*, *supra* note 5.

Regarding fasting, Mr. Li Hongzhi has stated, “some people go years or even over a decade without eating or drinking anything, but they do just fine.”⁸⁸ This is a “special cultivation method that people use under specially designated circumstances.”⁸⁹ Falun Gong members have allegedly participated in hunger strikes,⁹⁰ and the Chinese government claims many have died as a result.⁹¹

Mr. Li Hongzhi also teaches that modern medicine sometimes cannot eliminate the origin of illness because fundamental causes of illness often reside in other dimensions.⁹² Those with supernormal abilities can diagnose an illness generated in other dimensions and employ *qigong* cultivation to heal that illness.⁹³ However, he states that a disciple should not heal himself or others because it will disrupt karma and may propagate the disease in the healer.⁹⁴ Some Falun Gong members have died allegedly as a result of refusing medical treatment.⁹⁵

Similarly, a recent government crackdown against Falun Gong took place in Hebei province against 180 practitioners who were detained for apparently precipitating societal unrest by spreading “doomsday” prophecies about the SARS outbreak, and by recruiting members with promises that those who practice Falun Gong will not contract the disease.⁹⁶ Some members have allegedly participated in unconscionable tactics to spread the disease around China to cause societal unrest and trepidation within the population.⁹⁷

In response to the crackdown and reports of brutal treatment of disciples in China’s Re-Education Through Labour System (RETL), which is the Chinese government’s non-criminal rehabilitation system

⁸⁸ See LI HONGZHI, *supra* note 29, at 151.

⁸⁹ See *id.*

⁹⁰ See *New Permit Policy Makes entry to HK easier*, SOUTH CHINA MORNING POST LIMITED, June 2, 2003, available at LEXIS, Asia Pacific Library [hereinafter *New Permit Policy*]; Audra Ang, *Eight Falun Gong practitioners sentenced to jail for hijacking television signal*, Dec. 28, 2002, available at LEXIS, Asia Pacific Library.

⁹¹ See Christopher Bodeen, *China releases U.S.-based woman after three-year sentence for Falun Gong activism*, ASSOCIATED PRESS, Mar. 19, 2003, available at LEXIS, Asia Pacific Library; 239 *Falun Gong members*, *supra* note 85.

⁹² See LI HONGZHI 3, *supra* note 17, at 10.

⁹³ See *id.* at 11-12.

⁹⁴ See LI HONGZHI, *supra* note 29, at 42-44, 144.

⁹⁵ See Bodeen, *supra* note 91.

⁹⁶ See *China Jails 180 Falun Gong members for SARS rumors*, WASH. POST, June 5, 2003, available at <http://www.washingtonpost.com/wp-dyn/articles/A18206-2003Jun5.html> (last visited June 12, 2003) [hereinafter *China Jails 180*].

⁹⁷ See *Falun Gong Accused of Trying to Spread Sars in China*, FIN. TIMES INFO., June 10, 2003, available at LEXIS, Asia Pacific Library.

designed for “societal agitators,” Mr. Li Hongzhi stated, “China’s Labor Re-education Camps are dark dens of evil forces. Most of the disciplinary guards there are reincarnated minor ghosts from hell. As for the people who have been ‘reformed,’ it was arranged in history that they would persecute the Fa this way.”⁹⁸

Regardless of the crackdowns and physical harm inflicted on disciples, Mr. Li Hongzhi urges disciplines to continue spreading the Fa and saving people.⁹⁹ He calls on them to fight the “evil,” and he chastises those disciples who do not “validate Dafa.”¹⁰⁰ Disciples must remain true to the teachings because “the evil [that] persecutes Dafa” will be defeated and “[the CCP’s] current head himself is used to destroy the party and its regime from within the party.”¹⁰¹ Disciples should be willing to make great sacrifices and not just take from the Dafa, as “[t]hose people who are still unable to step forward today will be weeded out after this tribulation is over.”¹⁰² Human Rights Watch acknowledges that the organization promotes apocryphal¹⁰³ and salvationist teachings.¹⁰⁴

The Chinese government also claims that Falun Gong teachings have threatened the stability of the economic transformation process.¹⁰⁵ Policies that foster individualism, markets, and science can arguably counter themes of virtuous living espoused by Falun Gong,¹⁰⁶ which advocates living selflessly,¹⁰⁷ relinquishing attachments,¹⁰⁸ and avoiding being dominated by scientific discoveries. Another claim is that Falun Gong has even taken advantage of the difficulties of the modernization process. Allegedly, Falun Gong has “lured” despondent and psychologically imbalanced people to the group, particularly those who have had difficulty coping with rapid changes emerging

⁹⁸ See LI HONGZHI 2, *supra* note 30, at 18.

⁹⁹ See *id.* at 27.

¹⁰⁰ See *id.* at 25.

¹⁰¹ See *id.* at 23.

¹⁰² See *id.* at 25.

¹⁰³ Chinese Ambassador Yang has been quoted: “What the leaders of Falun Gong have been saying is that the earth has been destroyed many times and the earth is about to explode and the leaders have magic power to postpone the explosion of the earth.” See *Cheat Western Public Opinion*, *supra* note 27.

¹⁰⁴ See HUMAN RIGHTS WATCH, *supra* note 8 at II; see LI HONGZHI, *supra* note 29, at 17, 51, 58, 59, 69, 95, 156, 178; see also LI HONGZHI 2, *supra* note 30, at 11, 25, 34, 43.

¹⁰⁵ See HUMAN RIGHTS WATCH, *supra* note 8, at I and VII.

¹⁰⁶ See LI HONGZHI, *supra* note 29, at 77.

¹⁰⁷ See *id.* at 27.

¹⁰⁸ See LI HONGZHI 3, *supra* note 17, at 36.

from the movement from a planned to a market economy.¹⁰⁹

Mr. Li Hongzhi did specifically mention as early as 1994 that Falun Dafa Assistance Centers “must not intervene in politics.”¹¹⁰ It seems he prognosticated the confrontation in China. Given the extent to which Falun Gong as an organization proliferated, it is not surprising that political altercations have arisen with a government that has been quite concerned about maintaining power. For centuries, Chinese leaders have been suspicious of religions and cults that could garner support with their teachings because most of the major uprisings against government have involved superstition, cults, or religion.¹¹¹ To curb the Chinese government’s vexation at the root, it has requested that the United States extradite Mr. Li Hongzhi back to China.¹¹²

III. HUMAN RIGHTS ABUSES

A. Introduction

It would be difficult to deny that the crackdown against Falun Gong has not been abusive. Falun Gong’s complaint to the district court alleged that President Jiang Zemin suppressed the rights of thousands of Falun Gong practitioners by engaging in actions leading to “arrest without trial, execution, rape, disappearance, forced labor in work camps, and torture.”¹¹³ It similarly alleges violations of due process protections, and denial of freedom of thought, conscience, and religion.¹¹⁴ However, one must distinguish between human rights violations that can potentially impose criminal or civil liability violations on leaders, from those claims that cannot impose such

¹⁰⁹ See *Expert Exposes Tricks of Falun Gong*, XINHUA NEWS AGENCY, July 26, 2001, available at LEXIS, Asia Pacific Library.

¹¹⁰ See LI HONGZHI 3, *supra* note 17, at 87-88.

¹¹¹ See Chen Huanzhong, *A Brief Overview of Law and Religion in the People’s Republic of China*, 2003 BYU L. REV. 465, 467 (2003).

¹¹² See *China expels three Australian Falungong members*, AGENCE FRANCE PRESSE, Dec. 7, 1999, available at LEXIS, Asia Pacific Library. There were also rumors that China offered \$500 million to the U.S. to extradite Mr. Hongzhi. *China government seeks to dispel “rumours” of Falungong crackdown*, DEUTSCHE PRESSE-AGENTUR, June 14, 1999, available at LEXIS, Asia Pacific Library.

¹¹³ See Zemin, *supra* note 13, at 4.

¹¹⁴ The complaint contains “claims for torture; genocide; violation of the right to life; violation of the right to liberty and security of the person; arbitrary arrest and imprisonment; violation of the right to freedom of thought, conscience, and religion; and conspiracy to commit violations of civil rights within the United States.” See *id.* at 4.

liability because sovereign immunity is a defense.

The international community's obligation to hold state leaders responsible for violating the rights of citizens arguably only emerges when universal jurisdiction crimes have been perpetrated. Universal crimes include piracy, war crimes, slavery, and crimes against humanity.¹¹⁵ For government abuses against citizens, however, court precedence and academic commentary suggests that crimes must be committed on a "mass scale" and subject citizens to "widespread or systematic attack" before the boundary between a purely domestic matter and a crime permitting universal jurisdiction is reached.¹¹⁶ If a

¹¹⁵ See generally M. Cherif Bassiouni, *Sources and Theories of International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW 83 (2d ed. 1999).

¹¹⁶ The argument that a state can lose immunity for genocide is often grounded on its categorization as a *jus cogen* fundamental norm, which is regarded as superior to both treaties and customary international law. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), Provisional Measures, 1993 I.C.J. 4, 440 (Order of Sept. 13). *Jus cogen* norms include slavery, genocide, torture, and summary execution. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k; see also Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714. The argument that sovereign immunity is waiver for a *jus cogen* norm has often rested on two explanations – that there is an implied waiver by implication when such a norm is violated or that immunity was never available for such acts. Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 774 (2003). There can also be a potential extension that would pierce sovereign immunity, and perhaps even that head-of-state immunity when there is "widespread and systematic" violations of severe human rights abuses. See Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State is Not Immune for Torture*, 14 TEMP. INT'L & COMP. L.J. 263, 309-10 (2000); Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trial of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 135-36 (2003); Bassiouni, *supra* note 115, at 83. Heads-of-state have historically enjoyed the most immunity. See Jerrold L. Mallory, *Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179 (1986), but there is now some question about whether that immunity has been and should be narrowed. See Keith Highet, George Kahale III & Joseph W. Dellapenna, *International Decisions: Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the Department of State*, *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994), 88 AM. J. INT'L L. 528, 531-32 (1994); Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 657-663 (2002); see Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 186 (1994). The Rome Statute of the International Criminal Court may also lend credence to this trend. It reads: "Head of State [immunity] . . . shall in no case exempt a person from criminal responsibility under this Statute." Rome Statute of the International Criminal Court, July 17, 1998, art. 27, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, 1010. However, to date, the United States has never negated a sitting head-of-state's immunity (*Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296-97 (S.D.N.Y. 2001); *Saltany v. Reagan*,

claim does not reach this threshold, universal jurisdiction does not apply. In this case, sovereign immunity, comity, the political question doctrine, derivative *respondeat superior* liability, and personal jurisdiction may all limit justiciability. A domestic court may not be able to exercise jurisdiction over a government leader for committing human rights abuses.

