

The Complexity of Religion in Determining Refugee Status

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This paper was prepared as a background paper for an expert discussion on religion organized as part of the follow-up to the Agenda for Protection. The views expressed in this paper are not necessarily those of UNHCR. The paper is available online at <http://www.unhcr.org/protect>.

“The Complexity of Religion in Determining Refugee Status”
Roundtable on Religion-Based Refugee Claims
United Nations High Commissioner for Refugees and Church World Service
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a revised version of this paper will be published in a forthcoming
issue of the *Harvard Human Rights Journal*

October 24, 2002

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The victims of intolerance and discrimination on grounds of religion or belief are quite diverse: they may be believers or non-believers, communities of religion or belief or they may belong to society at large. Particularly affected, however, are vulnerable groups, such as women and minorities.¹

- Professor Abdelfattah Amor

U.N. Special Rapporteur on Freedom of Religion or Belief

Introduction²

Claims of persecution on the basis of religion are likely to be among the most complex, arcane, and incomprehensible that will need to be decided by an asylum adjudicator. While religion may involve group identity (like race and nationality) or voluntary affiliation (like political and social groupings), it also encompasses an enormous range of human activities and beliefs. Adherents of some religions might claim, for example, to suffer persecution if required to cut their hair or shave their beards, while adherents of others might claim to be persecuted if forced to grow their hair. Some religions require ritual slaughter of animals and others forbid eating meat. Some require drinking alcohol in sacred rituals, others forbid its consumption at any time. Some religions forbid military service, others require male adherents to carry knives. Some require worship on Saturday and some on Sunday. Some permit a man to have more than one wife, and others consider the practice a sin. Some people believe they are commanded by God to "Preach that Jesus is the Christ" and others believe that such a profession is a punishable blasphemy. What the adherents of some religions might perceive to be trivial issues, adherents of

¹ Abdelfattah Amor, *Elimination of all forms of religious intolerance*, 3 July 2001, A/56/253, 43 (hereafter Amor, *Interim Report 2001*).

² This paper was originally conceived before I had the opportunity to read a draft of Karen Musalo's excellent draft paper entitled "Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions." The Musalo paper, unlike this, focuses on the legal issues underlying religious persecution claims. Prior to reading her paper, I had anticipated discussing many of the factual issues that arise in this area. Her paper, however, revealed to me many of the misconceptions asylum adjudicators have about the nature of religious persecution. While I defer to Musalo's expertise on the legal aspects of the issue, I thought it would be useful to provide some analysis of the theoretical and factual issues underlying the reality of religious persecution. While this paper does not purport to interpret the 1951 Convention or any domestic legislation, it does seek to provide useful background information that an adjudicator should consider when interpreting and applying asylum law. This paper has also benefitted from suggestions of many people, including Karen Musalo, Dot Ivey, Larry Katzman, and Jere Skipper B among others. I, of course, accept responsibility for its shortcomings.

others may see as absolute commands worthy of martyrdom. Even greater complications are added to this volatile mix when cultural traditions become grafted into a religion. Is a subservient role of women a command of a prophet or a cultural vestige? While some adherents will dismiss traditions as superstitions, others will see as an integral part of their religions.

The table of contents above shows the reader the direction that the paper follows, and it will not be summarized here. But it should be mentioned at the outset, some of the principal recommendations that follow from the analysis:

- everyone involved in handling religious persecution claims, including investigators, lawyers, experts, and adjudicators, need to understand that religion claims can be extremely complex and that it is very important to understand their full complexity before making judgments;
- perhaps more than in any other area of refugee law, adjudicators need to be careful and *not* arrive at conclusions based solely upon their own experiences; and
- it is necessary to obtain the best, timely, country-specific, and even region-specific information possible.

Part V below proposes some specific conclusions that should be considered by adjudicators of religious persecution claims.

I. Understanding (rather than defining) Religion

When I mention religion, I mean the Christian religion; and not only the Christian religion, but the Protestant religion; and not only the Protestant religion, but the Church of England.

- Mr. Thwackum (1749)³

[B]elief in a supreme being remains a necessary characteristic of religion for the purposes of English charity law.

- Charity Commissioners for England and Wales (1999)⁴

[T]he test of belief ‘in a relation to a Supreme Being’ [in a law providing for conscientious objector status from military service] is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God

- United States Supreme Court (1965)⁵

Neither the fictional Mr. Thwackum, the real English Charity Commission, nor the equally real U.S. Supreme Court was attempting to define “religion” for purposes of modern refugee law.⁶ Nevertheless, the definitions they offer exemplify a variety of mistakes that are made by judges, legislatures, and state commissions when they propose legal definitions of “religion,” whether for purposes of refugee law, laws against religious discrimination, or laws to regulate religion. While this paper does not purport to offer a definition of “religion” within the

³ From Henry Fielding, *The History of Tom Jones* (1749) Book III, Chapter 3.

⁴ Decision of the Charity Commissioners for England and Wales, *Application for Registration as a Charity by the Church of Scientology (England and Wales)* (17 November 1999), 21 (<http://www.charity-commission.gov.uk/registration/pdfs/cosfulldoc.pdf>).

⁵ *United States v. Seeger*, 380 U.S. 163, 165-66 (1965).

⁶ The key phrase in refugee law is “well-founded fear of being persecuted for reasons of . . . religion . . .” within the 1951 Convention Relating to the Status of Refugees. 28 July 1951, 189 UNTS 137. See also Protocol Relating to the Status of Refugees, 31 January 1967; 606 UNTS 267. The French version reads “Qui . . . craignant avec raison d’être persécutée du fait de sa race, de sa religion” A translation of the French version into English could read: “Who . . . has reason to fear being persecuted on the basis of race, religion” To the mind of this author, the original French version is clearer than the original English and the English would be improved by such a translation from the French.

meaning of the 1951 Convention or the refugee law of any country, it will attempt to explain why some of the legal definitions that have been suggested misconceive some of the underlying issues that give rise to religious persecution claims. In short, it will be suggested, that legal definitions of “religion,” including those proposed by asylum judges, often look to the meaning of religion from the perspective of religious persons (and scholars attempting to understand religion) rather than looking at what religion means to those who are persecuting people on the basis of their religion.

A. The understandable search for a legal definition

Academics and scholars have long sought to find a definition of “religion.”⁷ “The effort to define religion is as old as the academic study of religion itself.”⁸ Though many definitions have been proposed, no definition has prevailed. “During the last hundred years or so, dozens, if not hundreds of proposals have been made, each claiming to solve the definitional problem in a new and unique way. Needless to say, no one definition of religion has garnered a consensus, and the definitional enterprise, as well as the debate over the very need for definitions, continues in full vigor.”⁹

Whereas scholars of religion may have the luxury of considering whether “religion” can or should be defined, asylum adjudicators, when presented with the proper case, are required to interpret the phrase “well-founded fear of being persecuted for reasons of . . . religion” from the 1951 Convention.¹⁰ However impossible it might be to provide an accurate and complete definition of “religion,” or however incompetent judges and lawyers may be to offer such definitions, the legal system nevertheless requires them do exactly that: interpret language so as to decide whether or not something is “religion.” Thus in refugee law, as in many other areas of law, judges are required to interpret “religion” whether or not they are competent to do so.¹¹

⁷ For a broad discussion of issues related to defining “religion,” see William P. Alston, “Religion,” in *Encyclopedia of Philosophy* (1967) 7:140-45.

⁸ William E. Arnal, “Definition,” in Willi Braun and Russell T. McCutcheon, *Guide to the Study of Religion* (2000), 22.

⁹ Brian C. Wilson, “From the Lexical to the Polythetic: A Brief History of the Definition of Religion,” in Thomas A. Idinopulos and Brian C. Wilson, *What is Religion?* (1998), 141-42.

¹⁰ See footnote 6 above.

¹¹ As described above, the British Charity Commissioners must decide whether an entity is “religious” for the purpose of determining whether it is tax-exempt. Under the U.S. Constitution, courts must determine whether something is an “establishment of religion.” As an example of the difficulty to which judges can be put, we can consider the French 1905 Law on the Separation of Church and State. This law, as amended, exemplifies one of the significant

Because jurists are sometimes required to interpret the meaning of religion within the meaning of a statute or treaty, they do not have the option of avoiding the question. However difficult (or theoretically impossible) the task may be to define “religion” within the meaning of the 1951 Convention (and other areas of law), judges are obligated to do so.

difficulties surrounding legal definitions of Religion.” (The 1905 Law uses the French term “*culte*” as the generic term for “religion.”) If a religious organization is recognized by appropriate administration officials as a “religion,” it becomes eligible to receive certain benefits under French law. But in the very process of deciding whether the entity should be so recognized, the courts are confronted with the express language of the law: “The Republic does not recognize . . . any religion.” (1905 Law, art. 2). Thus, on the one hand, the state provides benefits for recognized religions, but on the other hand the state notes that it must not recognize religions. This stark legal schizophrenia in France is only less apparent in other countries. On the one hand states are institutionally not competent to decide what is and is not religion (which, after all, is a religious issue itself), but, on the other hand, courts and officials are necessarily required to make decisions that have important legal consequences on what is or is not religion.

Whether or not state institutions ideally are competent to determine what is and is not religion, in the actual world of law, judicial and political institutions frequently are thrust into the position of making such determinations. Other situations where state officials (including judges, administrators, and legislators) are called upon to determine whether something is religious include most notably:

- determination whether an entity is a “religion” or “religious association” for purposes of granting legal personality, obtaining tax benefits, limitation of personal liability of the organizers;
- whether someone has “religious” beliefs for the purpose of obtaining conscientious objector status;
- whether someone should be exempted from a law of general applicability on the grounds of religious belief (e.g., a Sikh motorcyclist being exempted from a requirement to wear a helmet or a Muslim slaughterhouse being permitted to ritually kill animals for meat).

However difficult or impossible it might be to define “religion,” many laws in fact require that definitions and guidelines be made. Things must be able to be put in the category of either “religion” or “not religion” and therefore judges necessarily must look for definitions.

B. Difficulties in the legal definition of “religion”

While this might at first seem troubling, it should be borne in mind that the difficulty of establishing definitions is pervasive in academic fields and, arguably, “religion” is the most difficult topic of all. “Definition plays a crucial role in every field of inquiry, yet there are few if any philosophical questions about definition . . . on which logicians and philosophers agree.”¹² Although the categorizations of definitions of religion offered below are necessarily oversimplified, they do at least suggest the range of options and the range of problems.

1. Characteristics of definitions of “religion”

It is useful to think of approaches to defining religion as looking at the problem from two different angles: first, the issue of *what* is being defined with respect to religion, and second, *how* it is being defined. The various definitions of religion partake of these two different issues.

a. Assumptions about the underlying nature of religion. Definitions of religion typically will make assumptions about what is the underlying nature of religion. “[E]ach and every definition of religion implies at least some theoretical conclusions”¹³ Of course one of the reasons that it is difficult to define “religion” is that “no convincing general theory of religion exists.”¹⁴ Three of the principal differing assumptions about religion are: first, religion in its metaphysical or theological sense (e.g., the underlying truth of the existence of god or 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 or social force (e.g., symbolism that binds a community together or separates it from other communities). Definitions of religion typically begin with one these assumptions. Of course, even within each of these three assumptions there will be widely different characterizations. Sigmund Freud and Rudolph Otto, for example, both focus on the psychological dimension of religion, though Freud saw religion as a set of false beliefs while Otto saw it as a powerful feeling of the other.

b. Types of definition: essentialist or polythetic. Once the underlying theoretical assumptions are made, there still remains the difficulty in the form that the definition will take.¹⁵

¹² Raziell Abelson, “Definition,” *Encyclopedia of Philosophy* (1967) 2:314.

¹³ William E. Arnal, “Definition,” in Willi Braun and Russell T. McCutcheon, *Guide to the Study of Religion* (2000), 22.

¹⁴ Stewart Elliott Guthrie, “religion: What Is It?” *Journal for the Scientific Study of Religion* (1996) 35:412.

¹⁵ “[T]he problem does not lie in what is to be defined, but in an inadequate grasp of what a definition is supposed to accomplish.” W. Richard Comstock, “Toward Open Definitions of

Two of the most important types of definitions may be characterized as first, “essentialist,” and second, “polythetic.” An essentialist definition of religion will seek to identify the elements that are necessary for something to be designated “religion.” In the epigraphs at the beginning of this section, Mr. Thwackum and the Charity Commissioners both offered an essentialist definition of religion. Thwackum’s essentialism, offered by Henry Fielding, reduces religion to the Anglican Church. The Charity Commissioners require that religion be theistic (and perhaps even monotheistic). Whenever a legal definition is essentialist, it assumes that religion has one or more elements in common with all other religions.

The second type of definition, the polythetic, does not require that all religions have at least one element in common. The most widely known illustration of a polythetic approach to definitions is Ludwig Wittgenstein’s explanation of the meaning of “game.” Wittgenstein described the wide variety of activities for which we use the term “game,” but notes that there is no single feature that all games have in common.¹⁶ Yet, he believes, we can nevertheless see resemblances among the different types of activity that are all called games, even if they do not all share at least one common feature. “I can think of no better expression to characterize these similarities than ‘family resemblances’; build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.”¹⁷ The statement of the U.S. Supreme Court in the epigraph above approximates the polythetic approach when it accepts in the religious believer something “parallel” to the orthodox belief in God. The most famous polythetic “definition” in American jurisprudence was Potter Stewart’s definition of “pornography”: “I know it when I see it.”¹⁸

The definitions in the epigraphs as well as other definitions of religion (including legal definitions) can typically be analyzed in terms of the components above: the underlying assumptions about religion and the type of definition that is offered. Mr. Thwackum’s comical definition assumes the underlying metaphysical truth of the Church of England (i.e., it is not a psychological or sociological definition) and it is in the essentialist form. The Charity Commissioner’s definition, which is essentialist like Thwackum’s, nevertheless looks to psychology for the underlying nature of religion. The U.S. Supreme Court’s *Seeger* definition,

Religion,” *Journal of the American Academy of Religion* (1984) 52:500.

¹⁶ Some logicians would conclude that the term “game” is thus too vague and cannot mean anything.

¹⁷ Ludwig Wittgenstein, *Philosophical Investigations* 3rd ed. (1958), 32e (paragraph 67).

¹⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring). A similar version is provided by Professor Comstock about religion: “if not asked, we know what it is; if asked, we do not know.” W. Richard Comstock, “Toward Open Definitions of Religion,” *Journal of the American Academy of Religion* (1984) 52:499.

like the Charity Commission's is psychological, but polythetic.

2. Typical shortcomings in legal definitions of "religion"

When jurists attempt to define "religion" they will likely be making, as described above, theoretical assumptions about what religion is and will opt for either an essentialist or polythetic definition. But their attempts will frequently suffer not only from the inherent difficulties of definitions, as described above, but possibly from either a lack of familiarity with the full range of religions or biases about religion. Three of the typical shortcomings that arise with regard to legal definitions, particularly when considering religious discrimination and religious persecution, are described below.

a. Familiar understandings of religion. Jurists understandably may look to their own experiences with religion. In the English-speaking world, it will be natural to see Christianity as an archetypal religion, leading jurists to focus on such notions as a divinity, church rituals, and belief in certain doctrines. Familiarity with some religions and ignorance of others is likely to skew judgments.¹⁹ Mr. Thwackum's statement above is a caricature of the problem of familiarity; the Charity Commission's decision exemplifies it. The U.S. Supreme Court's analysis shows a somewhat broader perspective, but it still emerges as a variation on the core principle of a divinity. Such familiar religions in the English-speaking world may prove to be less sensitive to religion as part of a person or community's identity.²⁰

b. Evaluating (or ranking) religions. It is also common for legal systems (as well as for people generally) to explicitly or implicitly evaluate (or rank) religions. Depending on the attitudes of the evaluator, religions may be described in ways such as "good religion" versus "bad religion," or, "religion" versus "non-religion." Thus some might think of monotheistic religions in terms such "traditional" religions with polytheistic or non-theistic religions as "primitive" or "superstitious." Those with a slightly different disposition might expand the traditional religions to include Christianity, Islam, Buddhism, Hinduism, et cetera, and to find that other groups are "not really religions" or are "sects" or "cults" not deserving of the label of "religion."

It is very common for legal systems to provide legal benefits to individuals or groups that

¹⁹ I saw, for example, within one week's period, an American Christian-based NGO criticize the *Hindutva* movement in India for attempting to integrate praise of *Ram* in Indian schools and criticize the U.S. Ninth Circuit Court of Appeals for holding that the phrase "under God" should be stricken from the "pledge of allegiance" that is recited in American public schools. Whereas pledging allegiance to a nation "under God" was familiar and acceptable to Christians, pledging allegiance to a nation "under Ram" was to be criticized.

²⁰ See I.C.2. below.

are designated as “religious” (or some similar term). This, of course, leads many groups to seek the designation in order to obtain such things as tax benefits or legal personality. In some cases the designation serves principally to separate religious groups from other types of group, such as sports clubs, political parties, or business entities. But in many cases the designation leads to a dispute between what is often considered to be “real” religion as opposed to “pseudo” religion. There are many pejorative terms that are used to describe such groups, including “*secte*,” “cult,” “splittist,” “heretic,” “apostate,” and “schismatic.” In some particularly extreme cases, adjectives will be piled onto these already pejorative terms and groups will be described, often without any supporting evidence, as “totalitarian sects” or “destructive cults.” Whereas scholars of religion, including sociologists and anthropologists are generally critical of such derogatory labels that typically derive from emotional hostility rather than from any systematically explained difference with more traditional religions, the attitudes may affect legal definitions.²¹ The range of legal understandings of religion can be very broad (as in India) to very narrow (as in Saudi Arabia). Thus “religion” may be seen not simply as a neutral description of such things as theological beliefs or ritual practices, but as judgment on whether the particular beliefs or actions are acceptable to the society or the legal system.²² Thus a definition of “religion” may not simply be neutral, but may be an inappropriate societal value judgment on particular beliefs or actions with “good” beliefs being characterized as “religions” and “bad” beliefs being characterized as “cults” or “heresies.”

c. The most serious shortcoming: failure to consider religion from the perspective of its adversaries. A conscientious jurist may attempt to overcome the definitional limitations described above by consulting the works of scholars and experts, including anthropologists, sociologists, theologians, and historians of religion. These jurists might, for example, cite definitions of religion offered by Emile Durkheim, Rudolf Otto, Paul Tillich, Max Weber, Clifford Geertz, or Joseph Campbell. But consulting such scholars who are both knowledgeable about and sympathetic to religion will not overcome a critical hurdle in defining “religion” for the purposes of understanding religious persecution (or discrimination) because such definitions do not describe religion from the perspective of those who are causing the persecution. The

²¹ In response to the question “what is the difference between a religion and a cult?” scholars of religion sometimes respond with answers such as “about 100 years” or “a religion is a cult with political influence.” (attributed to the novelist Tom Wolf)

²² Although it will always be necessary for legal systems to differentiate between tolerable religious-type activities and other intolerable activities (that may be conducted in the name of religion, such as human sacrifice), it is unfortunately the case that deep social prejudices often profoundly affect and distort legal judgments of what is and is not religious. One of the most recent and disturbing examples of this is the rhetoric that surrounded the adoption of a new law on religion in Belarus in October 2002. The excesses of the hostile rhetoric would be amusing to demonstrate the absurdity of some of the prejudices if the potential consequences were not so serious for the victims of it.

problem can perhaps be seen most easily by looking to the analogous cases of race and gender.

When an adjudicator is called upon to make a determination about racial persecution, it will probably be of no utility to seek a definition of “race” from experts such as biologists, geneticists, and anthropologists. In fact, under the prevailing viewpoint, race is *not* a scientific concept; indeed, it is often argued that attempts to define “race” scientifically are themselves motivated by an underlying racism. Regardless of whether race is or is not a scientific category with biological or genetic markers, there is no doubt that *racism* exists and that people are persecuted because of their *perceived racial characteristics*. Ultimately, adjudicators of racial persecution cases would be remiss in seeking a scientific or expert definition of “race” as an antecedent to determining whether racial persecution had occurred. What is needed is not an expert definition of “race,” but an understanding of whether asylum applicants have suffered because of a belief that they belong to a disfavored race.²³

Similarly, in gender discrimination cases, it is also likely to be unproductive to attempt to find a scientific definition of “sex.” Although it is easier to identify biologically based differences between males and females than it is to identify biologically based racial characteristics, the actual differences may have little or nothing to do with gender discrimination. In considering a definition of “sex,” a biologist would likely focus on the differences between male and female gonads and sexual organs. Yet it is perhaps the secondary-sex characteristics that, although only minimally relevant to a scientific definition of “sex,” that may be more important for understanding gender-discrimination claims. Thus it presumably would be inappropriate for an adjudicator to ask a person claiming gender persecution whether she (or he) has had a hysterectomy (or an orchiectomy) or whether the applicant truly considers herself (or himself) to be a woman (or man).²⁴ While such questions arguably might be relevant to some notion of what is meant by sex or gender, they really are irrelevant if a woman was fired from a job because her male employer *thinks* she is a woman and has a *bias* against her because of his sexist belief. The relatively important issue in race and gender persecution, therefore, is not an “objective” or scholarly definition of the terms from the perspective of experts, but the understanding of race and sex from the perspective of the persons who are persecuting.

²³ We can easily understand that it would have been inappropriate, for example, for an asylum adjudicator hearing a case under South African apartheid to focus on issues such as: (a) whether “race” can be defined; (b) an applicant truly considers himself to be “Negroid,” or (c) whether all four of the applicant’s grandparents were black.

²⁴ Of course such inquiries would be appropriate *if* there were reason to believe that a male applicant (or a member of an unpersecuted racial minority) were attempting to deceive the court about the real status of the applicant. But such inquiries would be relevant for the issue of fraud on the court. Putting aside this question of fraud, the inquiries would otherwise be inappropriate.

So it is the case with religion as well. We do not necessarily come closer to understanding “religious persecution” by considering whether “religion” requires either a belief in a divinity, a feeling of the transcendent or wholly “other,” a belief in the supernatural, having an “ultimate concern,” adhering to community rituals, or having any metaphysical beliefs at all.²⁵ While such notions of religion may be of use for understanding religion from the perspective of the religious person, they do *not* explain what “religion” means to the person who is instigating the persecution. Two examples of persecutorial attitudes may help explain the importance of looking to the persecutor rather than the persecuted in refugee law. The Patristic father, Saint John Chrysostom, spoke of Judaism in ways reminiscent of how some religions and some states speak of other religions today:

But the synagogue is not only a brothel and a theater; it also is a den of robbers and a lodging for wild beasts. Jeremiah said: ‘Your house has become for me the den of a hyena’. He does not simply say ‘of wild beast’, but ‘of a filthy wild beast’, and again: ‘I have abandoned my house, I have cast off my inheritance’. But when God forsakes a people, what hope of salvation is left? When God forsakes a place, that place becomes the dwelling of demons.²⁶

In banning the Falun Gong movement, the Chinese government stated:

Li Hongzhi fabricated the so-called Falun Gong by copying some qi gong practices and adding a lot of superstitious beliefs and ravings. Li propagated the explosion of the earth and the doomsday fallacy to fool the public. These malicious concepts have already resulted in physical and mental injuries and even death of people, undermining social stability. Falun Gong bears strong resemblance to heterodox groups like Branch Davidian in the United States and Japanese Aum Domsday Cult.

. . . .

Falun Gong organization, advocating malicious fallacies, has put people’s life at risk and wreaked havoc on the society.²⁷

²⁵ For a discussion of religion from the perspective of the persecutor, see I.B.2.c below. Several of the characteristics of religion are identified in I.D below.

²⁶ St. John Chrysostom, Homily 1 (part III) *Against the Jews* (or *Against the Judaizers*) (available at http://www.fordham.edu/halsall/source/chrysostom-jews6.html#HOMILY_I). Also quoted in Gordon W. Allport, *The Nature of Prejudice* (1954), 448. I heard an Orthodox priest in a Central Asian country refer to a Jehovah’s Witness publication as something that made him “want to vomit.”

²⁷ The irrationality of persecution can be seen in statements such as this. The evidence is overwhelming that the physical harm and death associated with Falun Gong was caused by Chinese officials against peaceful meditators. It is remarkable how frequently persecutors will

In such cases, whether it be St. John Chrysostom or the Chinese government, the tenor of the allegations far exceeds the weight of the evidence offered, as if the excessive rhetoric should be substituted for proof. As conceived by one of the most important psychologists of prejudice, such attitudes are “ordinarily a matter of gross and unwarranted overgeneralizations [that reflect] contempt, rejection, or condescension”²⁸ To people subjected to attacks flowing from such attitudes, it should not matter whether they attend synagogue or consider Falun Gong to be a religion rather than a spiritual movement. In short, *the relevant issues for adjudicators may not be the religious beliefs or religious activities from the perspective of religious communities or academics studying religion, but the attitudes of those who are causing the religious persecution.*²⁹

In the discussion in section C below, the three “facets of religion” will be considered from both the perspective of religious adherents and from the perspectives of their persecutors.