Part III, taken together with Part IV, serves to place the Chinese government's crackdown on Falun Gong within a relative, analytical context. Part IV will consider atrocities warranting universal jurisdiction in detail. Genocide cases meet the classic definition of a universal crime; however, Part IV will also briefly discuss several other situations involving gross human rights during this century in order to establish a frame of reference between genocide and non-genocidal human rights violations that could arguably meet the "mass scale" requirement for universal jurisdiction.¹¹⁷

The strength of Falun Gong's claims depend on the government's justification for: 1) banning the organization; 2) preventing member freedoms by imposing substantive crimes and societal infractions that restrain liberty; and 3) subjecting members to detention methods that have allegedly been severe and abusive. Alternatively, the Chinese government claims that it "banned" the group and detained members in order to thwart evangelism and reverse the group's inculcation as well as to prevent more suicides, and other activities that might break up families, the community, and general societal order.¹¹⁸

B. Potential Human Rights Violations

1. Banning Falun Gong: Cultural and Government Relativism

If the threat that Falun Gong's evangelism poses to society exceeds the organization's collective right to freely express itself and organize, international law *may* provide a basis to justify state action against Falun Gong.¹¹⁹ Chinese leaders have historically provided

702 F. Supp. 319, 320 (D.D.C. 1988)).

¹¹⁷ The only distinctions between genocide cases and the non-genocidal government massacres discussed in this section reside in the "intent" underlying the mass murders and the classification of the targeted group.

¹¹⁸ See *Falun Gong Claims*, *supra* note 1; HUMAN RIGHTS WATCH *supra* note 8, at III; *China Jails 180*, *supra* note 96; Bodeen, *supra* note 91; *239 Falun Gong Members*, *supra* note 85; Ang, *supra* note 90; *New Permit Policy*, *supra* note 90; Kennicott, *supra* note 4; *Falun Gong Cult Followers*, *supra* note 5. See *supra* notes 73-77 and accompanying text.

¹¹⁹ See Human Rights Committee, General Comment 10 (art. 19), U.N. GAOR 19th

stability by fostering and implementing policies that maintain the interests of the collective over the rights of the individual.¹²⁰ This position departs significantly from Western connotations of rights¹²¹ and from expectations under international law. The Chinese government's collectivist ideology has been historically and culturally-ingrained during the twentieth century;¹²² one query is whether cultural relativism should provide a justification to the Chinese government's reaction to Falun Gong.

Western legal definitions of individual human rights do not carry the same effect in China because Chinese law has traditionally been

Sess., P 4, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994). For example, at an extreme, if a group poses a real threat to societal stability and seeks to violently overthrow government, the government would have a right to react with a reasonable level of force that might otherwise be considered human rights violations. This is seemingly not the case here.

¹²⁰ Historical influences on current ideology trace back to the teachings of Confucius, who stressed the rights of society over the rights of the individual. *See generally* THE ANALECTS OF CONFUCIUS (Chichung Huang trans., 1997); *see also* RONALD J. TROYER, *Chinese Thinking about Crime and Social Control, in* SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA 45-46 (Ronald J. Troyer et al. eds., 1989). Confucian thought designated the importance of particular actors in society by placing the state first, the collective second, and the individual last. *See also* ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 10 (1992).

¹²¹ More individualistic societies elevate the concept of legal rights by institutionally defining them as privileges of the individual that the collective society, government and majoritarian voices cannot eliminate. *See* Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359, 367 (1995). Due to China's historically entrenched collectivist societal norms, what the Western world perceives as individual rights are considered *interests* in China.

¹²² In 1919, Chen Duxiu, an editor for Youth magazine who later became the CCP's first General Secretary advocated that collective interests should prevail over individual rights. *See* Guo Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 2 (1996). Duxiu asserted that China's future philosophical direction should not seek to hearten individual human rights, but rather to accentuate democracy and the larger community and nation. *See id.* The CCP's traditional posture is illustrated by Article 51 of the 1982 PRC Constitution, which states, "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state of society and of the collective, or upon the lawful freedoms and rights of other citizens." XIANFA [CONST.] art. 51. The Constitution was adopted at the Fifth Session of the Fifth National People's Congress on December 4, 1982. It was promulgated for implementation by the Proclamation of the National People's Congress on December 4, 1982. A more relaxed balance between individual rights and collective interests appears in a 1999 amendment to the Xianfa: "The People's Republic of China shall be governed according to law and shall be built into a socialist country based on the rule of law." *See* Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 399 (2000).

structured to remove individual rights¹²³ in favor of state-sponsored interests in the collective economy and society.¹²⁴ As the government codifies new freedoms and individual protections that could, upon application, be somewhat inconsistent with history and tradition, citizens might “subvert” collective stability by citizens exercising new freedoms. The government has reacted by meeting the distance between law and acceptable societal conduct with a crackdown movement,¹²⁵ as occurred during the 1989 Tiananmen Square massacre,¹²⁶ by hedging against an increasing crime rate,¹²⁷ and by deeming a group an “evil cult.” However, fortifying the rights of every individual and their freedoms may be the best way to provide collective security for all.

There is an intricate correlation between this cultural foundation and government policies. In fact, the difference between most Western governments and China, when navigating the actions of “fringe” religious groups, resides in the conceptualized role of government institutions. Most Western governments institutionally grant religions individual and group rights against government, while the Chinese government instead promotes or authorizes certain religions to exist. This role might even influence whether a

¹²³ See Luoji, *supra* note 122, at 5.

¹²⁴ The Chinese government has been concerned with the economic modernization reforms for the *collective* good of society. See Lubman, *supra* note 122, at 386-87. Over the past two decades, Chinese reforms have been dedicated to fomenting potent social and legal change in nearly every aspect of Chinese life. See Timothy A. Gelatt & Frederick E. Snyder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41, 41-43 (1980). However, the economic modernization process has been gradual and the government still claims that its history, culture, and need to develop make it unique and require exception from universal standards of human rights. See Eleftherios Georgiou, *China: Where the Failure to Adhere to Domestic Political Laws Often Leads to Religious Oppression*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 355, 358 (2000).

¹²⁵ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30 (1974). Punishing the potentially innocent allegedly saves lives by deterring harmful conduct and by removing a higher percentage of potential miscreants out of society. Detaining an individual pending a long investigation may be justified beyond the statutory period based on the same line of analysis. *Id.* at 32.

¹²⁶ See Jennifer Morris, *Human Rights Violations During the Tiananmen Square Massacre and the Precedents Obliging United States Response*, 12 CARDOZO L. REV. 1375 (1991).

¹²⁷ For example, in April 1996, the government implemented a “strike hard” campaign against crime because it recognized that there were escalating crime rates and believed that harsher police practices were necessary to fortify national security. See John T. Boxer, *China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest*, 22 SUFFOLK TRANSNAT'L L. REV. 593, 601-605 (1999).

government employs a “ban” or group prohibition to preempt evangelizing, or whether it will only prevent harm to society once members commit societal infractions perceivably consistent with group tenets.

Western governments and human rights groups have been very critical of China’s human rights record.¹²⁸ The Chinese government’s reaction to Falun Gong has evoked complaints from human rights groups that, pursuant to the Universal Declaration of Human Rights (UDHR), freedoms of expression association, and religion/conscience have been denied.¹²⁹ Likewise, China is a party to two other multilateral treaties that protect religious freedom – the International Covenant on Civil and Political Rights (ICCPR)¹³⁰ and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.¹³¹

¹²⁸ See Amnesty International, *People’s Republic of China: Establishing the Rule of Law and Respect for Human Rights: The Need for Institutional and Legal Reforms, Memorandum to the State Council and National People’s Congress of the People’s Republic of China*, at 2.2, available at <http://web.amnesty.org/library/index/engasa17052> (Oct. 22, 2002); *U.S. Report Slams PRC Human Rights Record*, FIN. TIMES INFO., Oct. 3, 2002, available at LEXIS, Asia Pacific Library, Global News Wire; *Human Rights Watch urges Bush to use leverage on China*, AGENCE FRANCE PRESSE, Aug. 15, 2001, available at LEXIS, Asia Pacific Library.

¹²⁹ See G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR]. The UDHR is an expression of individual rights most consistent with constitutional doctrines of Western countries. It is not a document that requires ratification, since it was adopted as a statement of objectives to be pursued by governments to give human rights to all. It is customary international law because it was approved by consensus and has solidified tacit acceptance over the past five decades. See EDMUND JAN OSMANZYK, *THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS* 402 (1990); see also DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 95-96 (2001).

¹³⁰ 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 morals or the fundamental rights and freedoms of others;

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions.”

International Covenant on Civil and Political Rights, G.A. Res. 220A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6136, art. 18 (1966) [hereinafter ICCPR].

¹³¹ Article 6 Rights include:

(a) To worship or assemble in connection with a religion or belief, and to

It is an international human right to take part in government¹³² and to express one's opinion peacefully.¹³³ While the Chinese government has provided more freedom of expression over the past two decades and the media has begun to acquire limited autonomy from the government,¹³⁴ the government still supervises what citizens can express to the extent and degree that it deems particular expression to require restrictions.¹³⁵ Falun Gong's message has been preempted as less acceptable speech that could incite societal harm and instability.

Freedom of association and assembly are also international human rights.¹³⁶ The Falun Gong organization has been restricted from

establish and maintain places for their purposes;

(b) To establish and maintain appropriate charitable or humanitarian institutions;

(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rights or customs of a religion or belief;

(d) To write, issue and disseminate relevant publications in these areas;

(e) To teach a religion or belief in places suitable for these purposes.;

....

(g) To train appoint, elect or designate by succession appropriate leaders called for by the requirements and standard of any religion or belief;

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and,

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion of Belief, G.A. Res. 36/55, U.N. GAOR 36th Sess., Supp. No. 51, at 172, U.N. Doc. A/36/51 (1981) [hereinafter *Declaration on Religious Discrimination*].

¹³² See UDHR, *supra* note 129, art. 21.

¹³³ See *id.* arts. 19, 20.

¹³⁴ See generally TODD HAZELBARTH, *THE CHINESE MEDIA: MORE AUTONOMOUS AND DIVERSE - WITHIN LIMITS* (1997).

¹³⁵ See generally WON HO CHANG, *MASS MEDIA IN CHINA: THE HISTORY AND THE FUTURE* (1993); Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate between the Cyberspaces*, 4 INT'L J. COMM. L. & POL'Y 1 (Winter 1999/2000).

¹³⁶ See UDHR, *supra* note 129, art. 20.

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assembling and evangelizing because of the perceived societal instability that could be caused by the group's proliferation and their dissent against government. Alternatively, international law provides that even peaceful assembly may be restricted if concerns over national security, public safety, or public health/morals, or violations of the rights and freedom of others are at issue.¹³⁷

2. Government and Populace Positions Regarding Falun Gong

Any branch of government or political faction can cast a disposition on whether a group poses a real threat to a stable society, which may or may not represent what citizens prefer. While citizen support may be indicative of a greater legitimacy of domestic action, it does not automatically provide a legitimate justification at the international level; global human rights and the role of fair and equal justice principally serve to protect individuals from the tyranny of the majority.