C. The facets of religion that frequently pertain to religious persecution

There are many human activities that, although very important for our lives, do not in and of themselves raise legal issues. However, some *aspects* of these activities do raise legal issues. For example, rules for games are not normally established by statute (though gambling may be); music is not controlled by law (though copyright and noise ordinances may be); love is unregulated (though marriage, divorce, and prostitution may be); recipes are not governed by law (though restaurant sanitation is). When the state governs the limited aspects of these activities it does not typically begin by defining “games,” “music,” “love,” or “recipes” but turns to the issues that are themselves properly governed by law. This would seem to be equally true with regard to religion. Although there are many countries that use the legal system to govern aspects of religion (including religious doctrines), most adhere at least in theory to

accuse their victims of having committed the crimes that the persecutors themselves are committing.

²⁸ Gordon W. Allport, “The Religious Context of Prejudice,” *Journal for the Scientific Study of Religion* 5(3) (1966): 448.

²⁹ The question of the “motives of the persecutor” is quite complex and can have sharply different and apparently inconsistent meanings. These will be discussed at different points in this paper. Here, for example, we are *not* considering issues such as causation, nexus, the elements of proof, or the burdens of proof. For the purpose of this section, the “motives of the persecutor” pertains *solely* to showing that adjudicators of religious persecution cases may sometimes incorrectly focus on *aspects or definitions of religion that are irrelevant to religious persecution*. Thus the adjudicators’ *definitions or understandings* of religion may have the effect of denying legitimate persecution cases.

the notion that the proper role of the state pertains only to issues related to public order, health, safety, and the rights and freedoms of others. The point once again is not to look for the “essence” of religion (or games or music) in order to define it in legal terms, but to identify the aspects of religion that raise legal issues and to formulate definitions or standards to regulate those limited aspects.

With regard to understanding “religion” within the context of persecution on the basis of religion, there are three facets that are of particular importance that should be understood by jurists involved in asylum claims. In a religious persecution claim, it could be expected that at least one of the three facets below will be of relevance. It is, of course, possible that any combination may be present. It also is possible that some other facet of religion not identified here may also occur, though the three identified below are those that are most likely to be involved.

1. Religion as *belief*

The facet of religion that is mostly easily understood by jurists is that of religion as a set of *beliefs*.³⁰ From the perspective of religious persons, the beliefs might be, for example, the Nicene Creed, the thirty-nine articles of the Church of England, the transmigration of souls, karma, the *dharma* of Hinduism, the wisdom of the Lotus Sutra, or the five pillars of Islam.

From the perspective of the persecutor, the religious beliefs are likely to be described in terms such as heresy, blasphemy, apostasy, or superstition. From this perspective, religious leaders may be described as tricksters, false prophets, blasphemers, or cult leaders engaged in mental manipulation or mind control. Some of the clearest examples of persecution for “false” beliefs are those following a conversion to a new religion different from that of others of the same general ethnicity in the same region, such as the conversion of a Pakistani or Saudi to Christianity. There also can be cases where groups as a whole may be considered heretics and suffer persecution, even though they are of the same general ethnicity as their persecutors. Some of the clearest cases are Baha’is in Iran and Egypt and Ahmadis in Pakistan and elsewhere.

While conversion and related cases may be among the most salient, problems of religious persecution also occur for those with religious beliefs living in communities that are hostile to those beliefs. Such may be the case in China for a Russian Orthodox or a Catholic, in Russia for an Old Believer, or for a Pentecostal in Uzbekistan.

³⁰ In his study of religious prejudice, Allport identifies two “polar types of religious affiliation.” “The Religious Context of Prejudice,” 452. The first, which corresponds roughly to the facet of “religion as beliefs” as described here, Allport identifies as “associational” and suggests the voluntary adoption of beliefs of a somewhat like-minded community. The second, “communal,” corresponds roughly to the facet of “religion as identity” in the following section of this paper.

Even though such cases described above may be the clearest in terms of persecution on the basis of belief, it is not necessarily relevant or appropriate for the asylum adjudicator to raise issues of the sincerity of the religious beliefs or the knowledge of the applicant about the theology of the religion. A person may convert for many reasons and a deep knowledge of the religion may be less important than the spiritual feelings of comradeship with fellow believers. While it presumably is always relevant for an adjudicator to consider the accuracy of the applicant's assertions about the facts of the persecution, the applicant's depth of understanding of religious beliefs is not likely to be relevant in most cases.

2. Religion as *identity*

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 persecution as it exists in the world. As identity, religion is less a matter of theological beliefs than it is an issue of family, culture, ethnicity, and nationality. It is akin to what Gordon Allport describes as “communal” rather than “associational.”³¹ People may consider themselves Muslims even though they have not been inside a mosque for twenty years and even though they know little about the *Qur'an*. Others also may consider them to be Muslims simply because of who their relatives are or in which country they were born. It is, for example, common for many people to think that to be a Pole is to be Catholic, to be Russian is to be Orthodox, or to be an Uzbek is to be a Muslim. When the Patriarch of the Russian Orthodox Church gave an award to the self-proclaimed atheist President Alyaksandr Lukashenko of Belarus for promoting Slavic unity, we may reasonably believe that the Patriarch is placing a higher priority on the link between Orthodoxy and Slavic ethnicity than on Christian theology. “Christian” in Armenia, is understood to be part of an ethnic trait.³² In Burma, some Buddhists engage in propaganda against Muslims because of the fear that “our race is disappearing.”³³ In Bosnia-Herzegovina, “[r]eligious intolerance in the country directly reflects ethnic intolerance because the identification of ethnicity with religious background is so close as to be virtually indistinguishable.”³⁴ Thus, “association of ethnicity and religion is so close that the bitterness engendered by the war [in Bosnia] and the 270,000 deaths it caused has contributed to mutual suspicion among members of all three major religious groups.”³⁵ Or, as David Little describes

³¹ See *ibid.*

³² U.S. Department of State, *Religious Freedom Report 2001* (2001), 223 (hereafter *Religious Freedom Report 2001*).

³³ *Ibid.*, 120. There have been forced conversions to Buddhism, which is almost the last thing that would be expected in a country dominated by Theravadan Buddhism. *Ibid.*, 119.

³⁴ *Ibid.*, 245.

Sri Lanka:

Ethnicity, language, cultural habits, and race may all serve, singly or in combination, as a relevant badge of identity. The key consideration is this: One group, however defined, believes that it has religious authorization for declaring the superiority and preeminence of its own language and cultural tradition above others³⁶

In the case of Sri Lanka, Sinhalese Buddhists engage in “ethnocentric policies,” as do the Hindu Tamils.³⁷

Scholars defining religion, and judges applying definitions for religious persecution, often omit this critical dimension of religion being inextricably tied into ethnicity, family, culture, traditions, and history. But these forces that work to constitute identity are among the most potent social forces to bind communities or lead to violent outbreaks among different communities. “There is one thing we can say with certainty as we scan the group identity conflicts that crowd our contemporary scene: in one degree or another, religion figures in them all. Usually it appears enmeshed with other factors of great weight - race, land, nationality, history, power”³⁸ The classic study of prejudice pointed to exactly this issue:

The chief reason why religion becomes the focus of prejudice is that it usually stands for more than faith - it is the pivot of the cultural tradition of a group. However sublime the origins of a religion may be, it rapidly becomes secularized by taking over cultural functions. Islam is more than a religion; it is a well-knit cluster of related cultures carried by ethnic cousins who are sharply demarcated from the non-Moslem world. Christianity is so locked with western civilization that it is hard to keep in mind its original core; and sects of Christianity have become tied into subcultural and national groups so that religious divisions march hand in hand with ethnic and national divisions. Most clear of all is the case of the Jews. While they are primarily a religious group, they are likewise viewed as a race, a nation, a people, a culture. When religious distinctions are made to do double duty, the grounds for prejudice are laid. For prejudice means that inept, overinclusive categories are employed in place of differentiated thinking.³⁹

³⁵ Ibid., 248.

³⁶ David Little, *Sri Lanka: The Invention of Enmity* (1994), 104-05.

³⁷ Ibid., 110.

³⁸ Harold R. Isaacs, *Idols of the Tribe: Group Identity and Political Change* (1989), 154.

³⁹ Allport, *The Nature of Prejudice*, 446.

When religion is tied to ethnic identity, the persecutor does not attack because of a disagreement over an interpretation of the Nicene creed or whether enlightenment is best attained through Pure Land or Theravadan Buddhism; the persecutors typically attack because they see the religion of the other as part of a threat to their own competing identity. These identity issues are not necessarily sophisticated and do not involve considered understandings of history and culture. “[R]eligious identity in Ukraine, particularly among the members of the national churches, does not include a very developed consciousness of tradition and doctrine but tends to be reduced to a rather primitive form of group loyalty.”⁴⁰ From the perspective of the persecutor, the other’s religious identity may well be understood as a form of pollution or corruption. Thus St. John Chrysostom, as quoted above, uses such epithets when he refers to a synagogue as “not only a brothel and a theater; it also is a den of robbers” Or, as the Nazis saw it, Jews “must not enter Aryan society, because they are a deadly germ that would destroy it. They must not stay in Germany, because their presence pollutes the pure German soil.”⁴¹

3. Religion as a *way of life*

In modern societies, religion is often understood as a group of persons with common beliefs who voluntarily associate with each other, as suggested in the first facet of religion described above. A scholar of religion has even criticized a renowned anthropologist for letting such a preconception interfere with his analysis of religion. He asserts that Clifford Geertz’s “treatment of religious belief, which lies at the core of his conception of religion, is a modern privatized Christian one because . . . it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.”⁴² Where religion is treated as principally belief and principally private, one thinks of believers as, for example, attending a church or synagogue on a weekly basis and engaging in acts in a limited way. In this aspect, beliefs are often quietly held and are manifested, if at all, at such occasions as baptisms, marriages, high holidays, and funerals. In majority Christian countries, for example, the work week typically provides for Sunday worship and religious holidays are legally recognized national holidays. Manifestations of religion are limited to such standard activities.

But for other people, religion is the whole of their lives. It may demand prayers five times a day, constant efforts to propagate the religion, refusal to eat meat, demanding of the wearing of certain types of clothes, requiring that beards be grown or that heads be shaved. In this facet, “religion is perhaps the most comprehensive of all human activities.”⁴³ Unlike the

⁴⁰ David Little, *Ukraine: The Legacy of Intolerance* (1991), 56.

⁴¹ Bernard Lewis, *Semites & Anti-Semites* (1987), 116.

⁴² Talal Asad, *Genealogies of Religion* (1993), 47.

⁴³ Leonard Swidler, *Religious Liberty and Human Rights in Nations and in Religions*

once-weekly attendance at religious ceremonies, religion for these other people affects many aspects of their lives that are less likely to be accommodated by the laws of a state. Some countries require military service, which runs afoul of pacifists' strong religious beliefs. Other countries demand oaths of loyalty, which some religions see as placing humankind's institutions before those of God. Some countries forbid women, in certain situations, from covering their heads, which many women may see not only as personal modesty but as devotion to God as well. Some religious persons believe that it is their obligation to proclaim their beliefs to others. A belief that may run afoul of the laws of a state that prohibits proselytism.

To the persecutors of others whose way of life is different, the type of language used typically is that of fanaticism and zealotry. Religious persons whose lives revolve around their religion are seen as excessive. One judge on the Europe Court of Human Rights described the attempt of a Jehovah's Witness to convert an Orthodox woman to his faith. He is

a hardbitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts whose earlier convictions have served only to harden him in his militancy He swoops on her, trumpets that he has good news for her (the play on words is obvious, but no doubt not to her), manages to get himself let in and, as an experienced commercial traveller and cunning purveyor of a faith he wants to spread, expounds to her his intellectual wares cunningly wrapped up in a mantle of universal peace and radiant happiness. Who, indeed, would not like peace and happiness?⁴⁴

States are often not only reluctant to make accommodations for these full religious lives, but they sometimes gratuitously attack such believers for being insufficiently loyal to the state or a danger to society. While states need not make accommodations for all religious practices, they may reveal their deep prejudices and irrational hostilities when they choose to persecute principled, devout, well-meaning people whose practices appear unusually involved and do not accord with the laws that are designed to accommodate the religion of the majority. The asylum adjudicator must seek to understand the religious facets of such cases not from that of a person who might attend religious services a few times a year, but from the perspective of those who have chosen to devote their lives to their religion as they understand it.

D. Conclusion: characteristics of religions (in lieu of a definition)

As has been suggested above, it is neither possible nor advisable to attempt a legal definition of "religion." However, as also has been recognized, asylum adjudicators are

(1986), vii.

⁴⁴ *Kokkinakis v. Greece*, European Court of Human Rights, Series A no. 260-A (1993) (Valticos, J., dissenting).

nevertheless required to interpret the meaning of the term “religion” as it appears in statutes and conventions. Rather than searching for a definition, it is more appropriate to be sensitive to the characteristics of religions as they are likely to appear in refugee cases. Although the following list should not be understood as exhaustive, legitimate claims for a “well-founded fear of being persecuted for reasons of . . . religion” could be based *on one or more* of the following characteristics:

1. Belief in one or more divinities who have played a role in creating the world, governing the world, intervening in the affairs of the world, or in judging people.
2. Belief in the transmigration of souls (reincarnation).
3. Belief in the law of karma, divine justice, or following a way or a path established in spiritual writings, such as the *Tao te Ching*.
4. Belief that the future can be foretold (or that fortuitous actions can be prescribed) by a “spiritual” understanding of material signs or by an interpretation of feelings or intuitions.
5. Adherence to rituals or offering prayers either for seeking divine intervention or for placating divinities. Rituals may include actions such as reciting words, chanting, singing, making specified gestures, or giving gifts to idols, statues, or symbols.
6. Being a part of a group that shares a sense of identity with each other through common traditions, beliefs, and or a worldview and that is considered by others to be a religion.
7. Having a deep personal experience of ultimate concern or wonder, transcendence, or power of a supreme “other.”
8. Having beliefs about the importance of ethics, morals, and proper behavior that are derived from “spiritual” understandings rather than philosophical insight.

It should, once again, be emphasized that it is fully possible that groups have one or more of the above characteristics may not think of themselves as constituting a religion and that something may be a religion without having any of these characteristics.

Coda: are Falun Gong and the Church of Scientology “religions”?

The Falun Gong (or Falun Dafa) has, to this point, asserted that it is not a religion but is instead a “spiritual movement.”⁴⁵ The Church of Scientology insists that it is a religion. Although these two cases are not necessarily the most obvious significant examples of the difficulty of defining religion, they are perhaps the two most controversial and salient examples. Thus it is important to understand the issues involved in asking whether or not they should be considered religions. Again, the point is not whether these are the two most important groups at issue, but that they are effectively the lightning rods that allow us to focus on the heart of the issue.

Falun Gong’s reluctance to declare itself a religion, and the Chinese government’s ferocious attacks have led some states to avoid characterizing the movement as a religion and thereby avoid the difficult question of whether Chinese actions violate the international norms of freedom of religion or belief. However, as described above, the question should not necessarily stop at how a person (or group) might characterize itself or its beliefs. The question must also be considered from the perspective of the persecutor. Hence, does the *alleged persecutor* treat an entity as if it were a religion, particularly a religion of the type labeled as corrupt or polluted? If we look at the way that the Chinese government treats the Falun Gong we are compelled to observe that the government’s attitude and rhetoric resembles that of classic religious persecution and not that of eliminating social crimes. From the perspective of the harms suffered by the victims, it makes no difference whether they consider themselves to be religious or not. While the factual merits of any case must be decided by adjudicator, it would seem *inappropriate to deny status* to Falun Gong practitioners solely on the grounds that Falun Gong is not a religion.

With regard to the Church of Scientology’s claim to be a religion, many have been dubious. While scholars of new religious movements generally will find characteristics of Scientology sufficiently compelling to include them within the realm of religion, the political opposition to Scientology is sufficiently strong to oppose their inclusion. The Charity Commissioners, in the case cited in the epigraph above, denied the Church of Scientology the status of religion for the purpose of English charity law (which means that the organization is not tax-exempt). But, once again, it is important to look not simply at the teachings or theology of an entity whose adherents are seeking asylum. Rather, it is important to look at the nature of the persecution. The persecutors of religions, it should be remembered, will typically formulate their attacks as attempts to rid society of pollution. But, unlike criminal law (where similar language might be used), the groups are not prosecuted for violating criminal statutes, they are persecuted

⁴⁵ While this author does not profess to be able to understand accurately the difference between a religion and a spiritual movement for Falun Gong, it presumably means that Falun Gong focuses its attention on the mental states and the activities of its adherents rather than on a divinity or other type of supernatural power.

because of who they are or what they believe B classic indicia of religious persecution.

The point here is not to make a dispositive answer on whether Falun Gong and Scientology are “religions” within the meaning of the 1951 Convention. Rather, it is to say that the answer to such questions may not be found in the group’s self-reporting or in the beliefs of their adherents. It is important to look also at the characteristics of the persecutors to understand whether they may, in some circumstances, be found to have been “persecuted for reasons of . . . religion.”

II. Understanding Coercion and Persecution

In portions of the preceding section it was suggested that understanding the “motives of the persecutor” can be relevant for understanding the meaning of the term “religious persecution.” Here we turn from the definitional aspect of “religion,” to examine the nature of the persecution itself.

A. The two “directions” of coercion in religious persecution

It is sometimes mistakenly assumed that religious persecution consists only of coercion against religion by its adversaries. In fact, there are at least two different directions that coercion leading to persecution can take.

1. Coercion that attacks or interferes with religion

The type of coercion with which we are most familiar is that directed against one (or more) religions. The coercion may be demonstrated as acts against a religious believer, a religious community, or a group of religious communities. The coercion may consist of attempts to disrupt religious services, cause harm to religious buildings, shrines, and symbols, or to threaten the lives of others. The actions may be taken for the purpose of expressing hatred or of destroying a religious community or of forcing it to flee.

2. Coercion that enforces religious conformity

A second form of religious coercion that is sometimes overlooked, or misunderstood, is that of enforcing religious conformity on a community. In such situations the state or a religious community uses compulsion to require members of a religious community to comply with religious (or cultural) rules. Thus the quasi-official “religious police” in Saudi Arabia, the Mutawwa’in, may walk through the marketplace and strike males who are not at prayers or arrest women who are not completely veiled. Coercion to enforce religious standards may range from the modest parental punishment of a child to an extra-judicial execution of a heretic. While not all coercion to enforce religious norms constitutes religious persecution, an adjudicator should be aware that the coercion may exist to such a degree that a person is incapable of even expressing

her own beliefs (or rejection of the beliefs of her neighbors) without risking severe physical harm or even death. While this direction of persecution may not be the most commonly understood aspect of persecution, it is widely pervasive and can be extremely serious. As in many other areas related to religious persecution, girls and women are more likely to be the targets of coerced conformity than are males. Another salient example of the use of enforced conformity against a particular group within a larger religious community occurs in the caste system in India, with the most serious victims being the Dalits (untouchables).⁴⁶ While these two groups suffer disproportionately, this form of persecution can be inflicted on any individual or group within a society.

B. Agents of religious persecution

It is useful to think of the potential agents of persecution as being of three general types: first, the state persecuting one or more religious communities; second, religious communities (or society generally) persecuting other religious communities; and third, religious communities enforcing conformity on their own people. Of course, different combinations of these three agents is possible.

1. The state as persecutor

States may commit religious persecution in either of the two “directions” described above. Of course the classic case of state persecution of a religious community is that of Nazi Germany against the Jews. But there are, of course, numerous other examples of where the state may use its power to attack religious groups. Without necessarily arguing that certain state actions constitute religious persecution, the types of examples that are evident include Saudi Arabia’s severe restrictions on all forms of religion except those consistent with Wahhabi teachings. China has attempted to prohibit all religious activity unless it operates under the direct authorization and control of the state. The government of Uzbekistan routinely disrupts Protestant religious services. The Myanmar-Burmese government prohibits many religious activities of Christian and Muslim groups, “operates a pervasive internal security apparatus” to control religious activity, and promotes social tension among religions.⁴⁷ Many states have conducted political campaigns against disfavored groups to which they attach a wide-range of pejorative terms.

States also may be involved in promoting religious conformity. The example of Saudi Arabia already has been used, and Burma promotes an official Theravadan Buddhism. The Pakistani law against blasphemy is designed to promote conformity within Islam and is used

⁴⁶ See Smita Narula (Human Rights Watch), *Broken People: Caste Violence Against India’s ‘Untouchables’* (1999).

⁴⁷ *Religious Freedom Report 2001*, 114-20.

disproportionately against Ahmadis, but it is also used against Muslims and Christians.

2. Inter-religious and societal persecution

A second typical form of persecution is by one religious community against another. Although such persecution may or may not be formally sanctioned by the religious leaders of a religious community, it is frequently the most violent. Particularly when religion is tied with issues of identity and ethnicity, inter-religious conflict can have serious ramifications. “religion . . . finds itself peculiarly tailored to the nationalistic, class, and ethnic cleavages and outlooks that sustain the prevailing social order.”⁴⁸ Prejudice, including prejudice against other religions, “provides an explanation in terms of menacing out-groups; religion promises a heavenly, if not terrestrial, reward. Thus for many individuals the functional significance of prejudice and religion is identical. One does not cause the other; rather both satisfy the same psychological needs.”⁴⁹

Society, including one or more religious communities within a society, also can be responsible for religious persecution against religious communities. “The accumulated evidence suggests that the more strongly religious beliefs and affiliations are held, the greater the hostility toward other religious beliefs and those who hold them.”⁵⁰ While such persecution may take many different forms and derive from many different motivations, the most typical examples involve one religious community mobilizing itself to attack another religious community not on grounds of differing beliefs, but because of different notions of identity. Thus the facets of religion noted above as “identity” and “way of life” can become particularly violent when one religious community pits itself against another. No region of the world is immune from such potential conflicts. Among the more salient examples now occurring are the violence principally (though not exclusively) by Hindus against Muslims in the state of Gujarat, India, and the violence being caused principally (though not exclusively) by Muslims against Christians in Indonesia. In Bosnia and Herzegovina it is dangerous for all religious groups because of societal violence.⁵¹

This type of violence becomes even more serious when the government fails to take effective measures to quell community conflicts or, even more seriously, when governments tacitly encourage violence as has been alleged in Gujarat.⁵² The social tensions in Burma

⁴⁸ Allport, “The Religious Context of Prejudice,” 450.

⁴⁹ Allport, “The Religious Context of Prejudice,” 451.

⁵⁰ Isaacs, *Idols of the Tribe*, 151.

⁵¹ *Religious Freedom Report 2001*, 247, 248-49.

⁵² See Human Rights Watch, *We Have No Orders to Save You* (2002).

between majority Buddhist and minority Christian and Muslims also has led to violence by the former against the latter, with the government apparently stimulating rather than controlling the conflict.⁵³

3. Religious communities forcing conformity on their own people

As has already been described above, religious persecution can proceed not only in the direction of attacking religions, but it can also proceed in the direction of attempting to enforce religious beliefs and practices on those who do not wish to accept them.

C. Whether it is *religious* persecution

In many asylum cases it may be difficult to determine whether the alleged persecution is a result of religious, gender, political, or even cultural factors or perhaps some combination of these factors. The issue of the “mixed motives of the persecutor” raises some complex and perhaps seemingly contradictory problems.⁵⁴ It may, however, ultimately be futile to separate artificially motives that cannot be separated in the mind of the persecutor.

1. *Why* there is religious persecution versus *whether* there is persecution

It was suggested above that one shortcoming of some legal definitions of religion is their failure to include what religion means to its adversaries.⁵⁵ In this regard we understand that those who cause religious persecution may do so because they dislike all religions, because they dislike some religions, or because they seek to impose their own religion onto others. Thus, understanding the motives of the persecutors helps give us a broader understanding of what “religion” actually means and *why* there is religious persecution. In these important, but delimited ways, it is helpful to understand the phenomenon of religious persecution. But this raises the significant question of whether *proving the specific motives* of the persecutor should be a prerequisite to proving that there has been *religious* persecution.

⁵³ *Religious Freedom Report 2001*, 120.

⁵⁴ On the one hand, the 1951 Convention does not, on its face, require asylum-seekers to prove the specific motives of their persecutors (which would in fact be virtually impossible in almost all cases). However, on the other hand, as was discussed in Part I.B.2.c above, understanding the “motives” of the persecutors may be important in determining whether or not the persecution is “religious” and therefore subject to the 1951 Convention. Moreover, we must also be prepared to consider whether the motives of the persecutor are “mixed” in order to evaluate, for example, whether the persecution was based on religion (which is clearly protected under the Convention) or cultural differences (which may not be).

⁵⁵ See I.B.2.c above.

For example, what if it is difficult to determine whether alleged persecution was caused by *racial* animus rather than by *religious* animus (as in the case of the attacks by the Islamist-Arab government of Sudan on the Animist-Christian population of the Nuba mountains)?⁵⁶ Or, what if it is difficult to determine whether forcing women to wear certain attire is due to *religious* motives or *gender-related* motives? Or, what if it is difficult to determine whether the refusal of a state to provide for conscientious objection to military service is due to bias against *religious* pacifists or if the laws are merely *neutral* laws of general applicability that are applied equally to all citizens. In such cases, is the *motive* for the action relevant to the question whether there is *religious persecution*?