The Chinese government internally debated whether Falun Gong should be banned or whether it should be placed under bureaucratic control like other authorized religious groups.¹³⁸ Since the banning and crackdowns, all government institutions have agreed with the government's treatment of the group. China's Ministry of Civil Affairs and Public Security censored Falun Gong activities; the National People's Congress set crimes and penalties for practicing and evangelizing Falun Gong tenets;¹³⁹ the Supreme People's Procuratorate has brought charges against those organizing and advocating Falun Gong;¹⁴⁰ and the Supreme People's Court has convicted and sentenced Falun Gong practitioners.¹⁴¹

Mainland Chinese citizens may have also become more opposed to the group after it allegedly became more defiant.¹⁴² In a survey of

¹³⁷ See ICCPR, *supra* note 130, art. 21.

¹³⁸ See HUMAN RIGHTS WATCH, *supra* note 8, at VII.

¹³⁹ It was alleged in the district court complaint that President Jiang Zemin "ordered the NPC to pass laws that would legitimize the crackdown." See Zemin, *supra* note 13, at 4.

¹⁴⁰ *Apparent Full Text of Work Product of Chinese Supreme People's Procuratorate*, FIN. TIMES INFO., Mar. 31, 2003, available at LEXIS, Asia Pacific Library, BBC File.

¹⁴¹ See Clopak, *supra* note 19, at 17; see also *China: Apparent Full Text of Supreme Court Work Product*, XINHUA NEWS SERVICE, Mar. 29, 2003, available at LEXIS, Asia Pacific Library.

¹⁴² See *The Killing of a Cult*, AGE COMPANY LIMITED., Mar. 17, 2002, available at LEXIS, Asia Pacific Library; *Cheat Western Public Opinion*, *supra* note 27; *CIA behind Falun Gong*, *supra* note 30. A number of Chinese academics and experts have requested that the international community "jointly denounce and resolutely put a stop

overseas Chinese, results indicate variance of opinion on issues relating to the crackdown. Those surveyed do believe that Falun Gong is a cult that is harmful to Chinese society, stability, and the modernization process.¹⁴³ The Chinese are also very critical of Mr. Li Hongzhi, stating that they believe the teachings are fallacious,¹⁴⁴ and that they have led parishioners to engage in illegalities¹⁴⁵ and commit suicide.¹⁴⁶ However, those surveyed do not believe that Falun Gong should be banned.¹⁴⁷ In fact, the surveys indicate that a high percentage of Chinese believe that the government violated human rights and that its actions in response to Falun Gong have been inappropriate.¹⁴⁸ Likewise, respondents were especially sure that the Chinese government banned the group primarily because of the fear of losing political control and only partially because it posed a potential harm to society.¹⁴⁹

Certainly, the Chinese government has the right under international law to respond to Falun Gong member actions that are illegal or threaten societal stability.¹⁵⁰ However, it is another question indeed whether individual actions aggregate into a justification for a large-scale ban or crackdown that denies freedom of expression, association, and conscience. According to Human Rights Watch, the thousands of Falun Gong practitioners who have been arrested or

to the new crimes of 'Falun Gong,' which harm public security and challenge human civilization." See *Chinese Academics Denounce Falun Gong*, BBC WORLDWIDE MONITORING, July 11, 2002, available at LEXIS, Asia Pacific Library. One source reports that most intellectuals in China have regarded Falun Gong as a "dangerous and manipulative superstition rather than a religion." See Huanzhong, *supra* note 111, at 472.

¹⁴³ See Mei Lu, *The Controversy About Falun Gong: What Do Chinese People Think?*, THE REPORT OF FALUN GONG SURVEY, at <http://www.voicesofchinese.org/falun/surveyrpt.shtml#falun> (last visited June 4, 2003). See questions 1, 5, 8.

¹⁴⁴ See *id.* questions 11, 12, 13.

¹⁴⁵ See *id.* questions 1, 5, 7, 8.

¹⁴⁶ See *id.* questions 9, 10.

¹⁴⁷ See *id.* questions 4, 14.

¹⁴⁸ See *id.* questions 14, 15.

¹⁴⁹ See *id.* questions 17, 18.

¹⁵⁰ Members have committed suicide. See Calum Macleod, *Falun Gong Inmates Hang Themselves in Protest*, THE INDEPENDENT, July 4, 2001, available at LEXIS, Asia Pacific Library, Papers File [hereinafter Falun Gong Inmates]; *Chinese Legal Officials Interviewed on Anti-cult Moves*, BBC WORLDWIDE MONITORING, Feb. 11, 1999, available at LEXIS, Asia Pacific Library, BBCMIR File [hereinafter Chinese Legal Officials]. Allegedly members have performed self-immolation by lighting themselves on fire. See *Wheel of Energy: Killing Spiritualism by Force in China*, THE STATESMAN (INDIA), Mar. 19, 2001, available at LEXIS, Asia Pacific Library, AAIW File. Members have also died from hunger strikes. See Ang, *supra* note 90.

placed in RETL have not been confined for any violent act against anyone else but rather for organizing and promoting Falun Gong itself.¹⁵¹ While the Chinese government would probably dispute the accuracy of this claim,¹⁵² the government has implied that members who organize or promote Falun Gong have also engaged in illegal activities, disrupted society and the economy, and deceived people.¹⁵³

Thus, a legitimate justification for banning the group may not exist. By extension, to the extent that members either fear practicing their beliefs, or have been subject to the criminal justice system or to an administrative form of detention for the practice of their beliefs, they may have been denied their rights. Alternatively, if the government's ban was justified to protect against societal harm, then the substantive basis for criminalization or "offense against society" could be legitimate. Yet that does not mean that the rights of individual members upon application of the law have not been denied. Detaining members, depriving them of freedom of conscience, or brutally treating them are still human rights violations pursuant to China's obligations under the UDHRs,¹⁵⁴ the ICCPR,¹⁵⁵ and the Convention Against Torture.¹⁵⁶

3. Detention of Members

For the vast majority of Falun Gong members, the government has resorted primarily to traditional, non-legal, and preemptive cultural methods of behavioral modification. These methods *allegedly* promote socially desirable behavior¹⁵⁷ by detaining and "re-educating"

¹⁵¹ See HUMAN RIGHTS WATCH, *supra* note 8, at I.

¹⁵² See Kennicott, *supra* note 4.

¹⁵³ See *Chinese legal officials*, *supra* note 150.

¹⁵⁴ See UDHR, *supra* note 129, arts. 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 18, 19.

¹⁵⁵ See ICCPR, *supra* note 130, arts. 7, 8, 9, 10, 14, 18, 19, 26.

¹⁵⁶ Convention Against Torture, And Other Cruel, Inhumane, or Degrading Treatment or Punishment, Dec. 10, 1984, arts. 1, 2, 465 U.N.T.S. 85 [hereinafter Convention Against Torture].

¹⁵⁷ See Wallace Johnson, *Status and Liability for Punishment in the T'ang Code*, 71 CHI.-KENT L. REV. 217, 217 (1995). Rudimentary cultural inculcation includes fostering cultural and moral instruction within the family unit. See *id.* at 218. Raising children in a manner to support societal harmony, ostracizing individuals from his/her community for departures from acceptable behavior, and utilizing informal behavioral modification approaches is also a traditional approach. See Boxer, *supra* note 125, at 601. See *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1890-91 (1985). Leaders ruled by ethical guidance and sought to persuade through moral examples that emphasized societal harmony rather than adherence to written sources of law. See TROYER, *supra* note 120, at 50.

Falun Gong members to “bring them back” into the collective society as productive citizens.¹⁵⁸ However, global human rights protections require that if a citizen’s conduct is considered wrongful and merits a detention against one’s will, law should be defined transparently and grant individuals due process protections.¹⁵⁹ As applied to Falun Gong, this is the case even though the alleged “wrongdoing” in which most Falun Gong practitioners have purportedly engaged in is not criminal by Chinese standards, history, and culture but rather is quasi-criminal in nature. In effect, a detention has taken place against the detainees without affording due process protections.¹⁶⁰

Ostensibly, there is an incentive to preserve the perception that the criminal law system reform processes and human rights improvements are positively progressing without disruption.¹⁶¹ Thus, of the approximately 20,000 Falun Gong members¹⁶² subject to long-term detention, up to 99% have been placed in informal means of

¹⁵⁸ This uniquely Chinese distinction between legal and non-legal forms of defining societal conduct and punishment is often depicted as a balance between *li* and *fa*. See CHEN, *supra* note 120, at 9. *Li*, premised on Confucianism, refers to “moral and social rules of conduct” devised to educate and persuade society about proper behavior, and confers that excessive legal coercion is not necessary or desirable. See *id.* at 8-9. *Fa*, on the other hand, refers to rules imposed by the state, ostensibly in a codified form that can be backed up by state-imposed sanctions. See *id.* at 8.

¹⁵⁹ See UDHR, *supra* note 129, arts. 3, 8, 10, 11; ICCPR, *supra* note 130, arts. 9, 10, 14, 26.

¹⁶⁰ See UDHR, *supra* note 129, art. 3; ICCPR, *supra* note 130, art. 9.

¹⁶¹ Written criminal justice laws in China have become quite consistent with international standards on global human rights (see Daniel C. Turack, *The New Chinese Criminal Law System*, 7 CARDOZO J. INT’L & COMP. L. 49, 66 (1999)), and there have been vital improvements to the criminal justice system. See Lubman, *supra* note 122, at 388. If codified law provisions had been applied to a significant percentage of Falun Gong members, perhaps to those whose actions could not reasonably be defined as criminal, the more that reform measures would be seen as ineffective. Giving Falun Gong members, who would be detained for a significant period of time, attorneys, due process protections, and an assessment of guilt, might backlog courts and undermine perceptions of China’s modernization process, particularly when they might be subject to globally unpalatable substantive charges. Instead, seemingly the rationale is that employing RETL engenders more opacity and flexibility to behavioral modification to “bring followers back” into society as productive members with less stringent scrutiny from the international community and without undermining institutional reforms of the formal legal system.

¹⁶² See *Cambodian Authorities Deport Two Falun Gong Practitioners*, DEUTSCHE PRESSE-AGENTUR, Aug. 14, 2002, available at LEXIS, Asia Pacific Library [hereinafter *Cambodian Authorities*]. Others have said that this number could be in the tens of thousands. See HUMAN RIGHTS WATCH, *supra* note 8, at III; John Schauble, *10 Falun Gong Followers Die in Mass Suicide Protest*, AGE COMPANY LIMITED, July 4, 2001, available at LEXIS, Asia Pacific Library. Falun Gong reports that over 100,000 have been sent to RETL. See generally <http://www.faluninfo.net> (last visited Feb. 25, 2005).

detention outside of the criminal justice process in RETL camps,¹⁶³ without an independent tribunal assessment of their guilt.¹⁶⁴ While this non-legal approach is more annexed to cultural foundations than is the criminal justice system, the primary goal underlying the criminal justice system in China is similar to the goal of informal control mechanisms. The criminal justice system is also not intended solely to punish but also to rehabilitate and bring an individual back into the collective society as a productive member.¹⁶⁵

4. Criminal Law Offenses and Convictions

The Criminal Law in China distinguishes between “serious” and “minor” offenses, and the application of either depends on the circumstances surrounding a societal transgression and its harm to the community.¹⁶⁶ Serious offenses are more apt to be subject to the criminal justice process, while minor offenses, requiring a detention period, are more apt to be subject to RETL. Criminal convictions and RETL detentions have charged Falun Gong members with committing social chaos and ambiguous crimes,¹⁶⁷ such as disrupting public order, endangering national security, and subverting the socialist system.¹⁶⁸ These charges are premised on two sets of substantive laws that define the wrongdoing. First, in the 1997 Criminal Law Code, conduct that “endangers state security” is a crime.¹⁶⁹ Second, it is a crime to

¹⁶³ See HUMAN RIGHTS WATCH, *supra* note 8, at I; see also *China Jails Six Falungong for Up to Six Years*, AGENCE FRANCE PRESSE, Aug. 9, 2001, available at LEXIS, Asia Pacific Library. In addition, perhaps about five times the number that spend time in RETL camps also have gone to temporary detention centers. See Clopak, *supra* note 19, at 17.

¹⁶⁴ See Zemin, *supra* note 13, at 4.

¹⁶⁵ See Pamela A. Seay, *Law, Crime, and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China*, 9 IND. INT'L & COMP. L. REV. 143, 152 (1998).

¹⁶⁶ Criminal Law of the People's Republic of China, Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997, art. 13., available at <http://www.com-law.net/findlaw/crime/criminallaw1.html> (last visited Feb. 25, 2005) [hereinafter 1997 CLPRC].

¹⁶⁷ See HUMAN RIGHTS WATCH, *supra* note 8, at III; Clopak, *supra* note 19, at 17.

¹⁶⁸ See Thomas, *supra* note 21, at 495-96.

¹⁶⁹ This crime has its origins in the 1979 Criminal Law Code. In Article 90 of the 1979 Code, a counterrevolutionary crime was an act that sought to endanger the PRC with the goal of overthrowing the government. THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (Jerome A. Cohen et. al trans., 1984) [hereinafter 1979 CPL]. The 1979 CPL was adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and was revised

participate in activities of “heretical cult organizations.”¹⁷⁰ However, the number of Falun Gong members convicted in the criminal justice system is a fractional percentage of those who have been subject to long-term detention.

5. RETL

RETL “rehabilitates” political agitators,¹⁷¹ and those who commit minor crimes¹⁷² and societal transgressions¹⁷³ that are not appropriate for the official criminal justice system. RETL provides “thought reform”¹⁷⁴ through moral and cultural education so that the detainee may be brought back into society knowing acceptable societal conduct.¹⁷⁵ Thus, RETL is generally not intended to address “crimes,” which would be handled by the criminal justice system, but offenses committed by “troublemakers” that do not rise to the level of a “crime.”¹⁷⁶ Pursuant to Chinese culture and tradition, the vast

in accordance with the Decision on Revising the Criminal Procedure Law of the People’s Republic of China at the Fourth Session of the Eighth National People’s Congress on March 17, 1996. It came into force on January 1, 1997.

¹⁷⁰ See 1997 CLPRC, *supra* note 166, art. 300.

¹⁷¹ See *Leading Chinese Dissident Jailed Again*, AGENCE FRANCE PRESSE, Sept. 25, 2002, available at LEXIS, Asia Pacific Library, GNW File; Harvey Stockwin, *Longest Serving Tibetan Dissident Released*, ECON. TIMES, July 15, 2002, available at LEXIS, Asia Pacific Library, GNW File; *China Says More Than 100 Political Prisoners in Tibet*, AGENCE FRANCE PRESSE, May 30, 2001, available at LEXIS, Asia Pacific Library.

¹⁷² See Veron Mei-ying Hung, *Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?*, 41 COLUM. J. TRANSNAT’L L. 303, 303 (2003) (minor crimes, for which RETL may be applied, can include prostitution and drug addiction). *China’s capital considers reforms to labor camp system*, ASSOCIATED PRESS, July 20, 2002, available at LEXIS, Asia Pacific Library. *Shanghai restaurant owner jailed over strip-show waitresses*, DEUTSCHE PRESSE-AGENTUR, Jan. 30, 2002, available at LEXIS, Asia Pacific Library (a Shanghai restaurant owner was sentenced to a year of RETL for employing strip-show waitresses).

¹⁷³ RETL detention charges can often be for “disturbing social order” with the goal of the detention period being to transform future behavior to be more consistent with the law. See *China Reports Family Reunion of Jailed Couple Held at “Re-education Centers”*, BBC WORLDWIDE MONITORING, Jan. 30, 2003, available at LEXIS, Asia Pacific Library, BBCMIR File.

¹⁷⁴ See Ramin Pejan, *Laogai: “Reform Through Labor” in China*, 7 HUM. RTS. BR. 22, 22 (Winter 2000).

¹⁷⁵ See *IV. Legal, Moral, Cultural and Technical Education of Criminals*, Information Office of the State Council Of the People’s Republic of China, available at <http://www.china.org.cn/e-white/criminal/8-5.htm> (last visited Feb. 25, 2005); FU HUALING, CRIMINAL PROCEDURE LAW, INTRODUCTION TO CHINESE LAW 134 (Wang Chenguang et. al. eds., 1997).

¹⁷⁶ See Amnesty International, *supra* note 128, at 2.2.

majority of Falun Gong members are not criminals and did not commit crimes even though they are detained against their will.

Those held within RETL camps are called *personnel* rather than prisoners. It is believed that there are currently about 300,000 personnel in approximately 300 camps nationwide¹⁷⁷ and relative system overuse has led to complaints from human rights advocates.¹⁷⁸ Of these personnel, currently between 5,000 and 10,000 are Falun Gong members,¹⁷⁹ while more than 20,000 members are believed to have been sent to RETL since 1999.¹⁸⁰ Allegations about the functioning of the system, if true, could violate human right standards regarding a right to liberty,¹⁸¹ a remedy before a competent and independent tribunal for a fundamental right deprivation,¹⁸² and due process protections.¹⁸³ RETL detentions may also deprive individuals from freedom from arbitrary arrest,¹⁸⁴ involuntary servitude,¹⁸⁵ and torture.¹⁸⁶

Human rights groups and others have advocated that RETL should be reformed, if not abolished. Some have suggested that RETL has evolved in recent years from a method intended to modify moral behavior to a “crime control mechanism” employed to avoid procedural requirements of the Criminal Procedure Law, such as when sufficient evidence may not be available to convict under the Criminal Procedure Law.¹⁸⁷ As RETL operates outside the formal criminal

¹⁷⁷ See Hung, *supra* note 172, at 304 (RETL was established in the 1950s and it is believed that 3.5 million people have been detained in RETL since it was established). See *id.*

¹⁷⁸ *China: The Same to You, Too*, THE ECONOMIST, Mar. 3, 2001, at 38-39.

¹⁷⁹ These are estimates of total members currently in custody in 2001. See *China gives reporters glimpse of labor camp dubbed ‘living hell’ by critics*, ASSOCIATED PRESS, May 23, 2001, available at LEXIS, Asia Pacific Library [hereinafter *China gives reporters glimpse*].

¹⁸⁰ See *Cambodian Authorities*, *supra* note 162. Others have said that this number could be in the tens of thousands. See HUMAN RIGHTS WATCH, *supra* note 8, at III; Schauble, *supra* note 162. Falun Gong reports that over 100,000 have been sent to RETL. See generally <http://www.faluninfo.net/> (last visited Feb. 25, 2005).

¹⁸¹ See UDHR, *supra* note 129, art. 3.

¹⁸² See *id.* arts. 8, 10.

¹⁸³ See *id.*, art. 11.

¹⁸⁴ See *id.*, art. 9.

¹⁸⁵ See *id.*, art. 4.

¹⁸⁶ See *id.*, art. 5; Convention Against Torture, *supra* note 156.

¹⁸⁷ In the 1957 Decision of the State Council Regarding the Question of Re-Education Through Labor, RETL was established to punish four groups of individuals – those who commit dishonest actions that are not crimes, engage in counterrevolutionary actions, refuse to work, and are involved in disruptive or obstructive behavior that has not been remedied after admonition. See Hung, *supra*

justice system, those placed in RETL do not have due process protections.¹⁸⁸ Moreover, the exercise of local discretion in the application of criminal justice punishment may be inconsistent with the goals of moral reform. For example, the maximum period of detention available in RETL can sometimes be longer than penalties for certain crimes in the Criminal Law.¹⁸⁹

Today, the RETL system is still much of a mystery, as outside access is not given to RETL camps (or to the prison system).¹⁹⁰ Conditions allegedly are poor.¹⁹¹ There are reports of beatings, interrogations, inadequate food rations, and other human rights abuses,¹⁹² such as “cruel and degrading treatment,” torture,¹⁹³ and forced labor.¹⁹⁴ Apparently hundreds of Falun Gong members have died in these camps,¹⁹⁵ but the Chinese government denies that

note 172, at 312. After China emerged out of the Cultural Revolution and began to open itself to the international system, it modified RETL rules. In 1979, the Supplementary Decision of the State Council for Re-Education Through Labor limited the time period of detention from an indefinite period to a one to three year period, with a one year extension allowance when necessary; and limited its use to medium- to large-sized cities. *See id.* at 314-15. In 1982, the Ministry of Public Security passed a regulation, Trial Methods for the Implementation of Re-Education Through Labor, that extended RETL use beyond the previous four categories to “anyone who ‘joined others to commit a crime such as murder, robbery, rape, and arson,’ or who ‘abetted others to commit a crime’ where the circumstances surrounding such crimes are not serious enough for criminal punishments.” *See id.* at 314; *Cambodian authorities, supra* note 162.

¹⁸⁸ *See* Timothy A. Gelatt, *Chinese Criminal Code Symposium: The People’s Republic of China and the Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259, 313-14 (1982).

¹⁸⁹ *See* Hung, *supra* note 172, at 315-16.

¹⁹⁰ *See* Turack, *supra* note 161, at 67-69.

¹⁹¹ In fact, recently the United Nations High Commissioner for Human Rights has expressed concern over China use of RETL camps and has held a joint conference regarding this form of detention and the substantive offenses that justify its use. *See* Hung, *supra* note 172, at 305-06. The Chinese government has depicted this detention system in a more favorable light. *See* *China gives reporters glimpse, supra* note 179.

¹⁹² *See Released Chinese dissident speaks of horrors of labor camp life*, AGENCE FRANCE PRESSE, Feb. 15, 2002, available at LEXIS, Asia Pacific Library.

¹⁹³ *See* Pejan, *supra* note 174, at 22.