In the preceding sections of the paper it was argued that understanding motives was helpful in understanding *why* there is religious persecution and that understanding these motives is very useful in helping to identify many examples of religious persecution. Here it will be argued that knowing the motives of the person causing the persecution is not necessary for understanding *whether* there has been religious persecution. In short, knowing the motives for the coercion may be very *helpful for understanding* the nature and causes of religious persecution, but knowing the motives of the actors is *not necessary* for determining whether there has actually been religious persecution.⁵⁷

2. Mixed-motives: gender

The problem of the mixed motives of persecutors is perhaps most apparent in the area of gender.⁵⁸ According to Susan Akram, “[a]sylum and refugee claims relating to Islam or Islamic

⁵⁶ The majority of the population of northern Sudan, including most in the government, considers itself to be “Arab” and Muslim. The majority of the population in Southern Sudan considers itself to be “African” (including the Dinka, Nuer, Beja, Nubians, and other ethnic groups) and either Animist or Christian. While such labels play a significant role in the perceived identities of the Sudanese, the labels themselves may be highly misleading and are sometimes even fictional. Among the best treatments of these issues are Francis M. Deng, *War of Visions: Conflict of Identities in the Sudan* (1995) and Ann Mosely Lesch, *The Sudan: Contested National Identities* (1998).

⁵⁷ I am not examining here the legal issues of whether a claimant should have the burden of proving the motions of the alleged persecutor, though I believe that the claimant should not have this burden.

⁵⁸ “Gender refers to the social construction of power relations between women and men, and the implications of these relations for women’s and men’s identity, status, roles and responsibilities. Sex is biologically determined.” San Remo Expert Roundtable, 6-8 September 2001, Organized by the UN High Commissioner for Refugees and the International Institute of Humanitarian Law,” paragraph 2.

law in a particular country have arisen most frequently in claims made by women.”⁵⁹ It is common for religious societies to establish different roles and rules for men and women. These rules run the gamut from requiring women to sit behind screens in churches and synagogues, to prohibiting women from holding positions of authority, to requiring ritual baths for women after menstruation and childbirth, to requiring women to wear head and body coverings, to requiring women to submit to orders from their husbands, to preventing women from owning property, to establishing discriminatory rules on divorce, to forcing genital mutilation of girls and women.

Genital mutilation of women is strongly associated with religion and specifically Islam. No religious text requires believers to undergo mutilation. It is nevertheless practiced among diverse religious populations, including Muslims, Catholics, Protestants, Copts, Jews, Animists, and non-believers. . . . This mutilation is one example among many others that shows that the argument of cultural or religious identity can be simultaneously dangerous and erroneous. In effect, when it is practiced by Muslims, this mutilation is presented and justified as a religious act.⁶⁰

Religion also has condoned (if not encouraged) practices such as women immolating themselves on their husbands’ funeral pyres (Sati) and parents “dedicating” their daughters to become temple dancers (Devadasis), which as a practical matter often meant becoming temple prostitutes.⁶¹ Rarely do the disparate rules favor females over males.⁶²

Asylum adjudicators, when presented with cases of women seeking asylum on the grounds of religious persecution on the grounds of (at least in part) the imposition of sex-based rules, understandably ask whether these rules derive from *religion* or whether they derive from *traditional culture*. While the answer to this question should be that a “gender-sensitive

⁵⁹ Susan Musarrat Akram, “Orientalism Revisited in Asylum and Refugee Claims,” *International Journal of Refugee Law* (2000) 12:16.

⁶⁰ Abdelfattah Amor, *Étude sur la liberté de religion ou de conviction et la condition de la femme au regard de la religion et des traditions*, 5 April 2002, E/CN.4/2002/73/Add.2, 32 (paragraph 108) (hereafter Amor, *Women’s Report*) (translated from the French original by the author).

⁶¹ There is a sharp debate in India on the question whether Devadasis were simply temple dancers or were actually temple prostitutes for the priests.

⁶² One of the rare examples where males in a religion may be burdened and where females may not be is in circumcision B which of course is not equivalent to female genital mutilation.

interpretation [should be] given to each of the Convention grounds,”⁶³ it nevertheless is of some practical importance to consider the implications for religion-based claims. A salient example of the difficulty is that of the requirement in some predominantly-Muslim countries for women to wear the abaya (robe or dress that covers arms and legs) and the hijab (scarf covering the head). For practical purposes, women in Saudi Arabia are required to wear such coverings when they are in public. If a Saudi woman refuses to wear the abaya and hijab, and is harassed because of it, should this be considered by an asylum adjudicator to be relevant to the possibility of religious persecution, or is it culture alone?

Following from the analysis provided above, religious persecution should not be thought of as solely an issue of an attack on religion from the outside. Religious persecution may involve the attempts to enforce religious beliefs, punish those who are considered deviant, or to rid society of perceived pollutants. As the U.N. Special Rapporteur has observed, “the common point among extremists and religious fundamentalists (*intégrismes religieux*) in particular, whatever the religion, is the negation, often in violent ways, of the equality of the sexes. The extremism may be imposed by groups or by the state itself.”⁶⁴ While some women may not feel persecuted by a societal norm that is imposed on her, a woman who rejects such norms may reasonably feel coerced. In the case of Saudi Arabia, political and religious authorities are imposing standards for ostensibly religious reasons and they are using coercion to seek compliance with these norms promulgated in the name of religion. Although we might debate academically whether these norms originate in the *Qur’an* or in the customs of the Arabian desert, the fact remains that they are being imposed on women in the name of religion.

One of the extreme examples of such impositions was shown when a fire broke out at a girls’ dormitory in Mecca on March 11, 2002. The Saudi religious police, the Mutawwa’in (Commission for Promotion of Virtue and Prevention of Vice), refused to allow girls fleeing the fire to escape unless they were covered with the abaya and the hijab. Uncovered girls were beaten by the police and forced back into the burning building. At least fourteen girls died in the incident and many more were injured.⁶⁵ While on the one hand this case is extreme and the practices of the Mutawwa’in were widely criticized even inside Saudi Arabia, it nevertheless clearly reveals the extent that some religious authorities are prepared to take in order to force their religious beliefs on others and the tragic consequences that may result.⁶⁶ If a woman rejects

⁶³ San Remo Expert Roundtable, 6-8 September 2001, Organized by the UN High Commissioner for Refugees and the International Institute of Humanitarian Law, paragraph 4

⁶⁴ Amor, *Women’s Report*, 29 (paragraph 97) (translated from the French original by the author).

⁶⁵ See <http://www.hrw.org/press/2002/03/saudischool.htm>.

⁶⁶ This case was sufficiently extreme that there was a significant reaction against the Mutawwa’in in Saudi Arabia and there was open criticism of them throughout the Saudi press.

the standards, she may well be subjected to coercion for failing to adopt community religious norms and may well have a legitimate case as a victim of religious persecution. If an observer were to suggest that the dress requirements are a matter of “custom” and not “religion,” or that the requirement was “gender-based” rather than “religious-based,” or that “most women wear the attire without complaint,” or that the requirement could not be considered discriminatory because most women comply, then the observer would simply be failing to understand how religious norms are in fact imposed.

The issue of the abaya and hijab is illustrative of the larger issue of the relationship between gender and religion. Unfortunately, there are many other examples of how “religious” norms are forced upon girls and women in such a way that they may rise to the level of religious persecution. While the most egregious example is perhaps that of female genital mutilation, it should be remembered that there are many other ways in which women are subjected to coercion from which men are more typically exempt, including prohibitions on involvement in certain public activities, being subjected to rape, and a host of discriminatory laws B particularly relating to marriage, divorce, and ownership of property.

Women are subject to discrimination under Shari’a as interpreted in the country. In a Shari’a court, a woman’s testimony does not carry the same weight as that of a man: The testimony of one man equals that of two women. Female parties to court proceedings, such as divorce and other family law cases, generally must deputize male relatives to speak on their behalf.⁶⁷

Other forms of discrimination against women are enforced by religious laws. For example, to support ostensible community standards on sexual purity, women typically are subjected to the principal burden, including being permitted to travel only when accompanied by a male member of her family, prohibited from driving an automobile, required to wear head or body coverings. While some women may not feel burdened by such requirements, others reasonably may feel intense religious pressure to comply.⁶⁸ In considering these issues, the adjudicator often will not find the religious requirement to comply in the texts of the religion but in the mores enforced by religious leaders and the community.

The government used the occasion to reorganize the educational system and thereby lessen the control of religious authorities over girls’ education.

⁶⁷ *Religious Freedom Report 2001*, 480.

⁶⁸ In such situations, *it may be appropriate* for the adjudicator to take into account the specific beliefs of the applicant. As has been suggested throughout, the specific beliefs of the individual may or may not be important in fairly adjudicating a religious persecution claim. This is an example of where the person’s beliefs may be relevant.

3. Other mixed motives: race, ethnicity, identity

As in the case of gender, it may not always be clear whether actions resulting in persecution may have been caused by an animus against a religion or against other ethnic markers. As was suggested above, the harsh actions of the Sudanese government against the population in the south might be attributed to the racial bias of the (self-identified) “Arabs” of the north against the “Africans” of the south, or to the “Islamic” government’s bias against Christians and animists. The example of Sudan is only one of many. The current Special Rapporteur for Freedom of Religion or Belief, after having completed his recent study on the relationship between race and religious discrimination, observed that in India, the “actions of certain extremist groups and ultranationalist (especially Hindu) parties against Muslim communities and their places of worship are based on ‘the exploitation of religion to further a programme which is in fact political’ in order to ‘gain political advantage among the population.”⁶⁹

Indeed, the U.N. Special Rapporteurs who have most thoroughly considered the relationship between religious discrimination and other forms of discrimination have concluded that they are fully intertwined. Professor Odio Benito found that “religion usually encompasses more than faith. Often it is the focal point of the cultural tradition of a group.”⁷⁰ She thereupon concluded that “it is usually a political, historical or stereotyped reason that fosters religious persecution.”⁷¹ Similarly, Professor Amor concluded that:

The fact that it is difficult to establish clear distinctions when dealing with double or even triple (racial/religious/sexist) discrimination is merely proof that those guilty of discrimination are not targeting exclusively the racial *or* religious identity of the victim. They target both identities because in their minds they completely reject the other [person], either in a confused way or otherwise, on the grounds of the other’s beliefs, religious practices, rites and myths, as much as his racial, ethnic or even cultural origin. [These constitute] a form of aggravated discrimination that cannot be described in terms of a single identity⁷²

There are borderline cases where racial and religious distinctions are far from

⁶⁹ Abdelfattah Amor, *Racial discrimination and religious discrimination: identification and measures*, 13 April 2000, A/CONF.189/PC.1/7, 23 (hereafter Amor, *Racism Report*).

⁷⁰ Odio Benito, *Elimination of all forms of intolerance and discrimination based on religion or belief*, 46 (paragraph 184).

⁷¹ *Ibid.* (paragraph 185).

⁷² Amor, *Racism Report*, 27.

clear-cut. . . . [M]any instances of discrimination are aggravated by the effects of multiple identities. Moreover, the right to freedom of religion is an essential human right, just like the right to belong to an ethnic group or to a minority. When both of these rights are infringed in the case of a single person or group of persons, the violation is not just a superimposition or ordinary addition of offences. The combination of the two offences creates a new, more serious offence which, while of varying intensity, is by its very nature a separate concept.⁷³

The interaction between the racial and religious character of persecution may appear not only in the mind of the instigator, but in that of the victim as well. “In some cases, it is very difficult to distinguish between religious and racial or ethnic discrimination or intolerance. In other cases the two forms of discrimination may even become confused in the mind of both the perpetrator and the victim of the discrimination.”⁷⁴

4. Religious persecution *or* the application of “neutral laws”

The law, in its majestic equality, forbids the rich as well as the poor from sleeping under bridges, begging in the streets, and stealing bread.

B Anatole France⁷⁵

In the cases described above involving the interaction of racial, ethnic, and religious persecution, it would typically be assumed that the coercion is directed at a disfavored group or groups. When the state is involved, the state will be involved in intentionally selecting minorities for disparate treatment. But we also have the possibility that a state may enact “neutral laws” that are applied equally to all religious and ethnic groups, but where some groups might suffer disproportionately because of their religious beliefs or practices. Typical examples of such “neutral laws” with disproportionate impacts include laws on military conscription (that do not provide for conscientious objection), sanitation laws (that do not provide for ritual slaughter of animals), unemployment compensation laws (that do not allow an exemption for Sabbath worship), laws on oaths (and that do not provide for alternative expressions of truthfulness before a court), or laws that forbid door-to-door solicitations (and that do not provide an exemption for missionary activities). A state with such laws might be able to provide evidence that it has merely enacted “neutral laws” that are supported by the majority of the community and that the laws are neutrally and consistently enforced with respect to all citizens. Is it possible that such laws might nevertheless be relevant to supporting a claim for religious persecution? An

⁷³ Ibid., 5.

⁷⁴ Ibid., 32.

⁷⁵ Anatole France, from *Le lys rouge* (1894).

adjudicator should be prepared to examine such laws from two perspectives: first, whether they are in fact neutral, and second, whether their enforcement might nevertheless contribute to a claim of religious persecution.

First, with the exception of totalitarian states, laws regulating religion typically are responsive to the majority's religious practices. Islamic states and Israel, for example, all have laws permitting ritual slaughter of animals. Countries with a majority Christian population typically provide that Christmas is a recognized national holiday. While there are no states whose population consists of a majority of religious pacifists, a significant number of states provide for conscientious objection to military service. Not all states do so, however, and one of the telling markers of religious freedom in a state is the extent to which it provides for alternative military service. Some states indeed show a marked hostility to conscientious objectors and do not treat them as principled opponents to state policies but as criminals deserving of punishment for anti-state activities.⁷⁶ When we consider religion as a "way of life,"⁷⁷ the state's imposition of so-called "neutral laws" can have a devastating impact on individuals ability to practice their religion. Indeed, these laws, if followed, would require the individual either to violate deep principles of conscience or to be incarcerated as a common criminal. Whereas an adjudicator would presumably easily understand that a "neutral law" that prohibits all people from attending church on Sunday would likely qualify as "religious persecution," so should the adjudicator be prepared to find that a "neutral law" that requires all people to be conscripted or face lengthy jail sentences might qualify as "religious persecution" for those people who conscientiously object to military service. In such cases the adjudicator should be prepared to look beyond familiar understandings of religion (I.B.2.a), and examine religion as a way of life (I.C.3). The fact that the state or society might neutrally enforce certain laws may be irrelevant to the fact that some persons will either be forced to violate their religions or be subjected to severe punishment for adhering to them. *If persons are being punished by incarceration for adhering to their religious beliefs* *As for example in states that provide for no conscientious objection to military service and that criminalize all refusals to serve* *this would seem, as a factual matter, to establish a prima facie case of persecution.*⁷⁸ *Claims of religious persecution need to be understood from the perspective of religious persons who are unable observe their religious beliefs and practices without interference from the state or society.*

⁷⁶ This is the case, for example, in countries such as Algeria, China, Eritrea, Egypt, Kazakhstan, Mali, Singapore, South Korea, and Uganda. See War Resisters International at <http://wri-irg.org/co/rtba/index.html>. The U.N. Special Rapporteur reported that there is evidence of 1505 conscientious objectors in South Korea. Amor, *Interim Report 2001*, 17.

⁷⁷ See I.C.3 above.

⁷⁸ The adjudicator must, of course, consider a number of factors. In the area of conscientious objection, for example, the sincerity B i.e., the "conscientiousness" B of the applicant would seem to be of heightened importance, unlike the case where a person may be persecuted because of an ethnic religious identity.

Second, even in cases where the state does not apply laws that would criminalize the adherence to religious beliefs and practices, the laws may be part of a larger series of actions that have a cumulative effect of constituting persecution.⁷⁹ Thus it is important, at a minimum, to consider whether “neutral laws” that interfere with religious practices and beliefs, in conjunction with other societal factors, might combine to create a case of religious persecution even if such laws in themselves are not sufficient.

III. The Forms and Seriousness of the Persecution

Having considered above the structural and theoretical problems underlying definitions of religions and the theoretical and practical aspects of persecution, we will now turn to examples of how they are manifested in the world. The examples cited below are drawn from a number of different countries in order to illustrate different dimensions of the problem. It is important that the reader treat the examples below only as illustrations of the types of problem that exist. By using an example, the author is not suggesting that it does (or does not) constitute a case of persecution on the basis of religion. In order to make such a determination, one would need to look at the totality of the situation and the specific plight of an individual bringing a claim. Thus, the following consists only of examples of the types of problem that occur. The examples have been drawn principally from the most recent reports of the U.N. Special Rapporteur on Freedom of Religion or Belief and the U.S. Department of State’s *Annual Report on International Religious Freedom*.

A. Forms of persecution

1. Physical assaults on people, property, and religious symbols

The archetypal cases of persecution are those where groups attack religious communities by destroying religious property and assaulting religious persons. Unfortunately, the world is replete with such examples.

Defrocked Orthodox priest Vassili Mkalashvili in Georgia has led attacks on religious services of non-Orthodox churches.⁸⁰

Burmese military officials have attacked minority religions if their adherents do not agree to perform services for the soldiers.⁸¹ Burmese “security forces

⁷⁹ See III.B.2 below.

⁸⁰ Amor, *Interim Report 2001*, 11.

⁸¹ *Religious Freedom Report 2001*, 116.

continued to take actions against minority Christian groups, arresting clergy, destroying churches, and prohibiting religious services. [In some parts of the country] the Government attempted to coerce members of the Chin ethnic minority to convert to Buddhism”⁸² “Soldiers led by officers repeatedly disrupted Christian worship services and celebrations.”⁸³ Government authorities “coercively have sought to induce Chins, including children, to convert to Theravada Buddhism.”⁸⁴ There have been attacks on Muslims involving both social groups and state officials.⁸⁵ Authorities have systematically repressed and relocated Muslims.⁸⁶

In India, in addition to the continuing violence in Gujarat discussed above, Hindus have attacked a Christian priest.⁸⁷ Hindu militants have destroyed churches in India and erected Hindu idols.⁸⁸

In Indonesia, Muslim mobs attacked Christians in Ambon, where more than 5000 people have been killed since fighting broke out in 1999.⁸⁹ There have been many reports of forced conversions.⁹⁰ A mob of 2000 Muslims destroyed a Christian church.⁹¹

In 2001, Buddhist mobs, including priests, attacked Sansum Sevana Church and

⁸² Ibid., 117.

⁸³ Ibid., 117.

⁸⁴ Ibid., 119.

⁸⁵ Amor, *Interim Report 2001*, 16.

⁸⁶ *Religious Freedom Report 2001*, 118.

⁸⁷ Amor, *Interim Report 2001*, 11. Abdelfattah Amor, *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur on freedom of religion or belief, in accordance with Commission on Human Rights resolution 2000/33, E/CN.4/2002/73, 14 March 2002, 20-22 (hereafter Amor, 2002 Report)*.

⁸⁸ Amor, *Interim Report 2001*, 11-12.

⁸⁹ Ibid., 13.

⁹⁰ Ibid.

⁹¹ Ibid., 12.

Christians in Sri Lanka.⁹²

There are many reports of extreme cases of violence against religious groups in the former Yugoslavia.⁹³ Attempts to rebuild mosques and churches destroyed by war have led to violent riots, such as in Bosnia-Herzegovina.⁹⁴ An estimated 2000 to 5000 Serb demonstrators disrupted a ceremony in Banja Luka on the site of a destroyed mosque.⁹⁵ “religious buildings, clerics, and individual believers in any are where they are a minority bear the brunt of retaliation for discrimination and violence perpetrated by other members of their religious/ethnic groups in areas where they are the majority.”⁹⁶

There have been widespread and serious attacks on non-Muslim religious groups in the Comoros.⁹⁷

These examples are, of course, typical of the kind of assault that can be read in newspapers and observed on television almost every day.

2. Employment and other economic persecution

Although less salient than the physical attacks described above, religious groups are oftentimes subjected to discrimination B perhaps amounting to persecution B in the economic world. Again one of the most dramatic examples are the economic restraints placed on Dalits, who are often rigidly prescribed to work at either the most menial or despised tasks. Special Rapporteur Amor took heed of the allegations from Bangladesh of discrimination against Christian, Hindu, and Buddhist minorities not only by acts of violence, but “by a policy of discrimination with regard to employment in the public sector.”⁹⁸ In Saudi Arabia, Shi’a “are the subject of officially sanctioned political and economic discrimination.”⁹⁹

⁹² Ibid., 18, Amor, *Racism Report*, 23.

⁹³ Ibid., 13.

⁹⁴ *Religious Freedom Report 2001*, 248.

⁹⁵ Ibid., 249.

⁹⁶ Ibid., 249.

⁹⁷ Ibid., 16-17.

⁹⁸ Amor, *Racism Report*, 23.

⁹⁹ *Religious Freedom Report 2001*, 479.

3. Propaganda and media

In some countries there is relentless propaganda in the media, both from governments and social groups, against religious minorities. As the social-psychologist Elliot Aronson noted, the “media play an important institutional role in sustaining prejudice.”¹⁰⁰ Thus there is reason to be concerned when, for example, the Mufti of Egypt “reportedly issued a legal statement declaring the Baha’i community to be a sect and confirm[ed] the need to punish as apostates Baha’is who violated the laws of Islam.”¹⁰¹ In many countries, notably Belarus, Russia, Japan, China, and France, the population is subjected to an onslaught of television, newspaper, and radio broadcasts about destructive sects and cults.

4. The state’s use of laws and police powers to persecute

The activities described above, regardless of whether the state is involved, often take place outside of the law. States do, however, also enact laws and undertake measures (ostensibly within the rule of law) that harm religious groups to the point of persecution. The following are among the most typical areas where governments use the legal system to undermine religious activity. The different areas are not, of course, mutually exclusive.

a. Prohibiting religious activities

The most blatant means of using the law against religious groups is to prohibit them from conducting religious activities under the threat of punishment by the criminal law. Before 1989, there were several examples of such regimes. Perhaps the clearest extant case is the Democratic People’s Republic of Korea, though additional countries prohibit all but officially approved (and oftentimes controlled) religion, including Myanmar-Burma, China, Vietnam, and Saudi Arabia. There are many additional examples of governments identifying disfavored religions and thereafter prohibiting their religious activities. Sometimes these activities are conducted in concert with religious groups. Egypt’s actions against its 10,000 Baha’is may be of this type. “The Baha’i beliefs are not recognised as a religion in Egypt, and members are prosecuted by the official religious establishment, Al-Azhar, which considers them infidels and apostates from Islam.”¹⁰² In Egypt in 2001, members of the Baha’i community were arrested for their deviant beliefs.¹⁰³ Egyptian officials determine that a Baha’i marriage was against “the public order.”¹⁰⁴

¹⁰⁰ Elliot Aronson, *The Social Animal* 7th ed. (1995), 319.

¹⁰¹ Amor, *Interim Report 2001*, 10-11.

¹⁰² Boyle and Sheen, *Freedom of Religion and Belief*, 29.

¹⁰³ Amor, *Interim Report 2001*, 10-11.

¹⁰⁴ Amor, *2002 Report*, 19.

In Saudi Arabia, public worship and devotion by any group other than through approved Islamic mosques is prohibited and the law is enforced. “Non-Muslim worshippers risk arrest, lashing, and deportation for engaging in overt religious activity that attracts official attention.”¹⁰⁵

Several countries have begun to enact laws that use the registration process not for the purpose of regularizing religious activities, but to control and prohibit them. The most recent example is the law on religion adopted by the Belarus parliament on 2 October 2002.¹⁰⁶ The law, backed principally by the Russian Orthodox Church, appears to require all religious organizations to re-register and criminalizes any religious activities by groups that are not registered with the state. By tightly restricting the registration process, and then criminalizing religious activities of groups that the state refuses to register, of course interferes with the rights of freedom of religion and belief guaranteed by international human rights norms. In Belarus, the new law appears to further state actions that already were tending in that direction.¹⁰⁷ In the past, some Protestant congregations have, for example, been refused registration because they do not have a legal address, but have been unable to acquire property to obtain a legal address because they are not registered.¹⁰⁸ After the government refused to register the Belarusian Autocephalous Orthodox Church, state security services arrested a priest of that church on the grounds of conducting a service without prior authorization.¹⁰⁹ Uzbekistan has a law that is only marginally less severe. Jehovah’s Witnesses have been arrested in Turkmenistan for conducting religious service without registering – though the government refuses to register them.¹¹⁰

b. Registration and control of religious organizations and facilities

A related situation is where governments use religious-registration and other forms of registration laws to harass religious groups. The Burmese government, for example, makes it difficult for Christian and Muslim organizations to obtain building permits.¹¹¹ The Special Rapporteur has noted examples of refusing to provide residence permits for missionaries.¹¹²

¹⁰⁵ *Religious Freedom Report 2001*, 479.

¹⁰⁶ At the time this paper was written, President Lukashenko has not signed the bill into law.

¹⁰⁷ *Religious Freedom Report 2001*, 237.

¹⁰⁸ *Ibid.*, 237.

¹⁰⁹ *Ibid.*, 239-40.

¹¹⁰ Amor, *2002 Report*, 27.

¹¹¹ *Religious Freedom Report 2001*, 115.

¹¹² Amor, *Interim Report 2001*, 12.