¹⁹⁴ *See* Zemin, *supra* note 13. Behind the walls of RETL camps are fields and factories (*See* *China gives reporters glimpse, supra* note 179) and some have said that detainees are required to work very long hours and their rewards or lack of punishment are often commiserate with work effort. *See* Pejan, *supra* note 174, at 22.

¹⁹⁵ *See Falun Gong Inmates, supra* note 150; *China Gives Reporters Glimpse, supra* note 179; *China Sentences Falun Gong Woman Linked to Prize-winning Reporter*, DEUTSCHE PRESSE-AGENTUR, May 9, 2001, available at LEXIS, Asia Pacific Library, DPA File.

members have been tortured in RETL.¹⁹⁶ However, even the Chinese government recognizes that human rights abuses do occur in RETL.¹⁹⁷

While even Western countries have sought to “deprogram” some subject to cult “brainwashing and mind control,”¹⁹⁸ certain humane practices are normally followed to change the thought process of the former cult member.¹⁹⁹ The goal of RETL is to change the mindset of a detainee,²⁰⁰ however, if this detention system seeks to accomplish this goal by unofficially employing torture, as Falun Gong suggests,²⁰¹ administrators have violated the human rights of individual members.²⁰²

6. Summary

International law provides that a state is sovereign within its own borders and has a right to be free from foreign intervention.²⁰³ It has the right to external self-determination, to govern society, to maintain stability, and to provide economic and social well-being for citizens. Individuals are still considered “subjects of the state”²⁰⁴ and state sovereignty is emphasized over human rights,²⁰⁵ but the influence of political will on international law has rebalanced the rights of the individual in relation to sovereign prerogative.

If the government’s ban of Falun Gong and crackdown on members is justified or does not rise to the level of a universal jurisdiction crime committed on a “mass scale” that subjects members

¹⁹⁶ See Bodeen, *supra* note 91.

¹⁹⁷ *Beijing re-education-through-labour bureau moves towards public scrutiny*, BBC, July 23, 2002, available at LEXIS, Asia Pacific Library, BBC File. The Beijing municipal RETL bureau initiated a system to make personnel assessment more publicly open, transparent, and available to question. *See id.* If there was no problem, there would have been no need for the directors of all RETL centers in Beijing to implement the “Ten Prohibition for Cadres, Policemen, Staff Members, and Workers” on RETL, which is designed specifically to prohibit beatings, corrupt practices, and other unprincipled acts by workers in the centers. *See China Imposes “Ten Prohibitions” on Re-Education Through Labour Personnel*, FIN. TIMES INFO., Mar. 4, 2003, available at LEXIS, Asia Pacific Library.

¹⁹⁸ *See generally* Catherine Wong, *St. Thomas on Deprogramming: Is it Justifiable?*, 39 CATH. LAW. 81 (1999).

¹⁹⁹ *See id.* at 92-97.

²⁰⁰ *See* Pejan, *supra* note 174, at 22.

²⁰¹ *See* Zemin, *supra* note 13, at 4.

²⁰² *See* Convention Against Torture, *supra* note 156, arts. 1, 2.

²⁰³ U.N. CHARTER art. 2, para. 4.

²⁰⁴ *See* M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT’L L. 405, 408-09 (1984).

²⁰⁵ *See generally* JEREMY RABKIN, WHY SOVEREIGNTY MATTERS (1998).

to a “widespread or systematic attack,”²⁰⁶ or is not genocide,²⁰⁷ as Falun Gong has suggested has occurred,²⁰⁸ then the doctrine of sovereign immunity would likely bar a lawsuit against the government. In any event, Falun Gong accuses the Chinese government of causing hundreds of member deaths²⁰⁹ and violating the human rights of thousands of members.²¹⁰

IV. GENOCIDE AND UNIVERSAL CRIMES AGAINST HUMANITY

A. *The International Legal Framework that Prohibits Genocide*

Since World War II, countries have agreed that individuals should be endowed with rights under international law that protect them from government abuses. However, international law bypasses a nation’s domestic jurisdiction to hold the state responsible for human rights violations for the most egregious of crimes, such as genocide.²¹¹ While there is no consensus on how to define *genocide*,²¹² consensus-supported international law rules and instances of genocide occurring during this century provide guidance.

The term “genocide” could engender both narrow and broad interpretations. There are extreme cases of genocide whereby no impartial individual could deny that the definition was met. On the other hand, there are circumstances where the terminology, the level of abuse, and the perpetrator’s subjective intent could make reasonable minds differ as to whether the elements of the crime had been met. In such cases, very serious human rights violations may

²⁰⁶ See *supra* note 116.

²⁰⁷ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. IV [hereinafter Genocide Convention].

²⁰⁸ See generally Murray & Sexton, *supra* note 11.

²⁰⁹ See *After Four Years of Repression*, *supra* note 6.

²¹⁰ See Zemin, *supra* note 13, at 4.

²¹¹ See United Nations, Security Council, Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, U.N. Doc. S/1999/1257 (1999), at 5.

²¹² The term “genocide” was first coined in 1944 by Professor Raphael Lemkin, who defined the crime as a specific intent crime that not only included attempted mass killings of members of a particular group, but also actions that could destroy “personal security, liberty, health, dignity, and even the lives” of members of a particular group. See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944); Dorinda Lea Peacock, “*It Happened and It Can Happen Again*”: *The International Response to Genocide in Rwanda*, 22 N.C.J. INT’L L. & COM. REG. 899, 903 (1997). Professor Lemkin’s advocacy was a primary reason the issue of genocide emerged on the United Nations agenda.

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exist, and those human rights violations may even rise to the level of a “universal crime” against humanity, but that does not mean that genocide has necessarily occurred.

The Genocide Convention was adopted unanimously by the General Assembly of the United Nations in 1948²¹³ and it became effective in 1951.²¹⁴ Not all states are parties to the Convention, but it is arguably binding on all states either by ratification or as customary international law.²¹⁵ If a government commits genocidal actions against its citizens, claims of sovereign immunity are invalid,²¹⁶ and state officials who participated in the crime must be prosecuted. Genocide is defined in the Convention as:

[An] act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

Killing members of the group;

Causing serious bodily or mental harm to members of the group;

Deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part;

Imposing measures intended to prevent births within the group;

Forcibly transferring children of the group to another group.²¹⁷

Under the terms of the Convention, for genocidal acts perpetrated with specific intent,²¹⁸ genocide is a crime to *both* public officials and private individuals.²¹⁹

Thus, the *mens rea* must include an action by the government or the individual/group with the “intent to destroy, in whole or in part,” the protected category of persons. Criminal punishment does not only

²¹³ See Genocide Convention, *supra* note 207.

²¹⁴ See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 26 (2001).

²¹⁵ Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993; BEDERMAN, *supra* note 129, at 95-96.

²¹⁶ See Genocide Convention, *supra* note 207, art. IV.

²¹⁷ See *id.* art. II.

²¹⁸ See M. Cherif Bassiouni, *Observations Concerning the 1997-1998 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 413 (1997).

²¹⁹ See Genocide Convention, *supra* note 207, art. IV.

apply to those who directly commit the act, but also to accomplices, conspirators, and those who incite or attempt to engage in any genocidal act.²²⁰ Those charged with genocide must be tried before a tribunal within the state where the act took place, or by an international penal tribunal having jurisdiction, or when a Contracting Party accepts jurisdiction.²²¹ Both China and the United States are parties to the Convention; moreover, even if there are legal technicalities that make their party statuses inapplicable, the obligation to prevent genocide is customary international law.²²²

B. Applying International Law that Prohibits Genocide to the Falun Gong Crackdown

1. Introduction

The Chinese government's treatment of Falun Gong must be examined within the context of international law and precedent to determine if genocide has been committed. If genocide has occurred, the U.S. federal court system may have an obligation to accept

²²⁰ See *id.* art. II.

²²¹ See *id.* art. IV.

²²² Policies and statements underlying this convention made it very clear that because genocide is a concern for all nations, sovereign borders are bypassed. However, there has been some debate over whether the Genocide Convention should be viewed as a series of bilateral agreements as opposed to a multilateral convention because of the reservations that have been made to the Convention. Reservations are permitted if they do not undermine the "object and purpose" of the Convention. See *Reservations to the Genocide Convention Case*, 1951 I.C.J. 15, 1951 WL 3. Allowing broad and numerous reservations can still undermine the integrity of the Convention. Thus, technically, if reservations have been made and the bilateral interpretation is employed, then it is up to the state targeted for genocide and complaining states to determine the applicability and level of applicability for breaches of the Convention. China has been an active participant in the Genocide Convention from its genesis. See *Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948*, U.N. ESCOR, U.N. Doc. E/AC.25/9: "It shall be illegal to conspire, attempt, or incite persons, to commit acts enumerated in 1, 2, and 3" (art. I). China has also been a party since 1983. *China's reservations about Convention on genocide*, BBC News, Mar. 8, 1983, available at LEXIS, Asia Pacific Library. When the United States ratified the Convention in 1989 (See LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 235 (1991)), it made reservations that may have undermined the object and purpose of the treaty. Thus, the United States may not be a Contracting Party under Article IV of the Convention. However, this would not prohibit a finding that genocide is a customary crime against humanity, given that it was recognized as the most egregious violation of international law after Hitler's World War II atrocities.

jurisdiction for genocidal actions, even if it does so only pursuant to the civil jurisdiction of the ATCA and under the substantive authority of the Genocide Convention.²²³ This obligation is particularly strong where no tribunal has been established within China or at the international level to impose such liability.²²⁴ Whether the Genocide Convention should apply depends on whether Falun Gong is a religion and is not a cult, and whether the Chinese government crackdown was designed with the “intent to destroy, in whole or in part”²²⁵ the Falun Gong group because of its religious identity.

2. Is Falun Gong a Religion?

There is no “national, ethnical, [or] racial”²²⁶ distinction between the Chinese in general and Falun Gong members. Under the terms of the Genocide Convention, religion is the only basis for defining the government crackdown against Falun Gong as “genocidal.” Not only does the Genocide Convention prevent severe discrimination against religions; other international law conventions also provide citizens with freedom of conscience and to choose religious beliefs.²²⁷ The Chinese government has a track record of treating registered religious groups better than unregistered religious groups.²²⁸ This practice in itself arguably constitutes a human rights violation.²²⁹ Thus far, scholars have disagreed over whether Falun Gong should be deemed a religion,²³⁰ even though the group has seemingly never claimed to be a religion.

One of the problems in protecting an international right to

²²³ See Genocide Convention, *supra* note 207, arts. II, IV.

²²⁴ See *id.* art. IV.

²²⁵ See *id.* art. II.

²²⁶ See *id.*

²²⁷ See UDHR, *supra* note 129, art. 18; ICCPR, *supra* note 130, art. 18. See generally Declaration on Religious Discrimination, *supra* note 131.

²²⁸ See Georgiou, *supra* note 124, at 355. Some groups and individuals that violate Chinese law on registration requirements have been subjected to human rights abuses. See Steven Wales, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24 HOUS. J. INT'L L. 579, 609 (2002).