Many states have registration laws that, in conjunction with other forms of discrimination, may constitute persecution.

c. Blasphemy, heresy, schisms, and apostasy

Several countries have blasphemy laws or laws against heresy. In Malaysia, for example, four people were sentenced in 2000 to three years imprisonment for converting to Christianity from Islam.¹¹³ Journalists in Pakistan were arrested for blasphemy for publishing an article accusing people of exploiting the question of whether Islam requires men to wear beards.¹¹⁴ In Saudi Arabia, the punishment for apostasy is death, usually by beheading, though it may not be currently enforced.¹¹⁵ In Saudi Arabia, there “are an unknown number of detainees held in prison on the charge of ‘sorcery,’ including the practice of ‘black magic’ or ‘witchcraft.’ In a few cases, self-proclaimed ‘miracle workers’ have been executed for sorcery involving physical harm or apostasy.”¹¹⁶ The blasphemy law in Pakistan, for example, while infrequently employed against Christians is frequently used against Ahmadis. While such laws range from an almost quaint blasphemy law (in the United Kingdom) to the allegedly unenforced but severe punishment of beheading for apostasy in Saudi Arabia, they can be part of a larger cumulative case for persecution. Such laws were noticed by Special Rapporteur Krishnaswami in his original report: “there have been unfortunate instances of public authorities acquiescing in these efforts to apply pressure, in effect restricting the rights and liberties of heretical and schismatic groups”¹¹⁷

d. Censorship, control of information, and proselytism

Many governments control the publishing, broadcasting, or distributing of religious literature. The Burmese government “subjects all publications, including religious publications, to control and censorship. The Government generally prohibits outdoor meetings, including religious meetings of more than five persons.”¹¹⁸ State-controlled media promote the

¹¹³ *Ibid.*, 16.

¹¹⁴ Amor, *2002 Report*, 24.

¹¹⁵ Frank E. Vogel, *Islamic Law and Legal System* (2000), 241-42. In Saudi Arabia, “conversion by a Muslim to another religion is considered apostasy, a crime punishable by death if the accused does not recant. There were no executions for apostasy during the period covered by this report, and no reports of any such executions for the past several years.” *Religious Freedom Report 2001*, 479.

¹¹⁶ *Ibid.*, 482.

¹¹⁷ Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (New York, 1960), E/CN.4/Sub.2/200/Rev. 1, 58.

¹¹⁸ *Religious Freedom Report 2001*, 114. See also *ibid.*, 116.

government's preferences regarding religion.¹¹⁹ There are restrictions on importation of religious literature.¹²⁰ Saudi Arabia censors all incoming literature and Shi'a publications are permitted only under the tight control of the government.¹²¹ Several states are undertaking measures to prevent or restrict proselytism.¹²² While denial of visas to foreign missionaries obviously would not be cognizable as claims for religious persecution by the foreign missionaries, the actions can reveal a tendency to limit access to outside sources of information and can be a part of a pattern of harassment. For some religious believers, restricting their ability to "witness" for their faith or share their teachings runs afoul of their core beliefs and can make it impossible, in their understanding, to live their religion.

e. Sects and cults

Several states, most notably China, but also including Belarus, Japan, Russia, France, Belgium, and Austria have conducted publicity campaigns against sects and cults.¹²³ None of these campaigns provides objective criteria for neutrally describing groups that are threats to society. Rather, the campaigns typically are filled with innuendo and unsubstantiated allegations. In Belarus, state officials use the scurrilous epithet "destructive sects" to deny registration to respected religious groups, including the Church of Jesus Christ of Latter-Day Saints and the Jehovah's Witnesses.¹²⁴

f. Use of religious laws (including shariah)

Many states have legal systems that include religious laws and religious courts. Although *shariah* laws are the most widely known, other types of religious laws are sometimes enforced, such as Hindu law in India. These laws, for the most part, pertain to what is called either "personal" law or "family" law, and they govern such issues as marriage, divorce, and adoption. In most cases such laws do not give rise to what might be considered religious persecution. However, *shariah* laws may in some countries, such as Saudi Arabia, Sudan, Pakistan, and some states within Nigeria, may, for example, include not only family law but Islamic criminal law

¹¹⁹ Ibid., 114.

¹²⁰ Ibid., 115-16.

¹²¹ Ibid., 480.

¹²² By way of illustration, Christians were arrested in Nepal in 2000 for proselytizing. Amor, *Interim Report 2001*, 16, and some states in Nigeria have restricted missionary activities. *Religious Freedom Report 2001*, 70.

¹²³ See, for example, *ibid.*, 229, 242-43.

¹²⁴ *Ibid.*, 237.

(*hudud*) and punishment for crimes.

Shari'ah is an Arabic word that referred originally to a path, such as a path one would take to find water. Over time it came to mean “the right path” or “the right guide.” It has now evolved into a term that is translated as “Islamic law” B that is to say the path that God laid down that good Muslims should follow B but this meaning did not develop until long after Muhammad had died.¹²⁵ *Shariah* consists of all the divine laws to be followed by Muslims, from prescriptions on manner of prayers, rules on marriage and divorce, to prohibitions against murder. “The *Shari'ah* contains the injunctions of the Divine Will as applied to every situation in life. It is the law according to which God wants a Muslim to live.”¹²⁶ Or, “Islamic law in particular, is a system of duties, comprising ritual, legal, and moral obligations on the same footing, and bringing them all under the authority of the same religious command.”¹²⁷ Thus it includes both private rules regarding an individual’s prayers to social issues. They are sometimes described as :

The Shariah possesses the quality of totality and comprehensiveness. It encompasses the whole of many’s life so that from the Islamic point of view there is no domain that lies outside of it even if such an ideal is not easy to realize completely in human society.¹²⁸

Whereas the most commonly employed part of *shariah* laws pertain to personal and family law matters, the more notorious forms are those employed in what is elsewhere characterized as the criminal law, including the *hudud* punishments. The *hudud* punishment for murder may be beheading, theft may include amputation, and, for adultery, stoning to death.

There are three particularly problematic areas of religious laws as they pertain to the possibility of religious persecution.¹²⁹ First, the employment of religious on those who are *not* members of the religion. In some states in Nigeria that adopted *shariah* laws have effectively

¹²⁵ Joseph Schacht, *An Introduction to Islamic Law* (1982), 19.

¹²⁶ Seyyed Hossein Nasr, *Ideals and Realities of Islam* (1975), 94.

¹²⁷ Schacht, *Introduction to Islamic Law*, 11. The “normative legislation of the Koran incorporated sanctions for transgressions, but again they are essentially moral and only incidentally penal; the prohibition is the essential element, the provision concerning the punishment is a rule of action either for the agents of the newly created Islamic state or for the victim and his next of kin in matters of retaliation.” *Ibid.*, 13.

¹²⁸ Nasr, *Ideals and Realities of Islam*, 105-6.

¹²⁹ Severe punishments for crimes may raise other human rights issues as well, but they will not be considered here.

applied them to non-Muslims, including laws separating the sexes in public transportation and a ban on the consumption of alcohol.¹³⁰ In Saudi Arabia the testimony in court of non-Muslims is discounted. Second, the use of religious criminal laws to punish the “crimes” of heresy and blasphemy.¹³¹ Third, enforcement of religious laws that infringe on other rights. In Saudi Arabia, for example, women’s testimony is discounted and the laws present substantial disabilities on women in such areas as marriage, divorce, and inheritance.¹³²

g. Use of laws to discriminate, harass, seize property, etc.

Many states use their laws, police, and security services to harass religious groups. The Burmese government “continued to discriminate against members of minority religions, restricting the educational, proselytizing, and building activities of minority religious groups.”¹³³ People are required to carry identity cards which sometimes requires identification of religion.¹³⁴ In Saudi Arabia people also are required to carry identification cards with the designation of “Muslim” or “non-Muslim.”¹³⁵ In Saudi Arabia, the court testimony of non-Muslims or non-practicing Muslims is either discounted or ignored.¹³⁶ Religious minorities have only restricted access to army and the judiciary.¹³⁷ There are state-sanctioned actions against Ahmadis in Guinea-Bissau.¹³⁸ In Iran, the property of Baha’is has been seized and various licenses were revoked.¹³⁹ The National Security Service in Turkmenistan is involved in seizing the property of Protestants.¹⁴⁰ The Hoa Hao and other religions are harassed by state officials in Vietnam.¹⁴¹

¹³⁰ Such bans, in and of themselves, presumably do not constitute *religious* persecution.

¹³¹ See separate treatment of heresy above.

¹³² *Religious Freedom Report 2001*, 480-81.

¹³³ *Ibid.*, 115.

¹³⁴ *Ibid.*, 116.

¹³⁵ *Ibid.*, 479.

¹³⁶ *Ibid.*, 480.

¹³⁷ Amor, *Racism Report*, 23-24.

¹³⁸ Amor, *2002 Report*, 19.

¹³⁹ Amor, *Interim Report 2001*, 15.

¹⁴⁰ *Ibid.*, 18.

¹⁴¹ *Ibid.*, 19-20 and Amor, *2002 Report*, 28-30.

Some states not only take actions against religious persons, but also against those who protest such state actions. In Belarus, police arrested and a court convicted people for peaceful protests against harsh measures that had been taken against the Hindu community.¹⁴² The Special Rapporteur received evidence that the Pakistani police attacked a peaceful protest of that state's blasphemy laws, though the government denied it.¹⁴³ In 2002, Hong Kong police brutally attacked a peaceful demonstration by Falun Gong practitioners, and the courts convicted the peaceful protesters and not the police.

5. State failure to enforce laws against those who commit violence

Sometimes states act as passive accomplices to persecution by refusing to take actions against individuals and groups who attack religious communities. One of the most stunning examples occurred in India in 2002 when the Hindu-nationalist led government of Gujarat refused to intervene in a broad rampage against Muslims in that state.¹⁴⁴ There are other recent examples in Bosnia-Herzegovena¹⁴⁵ and in Burma, where "it appears that the Government was, at best, very slow to protect Muslims and their property from destruction."¹⁴⁶

Coda: typical governmental responses to allegations that they have engaged in religious discrimination or persecution

Governments typically respond to allegations that they are discriminating against religious groups or persecuting them by stating that they are merely enforcing criminal laws. This, for example, is the position of the Chinese government in response to allegations about their handling of Falun Gong. This also is how the Vietnamese government responds to its criticisms on issues related to Hoa Hao.¹⁴⁷

B. Seriousness of the persecution

Of course, not all interferences with religious freedom rise to the level of religious

¹⁴² Felix Corley, "Belarus: Further Massive Fine for Hindus," *Keston News Service* 14 October 2002.

¹⁴³ Amor, *Interim Report 2001*, 17.

¹⁴⁴ See Human Rights Watch, *We Have No Orders to Save You* (2002).

¹⁴⁵ *Religious Freedom Report 2001*, 247.

¹⁴⁶ *Ibid.*, 119.

¹⁴⁷ Amor, *2002 Report*, 111-12.

persecution. In order to make the determination whether actions rise to the level of persecution there are essentially two factors that must be considered: first, the extent to which interferences pertain to the core of religious practices, and second, the cumulative effects of the actions against individuals or groups making asylum claims.

1. Core and peripheral practices

Not all religious beliefs and practices are of equal importance to religious communities or to religious individuals. Some practices will go to the very core of religion whereas others are incidental. Prohibiting a Sikh from wearing a turban or Orthodox Jews from wearing head coverings may constitute grave infringements of religious commands. Insisting that Jewish and Muslim prisoners must eat pork also may be a grave infringement. Interfering with other religious practices may, however, constitute a much less serious threat. Prohibiting a Quaker from attending a single Meeting for Worship may be troublesome, but it does not interfere with fundamental tenets of the religion.

It may, however, be quite difficult for adjudicators to assess which practices are core to the religious adherent and which are peripheral. Religious texts do not necessarily provide effective guidance as to which religious doctrines are commands that adherents are required to follow, and which doctrines are advisory. For example, the “Word of Wisdom” of the Church of Jesus Christ of Latter-Day Saints (Mormons) sets forth the rules regarding what is prohibited and permitted in the consumption of food and drink.¹⁴⁸ But neither a Mormon nor an asylum adjudicator could possibly know what is permitted or prohibited by reading the text alone. According to the text, wine and “strong drink” would seem to be discouraged (but not prohibited)¹⁴⁹ and could be read to be of equal importance to the injunction that meat can be consumed only “sparingly” and never in winter.¹⁵⁰ And yet to be a Mormon in good standing one cannot consume *any* wine but can eat meat three times a day, 365 days a year. Different sects within a larger religious tradition may have sharply divergent interpretations of scriptures. For example, in the Christian faith, *Matthew* 28:18-20 is considered by some to be the “Great Commission” that requires Christians to proselytize all nations of the earth and to baptize them “in the name of the Father, the Son, and the Holy Spirit.” Whereas some evangelical Christians take this scripture as a literal command that they must fulfill by engaging in missionary work, other Christians interpret in a more allegorical way. The principal scriptural source for the veiling of women in Islam is the following text from the *Qur’an*: “O Prophet, say to thy wives and daughters and the believing women, that they draw their veils close to them; so that it is

¹⁴⁸ See *Doctrine and Covenants*, section 89.