²²⁹ The administrative process of permitting some groups to exist and others to not exist could in itself be challenged as a human rights violation, but this is another question that goes beyond the scope of this article.

²³⁰ See Jiangyu Wang, *China and the Universal Human Rights Standards*, 29 SYRACUSE J. INT'L. L. & COM. 135, 156 (Fall 2001); T. Jeremy Gunn, *Religion, Democracy, & Human Rights: The Complexity of Religion and the Definition of a “Religion,”* 16 HARV. HUM. RTS. 189, 196 (Spring 2003).

freedom of religion is establishing *how* that right should be defined.²³¹ There is no international consensus on what constitutes a religion; some even claim that the term “religion” should not be defined.²³² A broad definition articulated by one group or country may be denounced by another group or country that seeks a narrow definition because it desires to elevate the status of its own doctrines relative to other faiths. A very narrow definition may include solely the five religions that have an extended history and an overwhelming global membership – Buddhism, Christianity, Hinduism, Islam and Judaism. On the other hand, a narrow definition may screen other groups from attaining recognition as a legitimate religion.²³³ If the broadest definition were employed, arguably over six billion religions could exist in the world, as freedom of conscience preferences of each and every human being might be unique.

Many countries still persecute and discriminate against minority religions.²³⁴ If beliefs do not conflict with commonly understood cultural notions within a society, those beliefs are more apt to garner support from the public. If beliefs do heavily conflict with mainstream society, then disparate treatment and even discrimination against such a group is more likely to occur. Government actions may foster discrimination against a group, dissent within the populace, and even prevent evangelism, when a group obliges members to evangelize as an underlying doctrine.²³⁵ However, many sociologists have remarked that most of the world’s major religions first began as fanatical factions that eventually curbed their initial teachings to make them more

²³¹ Religion might be defined as a *belief, identity, or a way of life*. See Gunn, *supra* note 230, at 189.

²³² See generally THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CONCEPTS AND CONTESTS (Jan G. Platvoet & Arie L. Molendijk eds., 1999).

²³³ See Lance S. Lehnhof, *Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status Under the European Convention*, 2002 BYU L. REV. 561, 561.

²³⁴ China, Vietnam, Sudan, Myanmar, Cuba, Iran, and Iraq have committed religious persecution. See Christy Cutbill McCormick, *Comment: Exporting the First Amendment: America's Response to Religious Persecution Abroad*, 4 J. INT'L LEGAL STUD. 283, 284 (1998); Wales, *supra* note 228, at 600. Many other countries, such as Pakistan, Saudi Arabia, and Sudan have practices that are still hostile to minority religions. See *id.* at 602. In fact, all major religions have been persecuted at one time or another specifically because of their beliefs.

²³⁵ Some religions teach that it is an obligation to evangelize their tenets to others. See Gunn, *supra* note 230, at 204. Being *able* to disseminate a message is critical to any group’s proliferation and right to exist. Falun Gong has staged protests; launched e-mail, mailing, telephone and fax methods to spread its messages; and even apparently “broke” into cable and satellite systems to televise its message to millions. See *Three years after ban*, *supra* note 10.

consistent with mainstream societal thinking.²³⁶ By contrast, Falun Gong seems to have done the opposite. Based solely on the group's teachings, the movement started out conservatively and became more forceful after the government banned it.

Falun Gong has many characteristics typical of a religion. While there is no "tenure-length" that defines acceptability of beliefs, a group that has existed for only a decade could be as legitimate as a group that has existed for hundreds of years. Falun Gong has theological teachings that relate to spirituality. Its members ostensibly have feelings, attain comfort in their distinct beliefs about divinity, and are provided with a cultural and social force.²³⁷ In fact, Falun Gong bases its teachings on Buddhism, which is a majority religion. Thus, Falun Gong arguably discusses spirituality as much as many long-recognized religions²³⁸ with substantial global membership and it also claims to understand God and the fate of the Earth.²³⁹

Even if Falun Gong is defined as a religious group, the official government position is that the crackdown does not involve religious suppression. Rather, its focus is on obstructing Falun Gong's ulterior motives²⁴⁰ and punishing members, not for practicing Falun Gong, but for violating Chinese law.²⁴¹ "Motive" is important; if there is no intentional discrimination because of religion,²⁴² there is no

²³⁶ Martin E. Marty, *Introduction, in RELIGION, ETHNICITY, AND SELF-IDENTITY: NATIONS IN TURMOIL* 15 (Martin E. Marty & R. Scott Appleby eds., 1997); W. Cole Durham, Jr., *The United States Experience with New Religious Movements*, 5 EUR. J. CHURCH & ST. STUD. 213, 217 (1998).

²³⁷ There are three principal schools of thought surrounding the definition of religion:

First, religion in its metaphysical or theological sense (e.g. the underlying truth of the existence of God, the *dharma*, etc.); second, religion as it is psychologically experienced by people (e.g., the feelings of the religious believer about divinity or ultimate concerns, the holy, etc.); and third, religion as a cultural and social force (e.g. symbolism that binds a community together or separates it from other communities).

See Gunn, *supra* note 230, at 193-94.

²³⁸ *See supra* notes 31-66 and accompanying text.

²³⁹ *See* HUMAN RIGHTS WATCH, *supra* note 8 at III; *see* LI HONGZHI, *supra* note 29, at 17, 51, 58, 59, 69, 95, 156, 178; *see* LI HONGZHI 2, *supra* note 30, at 11, 25, 34, 43.

²⁴⁰ *See Cheat Western Public Opinion, supra* note 27.

²⁴¹ *See* HUMAN RIGHTS WATCH, *supra* note 8, at VII.

²⁴² Religious persecution can occur when there is discrimination against *beliefs, identity, or a way of life*. *See* Gunn, *supra* note 230, at 200. Religion as *belief* concerns matters relating to substantive tenets of a group, such as those involving spirituality or God. *See* Gordon W. Allport, *The Religious Context of Prejudice*, 5 J. SCI. STUD. RELIGION 452 (1966). In this case, the government's banning and crackdown of the

genocide.²⁴³ Thus, the justification for the government's crackdown depends on whether it was targeted at illegal "actions" or at "beliefs," and whether tenet evangelization posed a veritable threat to societal stability.²⁴⁴ Whether the "intent" necessary to meet the parameters of the Genocide Convention exists, presumably depends on the definition of a "cult." In this respect, from the first day of the crackdown, the Chinese government has called Falun Gong a "cult."²⁴⁵

3. Is Falun Gong a "Cult"?

If the government was justified in implementing a crackdown in the name of public safety, there may have been no intent to "destroy" a religious group in "whole or in part" as is required by the Genocide Convention.²⁴⁶ Or, if Falun Gong is regarded as a "cult," the "intent" to eliminate a religious group might not exist. The Genocide Convention thus may not afford substantive protection to the group, because the group lacks the status of a "religion," and the Chinese government took action on behalf of public safety,

A "cult" has been defined as "a closed system whose followers have been unethically and deceptively recruited through the use of manipulative techniques of thought reform or mind control."²⁴⁷ Margaret Singer describes eight factors that are typical of cults:

group resulted in *identity* discrimination, which is a member's "affiliation with a group." See Gunn, *supra* note 230, at 201. Members may have become fearful of the ramifications if they continued to practice Falun Gong. Likewise, religion as a *way of life* would also be breached if members no longer participated in their daily ritual of Falun Gong exercises although they may have wanted to do so. "While religion as *belief* is perhaps the most readily understandable facet of religion for the typical adjudicator, religion as *identity* is more likely to be the underlying cause of religious discrimination and persecution as it exists in the world." See *id.* at 189.

²⁴³ See Genocide Convention, *supra* note 207, art. II.

²⁴⁴ The United States has also recently struggled with balancing religious freedom and governments' right to enact laws to protect public health that may conflict with religious practices. See generally John Gatliff, *City of Boerne v. Flores Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285 (1998/1999).

²⁴⁵ See *Three years after ban*, *supra* note 10.

²⁴⁶ The General Assembly stated that genocide is a crime that is intended to deny the existence of entire human groups and destroy them "entirely or in part." G.A. Res. 96(I), U.N. Doc. (1946). The International Criminal Tribunal for Rwanda stated that genocidal intent can be gleaned from factors such as: "the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups."

²⁴⁷ See LEO G. PERDUE, WISDOM AND CULT 9 (Howard C. Kee & Douglas A. Knight eds., 1977).

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Cult leaders are persuasive individuals who claim to have a distinct knowledge about spirituality;

Cult leaders are charismatic and often overbearing;

Cult leaders place reverence on themselves and their abilities;

Cults are authoritarian in organizational structure;

Cults seem to be innovative and exclusive;

Cults often hold hypocritical positions on moral issues;

Cults often hold a comprehensive and extreme view of the world and seek to ensure that the thoughts and actions of members are passionately consistent with that worldview;

Cults often require members to accept significant life changes.²⁴⁸

The implicit assumption is that if a group can be defined as a “cult,” it is more apt to pose a threat to societal stability. A government would presumably have more latitude under international law in reacting to a group so defined.

The United States and many other Western countries have had to counter fringe religious groups recently and navigate negative public sentiment against such groups.²⁴⁹ Groups like People’s Temple,²⁵⁰ the Branch Davidians,²⁵¹ the Aum Shinrikyo,²⁵² the Order of the Solar

²⁴⁸ See MARGARET THALER SINGER & JANJA LALICH, *CULTS IN OUR MIDST* 8-10 (1995).

²⁴⁹ See Scott M. Lenhart, *Hammering Down Nails*, 29 GA. J. INT’L & COMP. L. 491, 492-96 (Summer 2001).

²⁵⁰ In 1978, over 900 people committed suicide in Jonestown, Guyana at the order of Reverend Jim Jones. See ANSON D. SHUPE, JR. & DAVID G. BROMLEY, *THE NEW VIGILANTES: DEPROGRAMMERS, ANTI-CULTISTS, AND THE NEW RELIGIONS* 207-31 (1980).

²⁵¹ In 1993, David Koresh led his Branch Davidians to the standoff in Waco, which resulted in the death of seventy-eight followers. See *Flares Said Found in Waco Evidence*, ASSOCIATED PRESS, Sept. 8, 1999, available at LEXIS, News Wires.

²⁵² The AUM Shinrikyo group engaged in a series of murders from February 1989 to April 1995, and the 1995 sarin gas attack on the Tokyo subway system. See *AUM’s Niimi Gets Death Sentence for Murders*, KYODO NEWS SERVICE, June 26, 2002, available at LEXIS, News Wires.

Temple,²⁵³ and the Heaven's Gate UFO cult²⁵⁴ all had beliefs that were radical relative to mainstream thinking and engaged in actions consistent with those beliefs. Anti-cultists argue that members involved in such incidents were "unknowing victims of 'Heavenly Deception,' coercive persuasion and brainwashing, and that everyone is susceptible to conversion by cults."²⁵⁵

The leaders of these small movements have all advocated apocalyptic "doomsday prophecies," and may have called on members to commit suicide.²⁵⁶ Thus, government reactions to these groups have not been deemed persecution but rather a justified reaction to prevent illegalities and more deaths.²⁵⁷ Chinese human rights experts have criticized the double standards of the United States, arguing that, "cults are a public hazard facing many countries in the world," and "the crackdown on 'Falun Gong' by the law in China is precisely to protect the human rights and normal religious freedom" of China's "100 million believers of various religions" and "over 3,000 religious groups."²⁵⁸ However, there may be serious problems with applying these standards to Falun Gong and deeming it a cult.

One must first start with the premise that every individual in the world has a right to believe what he or she chooses and that government cannot question these beliefs. Likewise, government should not be able to censor those beliefs, or assess when those beliefs are allegedly too extreme. This is why countries have consummated international agreements to protect freedom religion and conscience.

In the case of Falun Gong, it is a group that has had 80 million members. Are the beliefs of 80 million members, whose foundational

²⁵³ Between October 1994 and March 1997, there were 74 suicides by Order of the Solar Temple members across Switzerland, France, and Canada. See *Trial Set for Swiss Musician Accused over Cult Deaths*, AGENCE FRANCE PRESSE, Dec. 29, 2000, available at LEXIS, News Wires.

²⁵⁴ See generally JOHN R. HALL, PHILIP D. SCHUYLER, & SYLVAIN TRINTH, APOCALYPSE OBSERVED: RELIGIOUS MOVEMENTS AND VIOLENCE IN NORTH AMERICA, EUROPE, AND JAPAN (2000). In 1997, 39 members of the Heaven's Gate UFO Cult committed suicide because they believed that the Hale-Bopp comet had come to transport them to heaven. See S. Purdum, *Videotapes Left by 39 Who Died Described Cult's Suicide Goal*, N.Y. TIMES, Mar. 28, 1997, at A1.

²⁵⁵ See Wong, *supra* note 198, at 89-90.

²⁵⁶ See *239 Falun Gong Members*, *supra* note 85.

²⁵⁷ Of the cults listed, government reaction was justified because underlying illegalities could be tied to the cults. However, the government action on the Branch Davidians was a debacle that needlessly caused the death of almost eighty people.

²⁵⁸ See Zhongguo Xinwen She, *Chinese Human Rights Experts Defend Crackdown on Falun Gong*, FIN. TIMES INFO., May 23, 2003, available at LEXIS, Asia Pacific Library.

beliefs are tolerance and compassion too extreme for society, such that they should be censored by the Chinese government? Unless a group makes promises to recruits and later tries to take away the free will and individual choice of members, a government has no right to intervene in that group's affairs.

Alternatively, if members of a spiritual/religious faction are apt to harm themselves, other members, or society at large, or have committed illegalities, then even Western governments, including those with relatively strong individual right protections and freedoms, might even detain members and "assist" them in perceiving a *reality* that is more consistent with mainstream society. "Deprogramming" has been used as a method of treating "mind-control,"²⁵⁹ but it is very controversial and has led to civil rights claims in the United States. The detention and deprogramming may not even be seriously questioned by the vast majority of people within a country or by other states, assuming humane methodologies are employed and there is some degree of voluntariness. However, it is not consistent with international law to severely punish a small fraction of that group in the hopes that the rest will "self-reform" themselves out of fear, to suggest that a group of 80 million people should be subject to deprogramming.

4. To Eliminate "in Whole or in Part"

If Falun Gong is not defined as a "cult" and can be delineated as a group that is entitled to the class protection of "religion" under the Genocide Convention, then one must ask whether there is an "intent to destroy [the group] . . . in whole or in part."²⁶⁰ Of the peak membership of 80 million Falun Gong members in China, Falun Gong claims 748 members have died as a result of police and administrator brutality,²⁶¹ and tens of thousands have been placed in RETL facilities²⁶² where human rights abuses allegedly are common.²⁶³ In each of the genocide cases occurring during this century, tens of thousands to several million people were killed at the hand of the respective government. Only one case of genocide based on religious affiliation has taken place during this century – Pol Pot's killing of 300,000 of 500,000 Muslim Cham and 59,000 of the 60,000 Buddhist

²⁵⁹ See Wong, *supra* note 198, at 81-82.

²⁶⁰ See Genocide Convention, *supra* note 207, art. II.

²⁶¹ See *After Four Years of Repression*, *supra* note 6.

²⁶² See HUMAN RIGHTS WATCH, *supra* note 8, at III.

²⁶³ See *supra* notes 191-97 and accompanying text.

monks in Cambodia.²⁶⁴

Even if Falun Gong's claims regarding the number of member deaths and degree of brutality at the hand of government is accurate, it might still require *stretching* international law precedent to call the Chinese government's crackdown a "genocide." However, human rights violations warranting universal jurisdiction might also eliminate claims of sovereign immunity if violations rise to an extreme threshold level.²⁶⁵

C. *Summary of Cited Twentieth Century Atrocities*

Most human right atrocities involve extraordinary acts of government brutality against a civilian population undertaken primarily because of the government's desire to maintain political power. Many have suggested that the Chinese government's crackdown against Falun Gong took place because of the threat that Falun Gong's mobilization posed to CCP governance.²⁶⁶ Pursuant to international law, a government in control of a territory has the right to wield force to maintain societal stability. However, when a government employs force well beyond what is reasonably necessary to maintain societal stability,²⁶⁷ and does so preemptively to instill fear, the community of nations must act to hold leaders responsible when such actions reach the level of genocide and perhaps also when massive and widespread universal crimes against humanity are committed.²⁶⁸ The sanctity of sovereign prerogative is penetrated under the assumption that if a government is grossly vicious and inhumane, whether because of predecessor consent to treaties or commonly understood rules of civil society, it has no right to govern. State sovereignty is not a defense to genocide or to crimes against humanity that warrant universal jurisdiction.

In the Falun Gong case, the distinction among genocide, universal human rights crimes, and human rights violations is very important. The will of the international community exists to punish genocidal crimes,²⁶⁹ but this has not been as strong when race and ethnicity

²⁶⁴ See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 143 (2002).

²⁶⁵ See *supra* note 116.

²⁶⁶ See HUMAN RIGHTS WATCH, *supra* note 8, at I; Lu, *supra* note 143, question 17.

²⁶⁷ See U.N. CHARTER art. 2, para. 4; Janis, *supra* note 204, at 408-09.

²⁶⁸ See *supra* note 116.

²⁶⁹ Of the genocide cases, Hitler and the Nazis were held responsible, tribunals have been established for Yugoslavia and Rwanda and pressure has built internally for one in Cambodia. See POWER, *supra* note 264, at 486.

distinctions have not existed.²⁷⁰ Most cases of genocide were mass murders based on ethnicity, while few entailed the targeting a critical mass of religious practitioners. Non-genocidal human rights atrocities generally involve governments seeking to maintain political control at almost any cost. However, in these cases no specific ethnic group was targeted. Assuming Falun Gong's claims are accurate and the crackdown was not justified, reasonable minds may differ over whether the Chinese government's crackdown against the group has reached a threshold level that should abrogate sovereign immunity.

Pursuant to international law, if a government commits a genocide or another universal crime against humanity on the population, other countries have an obligation to come to the aid of those being persecuted. Even if this threshold level is not met, countries may still have a moral obligation to assist in ending a persecution through diplomatic negotiations and political pressure. If the government does not come to the aid of a population, the question is whether a branch of government, other than the executive, in an outside nation may remedy a dispute to the chagrin of the non-responsive executive.

V. JURISDICTION FOR UNIVERSAL JURISDICTION CRIMES AND HUMAN RIGHTS VIOLATIONS

A. *The International Relations Debacle*

The Alien Torts Claim Act (ATCA) provides for a *civil* right of action for torts committed by individuals in violation to the law of nations.²⁷¹ The Falun Gong lawsuit did not seek to impose criminal responsibility on Jiang Zemin, even though that is the presumed intention of the Genocide Convention and other treaties prohibiting universal crimes against humanity. Nevertheless, one cannot escape punishment for violations of substantive human rights law involving genocide and universal crimes, even though criminal penalties are more severe than civil remedies. A domestic court's assessment of civil responsibility for genocide or other universal jurisdiction crimes on a foreign leader, however, could bring justice but also incite an

²⁷⁰ Of the non-genocide universal crimes against humanity, the United Nations only established tribunals for Sierra Leone and East Timor. See Douglas Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121,132-33 (2001); *S.Leone rebel leader, others to appear before UN court*, AGENCE FRANCE PRESSE, Mar. 14, 2003, available at LEXIS, Africa Library.

²⁷¹ 28 U.S.C. § 1350.

international relations debacle.²⁷²

Because individuals cannot file actions against abusive states in international tribunals, or generally under international law, seeking a remedy in a foreign court may be the only option for victims of human rights abuses. However, few countries provide for such a cause of action; doing so would allow another state to intervene in the internal affairs of another sovereign country on behalf of the international community.²⁷³ In some cases, what may appear as human rights abuses may actually have an underlying justification that compelled the government to act in order to protect state security. Unless the community of nations deems that a government had no reasonable justification for exercising executive will on a civilian population, permitting a government institution in one state to unilaterally assess a criminal or civil penalty regarding a foreign event could violate the target state's sovereignty. States must therefore act to bring criminal charges against abusive state actors. Unfortunately, this has only happened in the handful of cases amounting to genocide and the most egregious "mass scale" human rights violations.²⁷⁴

If a crime is so egregious as to meet the definition of a widespread and brutal universal jurisdiction crime, but the community of nations has not acted at the international level to chastise and punish state leaders for those crimes, then engaging in "transnational law" litigation in domestic courts to hold those leaders responsible for human rights violations may be necessary. Such "transnational" litigation could have important benefits²⁷⁵ and may potentially be palatable within the scope of current international law doctrines.²⁷⁶ Still, this is not an accepted practice and it involves a risk that peaceful international

²⁷² If a domestic court were to find that genocide or universal crimes have been committed, the international community may have an obligation under international law to investigate and decide whether criminal responsibility should be assessed against such a leader at the global level.

²⁷³ See Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 403 (2001).

²⁷⁴ See generally Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 BROOK. J. INT'L L. 111 (1996).

²⁷⁵ See Tunks, *supra* note 116, at 677-78 (stating that restricting victim access to courts and providing an incentive to human rights violators to hold onto power are results of providing heads of state with immunity from prosecution, but without it world leaders would be unable to carry out diplomatic functions).

²⁷⁶ See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 132-35 (2000).

relations may be undermined.

1. Civil Jurisdiction

Under the ATCA, United States federal courts can assert jurisdiction for a civil action filed by an alien against someone committing a tort in violation of international law.²⁷⁷ The first case in U.S. courts to hold an individual civilly responsible for human rights violations occurring outside the U.S. was *Filartiga v. Pena-Irala*.²⁷⁸ In this case, the plaintiff brought suit against a Paraguayan police official, not a head-of-state,²⁷⁹ who was thought to be responsible for torturing and murdering their son, Joelito Filartiga, in Paraguay.²⁸⁰ Jurisdiction was authorized because torture is a violation of a number of international treaties and customary international law.²⁸¹ Other cases have been filed under similar causes of action and have recognized the subject matter jurisdiction of the ATCA, while others have not.²⁸²

The Foreign Sovereign Immunities Act of 1976 (FSIA) conferred power to grant immunity to the judiciary.²⁸³ Nevertheless, the FSIA has not been interpreted to modify the prerogative of executive branch in the determination of traditional immunity for heads-of-state.²⁸⁴ To

²⁷⁷ See 28 U.S.C. § 1350.

²⁷⁸ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁷⁹ *Filartiga* was not a case where the highest levels of government were held responsible for human rights violations. It was a case where a police inspector, who was directly involved in the torture and murder of an individual, was held civilly responsible under substantive international law. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). There was also personal jurisdiction over the direct perpetrator of the crime. See *id.* If there is no personal jurisdiction over someone who commits human rights violations, there is nothing to prevent numerous cases from being filed in U.S. courts, where uncollectible default judgments would likely become the norm. Even though there was personal jurisdiction over *Pena-Irala*, a default judgment was issued that granted over \$10 million that was never collected. See *id.*

²⁸⁰ See *id.*

²⁸¹ See M.G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L. L.J. 813, 816-17 (1978).

²⁸² See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 143 (2000).

²⁸³ 28 U.S.C. § 1602 (2005).

²⁸⁴ *Tachiana v. Mugabe*, 169 F. Supp. 2d 259, 277 (S.D.N.Y. 2001); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *Leutwyler v. Office of her Majesty Queen Ronia Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994); *Kline v. Kaneko*, 535 N.Y.S.2d 303, 304 (N.Y. Sup Ct. 1988).

date, the United States has never negated a foreign head-of-state's immunity,²⁸⁵ as long as the head-of-state is recognized by the executive.²⁸⁶ However, in *Kadic v. Karadzic*, the executive branch refused to provide head-of-state immunity to Radovan Karadzic. Karadzic, was sued under the ATCA as the leader of a self-declared Bosnian-Serb state called Srpska for acts of rape, forced impregnation, torture, and summary execution, even though there were fears that the court would become involved in political questions.²⁸⁷ Likewise, the Ninth Circuit, in 1994, held that Ferdinand Marcos, the former head-of-state of the Philippines, was not entitled to sovereign immunity for "private acts" when his military tortured and executed up to ten thousand individuals.²⁸⁸ Thus, the court's dismissal of the Falun Gong case may have seemingly incorporated an unstated executive branch determination that the Chinese government's reaction to Falun Gong was not genocide or a "widespread and systematic attack" that would require lifting sovereign immunity.

There are situations where leaders' actions are properly called into question because of brutal suppression. Yet, what happens if a government has a justifiable need to react to uphold state security, but the group that countered the government has formed transnational ties and can exercise political or legal leverage in a foreign country to question the sovereign acts? Should a domestic tribunal in a foreign country make the decision on whether a government action against a group is justified under the circumstances existing in that foreign country? "The indiscriminate invocation of universal jurisdiction . . . has the potential to cause substantial tears in the fabric of international relations."²⁸⁹ The judiciary may not be the most appropriate branch of government to decide head-of-state immunity issues.²⁹⁰

2. Applying Precedent and Comity to the Falun Gong Case

If the banning of and crackdown against Falun Gong is unjustified, then Jiang Zemin and other leaders may have deprived members of their freedom of association, expression, and religion. This would be the case if the harm caused by Falun Gong member actions and anti-

²⁸⁵ *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296-97 (S.D.N.Y. 2001); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988).

²⁸⁶ See *Tunks*, *supra* note 116, at 670-72.

²⁸⁷ See *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995), *cert denied*, 518 U.S. 1005 (1996).

²⁸⁸ See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1469 (9th Cir. 1994).

²⁸⁹ See *Sammons*, *supra* note 116, at 140.

²⁹⁰ *Doe v. United States*, 860 F.2d 40, 45 (2d Cir. 1988).

government advocacy did not exceed the government's need to preempt such actions by banning the group in the name of public security. However, to then hold Jiang Zemin or other leaders civilly responsible under universal jurisdiction for human rights abuses occurring within local-level Chinese prisons or RETL camps without an official policy permitting brutality or an unofficial policy that turned a blind eye to systematic and widespread abuse might conceivably require applying a *Palsgraf*-like causation torts test for the substantive offense under the ATCA jurisdiction.²⁹¹ However, such an outcome could have serious ramification for the future of peaceful Sino-U.S. relations.

If genocide or the widespread universal crime abuses necessary to pierce sovereign immunity did not occur in this case, the proper scenario for civil actions to remedy human rights violations may be to follow the *Filartiga* holding. Under this ruling, if RETL or prison system administrators have tortured and killed members as Falun Gong has stated,²⁹² they can be held civilly responsible under international law in U.S. courts under the ATCA.²⁹³ However, personal jurisdiction²⁹⁴ would be required over those who have allegedly committed the violations, and doctrines, such as *forum non conveniens* and *comity*, would likely be considered.

VI. CONCLUSION

China has made tremendous progress in improving human rights,²⁹⁵ in more fully defining crimes, and in providing a criminal law framework that is more transparent and apt to protect the rights of the accused. Leaders are dedicated to finding a new value system that “combines world standards for human rights with the strengths of its

²⁹¹ The Falun Gong allegations did contain causal arguments between Jiang's apparent orders and the alleged human rights violations. See Zemin, *supra* note 13, at 3-4.

²⁹² See *id.* at 4.

²⁹³ See *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

²⁹⁴ A defendant must have “certain minimum contacts . . . such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945).

²⁹⁵ See David Hsieh, *Beijing's search for value system on human rights; UN rights chief says China has made great strides in human rights and is looking for a suitable value system*, SING. PRESS HOLDINGS LIMITED, Aug. 21, 2002, available at LEXIS, Asia Pacific Library. A top human rights official with the United Nations High Commissioner for Human Rights has noted China's “great efforts” in improving human rights over the past five years. See *id.*

own governance” and “is suitable to modern China.”²⁹⁶ However, China still does not have an impeccable record, and Falun Gong has tested the current stage of improvements.

The Chinese government has “stretched the truth” on many occasions, and there is no reason to doubt that there might be embellishment in media sources reporting that Falun Gong is a bona fide threat to societal stability. While it is not reasonable to suggest that the organization could fall within a Western definition of “terrorist” group,²⁹⁷ the Chinese government’s banning and tagging the group with a negative stigma is quite similar to other governments’ preemptive measures on organizations assumed to pose threats to stable institutional or political order.²⁹⁸

Pursuant to international law, there is nothing more *moral* or *legal* about majority religions than minority religions or “New Age” spiritual movements. To state otherwise is, in itself, a form of discrimination. All freedom of religion and conscience must be protected. On the other hand, a government has a right to question and react to public security threats when a group can imperil societal stability. If a government reacts to generally applicable group illegalities, there is presumably no discrimination against belief. However, even if Li Hongzhi and Falun Gong intentionally sought to provoke the Chinese government, such prodding does not warrant an overly zealous reaction, or inhumane brutality as punishment to preempt future wrongdoings, as Falun Gong has claimed is the case. A government cannot claim internal threats as a defense to committing

²⁹⁶ *See id.*

²⁹⁷ “Terrorism” has been defined by the U.S. Department of Defense as: “The calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.” Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (Apr. 12, 2001, as amended through Nov. 30, 2004), available at <http://www.dtic.mil/doctrine/jel/doddict/data/t/05373.html>, cited in Nancy L. Bethurem, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 109, 124 (2002).

²⁹⁸ The treatment of Falun Gong has many characteristics similar to other political organizations that have sought to garner power from government even in Western countries. In fact, the political backlash and “banning” is quite reminiscent of the U.S. government’s treatment of anyone associated with communism after World War II. Congress established an “Un-American Activities Committee” that investigated communist affiliations to weed out any international or transnational association with potential subversion of the U.S. government. *See* *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959). Failure to register as a “Communist-action organization” or a “Communist-front organization” could subject one to several years of imprisonment. *See* *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

torture.²⁹⁹ Likewise, any provocation may not warrant the response even if Falun Gong could be deemed a “cult.”

Six instances of genocide have occurred during this century.³⁰⁰ The Ottoman Empire killed 1.5 million Armenians. Hitler murdered 11 million Jews and other targeted ethnicities. Pol Pot slaughtered approximately two million Cambodians. Hutus mass murdered an estimated one million Tutsis in Rwanda. Saddam Hussein gassed and killed hundreds of thousands of Kurds. Finally, Slobodan Milosevic ordered attacks that resulted in 20,000 Muslim deaths. No other consensus-instilling cases of genocide have occurred during this century. Some government sponsored mass murders, ethnic cleansings, and cases of genocide have resulted in governments being held responsible under international law, but not all instances have been so condemned or resulted in perpetrator punishment. The international political will did not exist to hold leaders responsible.

Government officials should be held responsible for committing universal jurisdiction crimes against humanity. If the Chinese government’s reaction to Falun Gong meets this threshold, U.S. courts could potentially have an international obligation to accept jurisdiction to remedy alleged human rights violations if requested by a party in interest. However, to hold leaders responsible for human rights violations that do not rise to the level of “genocide” as defined in the Genocide Convention and by comparison to precedent, or rise to the level of “mass scale” universal crimes as described in part IV, would be a violation of China’s sovereignty. This might be a very dangerous path to traverse.

If domestic courts transgress sovereign borders to judge foreign leaders in instances when it is unwarranted or is at least dubious, courts will no longer be respected forums for dispensing equitable and unbiased justice. Rather, they will become institutions for escalating international relations vendettas. The Act of State Doctrine,³⁰¹ which prohibits U.S. courts from judging actions of a foreign government within its own territory, international comity,³⁰² and the FSIA, was designed to prevent this. In addition, international law does not permit a state to prosecute leaders of other states. If it did, there could

²⁹⁹ See Convention Against Torture, *supra* note 156, at art. 2(2).

³⁰⁰ See generally POWER, *supra* note 264.

³⁰¹ See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

³⁰² “Comity” is the “recognition which one nation allows within its Territory to the legislative, executive, or judicial acts of international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. See *Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895).

be no end to courtroom battles for power in world politics. Countries could turn away from those that seek to hold foreign leaders responsible for sovereign actions against a population that may fall somewhere along a spectrum of marginally interpretable, to very offensive, to inhumane; however, such sovereign acts may still remain “liability-free” state actions under international law.

Indeed, if a state, or government institution within a state, acts unilaterally, but presumably on behalf of the community of nations to remedy a crime against humanity that may not warrant universal jurisdiction, it will be breaching international law if it casts criminal or civil liability on leaders. Principles of sovereignty would be bypassed and order in the international system would be subverted.