¹⁴⁹ Indeed it is suggested that wine, provided it is manufactured by Mormons, could be consumed in a sacramental context *Doctrine and Covenants* 89:5-6.

¹⁵⁰ *Doctrine and Covenants*, 89:12-13.

likelier they will be known, and not hurt.”¹⁵¹ Different schools of Islam will take this text, and other writings from the Sunna, and derive sharply different requirements about what women may and may not wear.

In order to determine the seriousness of an infringement of a religious practice, the adjudicator must seek to understand not only the standard teaching of a religion from a text, but whether a religious practice is in fact core or peripheral in the context of the particular claimant. To the extent that an inhibited practice is at the core of the applicant’s complaint, the more serious the violation of religious freedom.

2. Cumulative effects (“in light of all the circumstances”)

The UN *Handbook on Procedures and Criteria for Determining Refugee Status* notes that persecution should be understood not as a single dramatic event or events, but may be the cumulative result of many events.

Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.¹⁵²

The issue of at what point *discrimination* becomes *persecution* is well analyzed in Karen Musalo’s “Claims for Protection Based on Religion or Belief.” The adjudicator must consider all of the circumstances that pertain to religious persecution.

IV. Possible Trends in Religious Persecution

More than forty years ago, Arcot Krishnaswami concluded his famous 1960 study by suggesting likely future trends in the area of religious freedom by noting that “there is today a more favourable trend towards equality of treatment of religions and beliefs, and their followers,

¹⁵¹ *The Koran Interpreted*, trans. A.J. Arberry, (1955) 33:59.

¹⁵² *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Geneva, January 1992, paragraph 55.

than in the recent past.”¹⁵³ Krishnaswami particularly noted positive trends on religious freedom in Israel and in Islamic countries, which have not been borne out by subsequent developments.¹⁵⁴ He properly notes that “a reversal of these happy trends cannot be ruled out in the future.”¹⁵⁵ Since the 1960s, there have been some positive developments on the religious freedom front. The closed world of Soviet Communism has collapsed both in the former Soviet Union and in the former Communist countries of Central and Eastern Europe. The People’s Republic of China, which continues to have serious problems, is nevertheless better now than it was either in 1960 or during the Cultural Revolution. The international community also is paying significantly greater attention now to issues of religious freedom than it was ten years ago.

But there have been many troubling signs during the past ten years. Several constituent republics of the former Soviet have taken significant backward steps since 1991, including Russia, the five states of former Soviet Central Asia, the Caucasuses, and Belarus. With the exception of the three Baltic countries, none of the fifteen former Soviet republics appears to be clearly headed in the right direction - and there are some troubling signs even in Latvia and Lithuania. Many of the formerly Communist Central and Eastern European countries appear to be barely holding on to principles of religious freedom. The signs also are quite negative in several of the world’s most populous countries, including China, India, Indonesia, Pakistan, and Nigeria. Religious freedoms in many of the countries of the Middle East and North Africa have deteriorated in the last ten years. Even in Japan and Western Europe some states have begun campaigns against new religious movements generally by labeling them dangerous sects and cults. The attacks on the United States on September 11, 2001, also has had the effect of causing governments to become much more suspicious of religious groups, particularly Islamic groups.

Krishnaswami correctly noted in 1960 that changes in the course of human affairs necessarily will have a significant impact on the future. It is altogether possible that unanticipated future events will have a dramatic effect on long term developments in ways that simply cannot be understood at the beginning of the twenty-first century. With such caveats about the uncertainty of the future, and with full recognition that the future can be only dimly imagined, the following are among the most important issues that are likely to affect religious persecution claims in the future.

- the rise of religious fundamentalism, particularly in India and Islam, leading governments either to embrace it (Saudi Arabia, India) or to battle it (Turkey, Egypt, Algeria, Central Asia);

¹⁵³ Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, 55.

¹⁵⁴ *Ibid.*, 56-57.

¹⁵⁵ *Ibid.*, 60.

- the increase in disenchanted “identity” Islam, where large segments of the Islamic population will rally to charismatic figures or react against symbols such as Israel and the United States;
- population declines of non-Muslim populations in the Middle East and non-Jewish populations in Israel, which is likely to stimulate a further exodus;
- China’s pursuing (the perhaps inconsistent) paths of economic modernization at the same time it is tightening control over religious groups, particularly (and most irrationally) the Falun Gong;
- the increasing rise of religiously related violence, particularly in Israel, Palestine, Indonesia, Algeria, and Nigeria; and
- the rise of “unofficial” Islam, particularly in Central Asia, the Caucasus, and Russia.

Simply in terms of numbers and demographics, it can be imagined that there might be an increasing number of claims from all religious groups in China, Burma, Laos, and Vietnam; Muslims and Christians in India; non-Muslims in Indonesia, Pakistan, and Malaysia as well as the Middle East generally. There are, unfortunately, few signs that religious discrimination and persecution will be declining during the next decade.

V. Conclusions

The Conclusions below do not raise all of the issues relevant for religious persecution or repeat all of the issues discussed in the text above. Rather, they focus attention on those issues that are either most peculiar for religion claims or that are most likely to be overlooked or not understood in such claims.

A. Complexity of religious persecution claims

Conclusion 1: Complexity generally. Asylum adjudicators should be aware that claims of persecution on the basis of religion may potentially involve the most complex cases they will hear.

Religion cases may involve much more than persecution based upon a specified set of beliefs, but also may involve interconnected issues of gender, race, ethnicity, cultural norms, identity, and ways of life. People may be persecuted on the basis of their religion even though they have little substantive knowledge about what that religion is. For some people adhering to a religion a core practice may be very different from what are perceived as core practices by others

adhering to the ostensibly same religion.

Conclusion 2: Persecution to enforce conformity. Asylum adjudicators should be aware that although the stereotypical cases of religious persecution are those committed by governments or by one religious community against another, religious communities also persecute members of their own communities in order to enforce compliance with religious norms.

See discussion above at II.A.2 and II.B.3.

Conclusion 3: Mixed-motives for persecution. Religion cases particularly raise issues of the possible mixed-motives of the persecutor. Persecutors in religion cases often do not differentiate among religion, race, and ethnicity of their victims. The victims themselves may not differentiate between their persecution on the basis of religion, race, or ethnicity.

See discussion above at II.C.

Conclusion 4: Gender. Claims brought by women may present legitimate religious persecution issues that differ from claims brought by men.

Due to societal prejudices and religious norms, women are likely to suffer from religious persecution claims in a way different from men. This will be particularly the case in situations where women are under religious and societal pressure to comply with rules different from men, including attire and genital mutilation.¹⁵⁶

B. Preconceptions, misconceptions, and biases about religion and religions

Conclusion 5: Preconceptions and biases. Because of the extreme complexity of some religion claims, adjudicators should be particularly mindful of their own preconceptions about religion generally as well as their possible misconceptions and biases about specific religions.

Adjudicators, like all human beings, are susceptible of allowing their own biases interfere in the reasoning process. The suggestion here is not that adjudicators are particularly prone to such biases, but that biases are often not apparent. “Nothing is easier than to twist one’s conception of the teaching of religion to fit one’s prejudice.”¹⁵⁷ It is very common for people to

¹⁵⁶ It is important to note that gender stereotypes are oftentimes held by women about other women, in fact “it is far more common among women than we realize.” Aronson, *The Social Animal*, 316.

¹⁵⁷ Allport, *The Nature of Prejudice*, 447.

accept the presumptions of the society in which they are raised and to be unaware of the fact that they have done so.¹⁵⁸ “When we hold erroneous beliefs or stereotypes about other people, our responses to them often cause them to behave in ways that validate these erroneous beliefs.”¹⁵⁹

C. Terminology

Conclusion 6: Definitions of “religion”. “Religion” is not a term that can be given a precise legal definition. When attempting to understand the term “religion,” adjudicators should look beyond the types of religion with which they are personally familiar as well as the types of religion that are described by theologians, anthropologists, and other scholars of religion. In order to grasp fully the meaning of “religion” in asylum cases, the adjudicator must be prepared to understand what it means from the perspective of the persecutor.

As in the case of persecution on the basis of race, the important issue is not reaching a scientific or rigorous definition of “race,” but of understanding the ramifications of the persecution by the persons who accept racial stereotypes and persecute others on the basis of the stereotypes. The following three conclusions suggest ways in which religion can be conceived. They are neither mutually exclusive nor exhaustive of the possibilities.

Conclusion 7: Religion as “beliefs”. One of the important forms that religion takes includes beliefs in a divinity, a “path,” a “way,” or in doctrines and teachings about ultimate truth and reality.

Religion as a set of beliefs about the divine or ultimate reality, or the spiritual destiny of humankind, are classic forms of religion with which adjudicators are often familiar. Those who persecute people on the basis of their beliefs will often think of them in terms such as “heretics,” “apostates,” “schismatics,” and “superstitious.”

Conclusion 8: Religion as “identity”. Another important form of religion is that of identity, including membership in a community that observes common beliefs, rituals, traditions, ethnicity, nationality, or ancestry.

For many people, perhaps even a majority of people in the world, religion is less a matter of beliefs or doctrines and more a matter of a culture into which they were born. While such people may have little or no idea about the doctrines of their religion, they will identify themselves and will be identified by others as being in a religious community. Persecutors of

¹⁵⁸ Aronson, *The Social Animal*, 311-12.

¹⁵⁹ *Ibid.*, 312-13.

religion as identity may choose to describe them in such terms as “dirty” and “polluted.”

Conclusion 9: Religion as a “way of life”. Another form of religion is as a way of life. For such people, religion is a vital aspect of how they relate to the world and is likely to involve manifestations of religion that will appear different to others, including the wearing of distinct clothing, having a conscientious objection to military service and oaths, engaging in activities such as proselytizing, or complying with different dietary requirements.

Whereas some religious adherents might observe their principal religious rituals at distinct times and in the company of other adherents of their religion, others will be deeply involved in religious activities that will permeate their lives. Such religious people are particularly distinct when they are in communities where they are minorities. At such times they will may be noticeable for such things unusual clothing or engaging in activities that appear different from the norm. These practices, which may seem trivial from the non-believers perspective, may be at the core of the religion for the believer. Persecutors of such people may choose to describe them in terms such as “zealots,” “fanatics,” and “obsessed.”

Conclusion 10: Other important terms. Religion has spawned a vast lexicon of words that may have either arcane meanings to members of religion, entirely different meanings to different religious communities, or that may have acquired pejorative meanings after use by their adversaries. It is important for adjudicators to be careful in using and interpreting terms from the religious lexicon.

A few of the many terms that have complicated and often contradictory meanings include: “fundamentalist,” “evangelical,”¹⁶⁰ “sect,” “cult,” “orthodox,” “Wahhabi,” “schismatic,” “faith,” “church,” and, of course, “religion.”

D. Reliability of evidence

Conclusion 11: Difficulty (or impossibility) of obtaining reliable evidence. Because of the complexity of religious persecution claims and the difficulty of fully grasping them, it is important for adjudicators to pursue the most objective and reliable information possible. In many cases the adjudicator

¹⁶⁰ In Germany, “Evangelical” refers to the principal established Lutheran and Reformed Churches, while in the United States it typically refers to a segment of the Protestant faith that is *relatively* unhierarchical, eschews complicated theology, and espouses a relatively simple faith of preaching the word of Christ and living one’s life in accordance with the plain teachings of Christ. Critics of evangelicals in the United States will often caricature them as extremely conservative, reactionary, fundamentalist, ignorant, and naive.

and claimant will be severely hampered in considering the type of information that would ideally be wanted.

It is often difficult and sometimes even impossible to obtain reliable information about the status of religious persecution in a country. As with all human rights issues, governments will often minimize or deny violations while claimants will often exaggerate their seriousness. In many of the countries where the persecution is likely to be the worst, the evidence about the persecution also is likely to be very difficult or even impossible to obtain. In some cases it is even difficult to know how the law in fact operates because of secret proceedings before courts. For example, after noting that the government of Saudi Arabia committed “abuses of religious freedom,” the U.S. government observed that information “about government practices is incomplete because judicial proceedings are closed to the public and the Government restricts freedom of speech and association.”¹⁶¹ Similarly, the press is subject to both external and self-censorship. “Thus, reports of abuses often are difficult or impossible to corroborate.”¹⁶² Because of the sharply different assumptions about what religion is and what constitutes religious persecution, the difficulty of obtaining reliable evidence in religion cases is probably more severe than in any other asylum issue.

***Conclusion 12: Standard sources of information.* The standard sources of information to which adjudicators should look for information about religious persecution are the reports of the U.N. Special Rapporteur for Freedom of Religion or Belief and the U.S. Department of State. Nevertheless, adjudicators should be aware of the significant limitations of both sources and should use them with caution. Even courts in the United States should not rely exclusively on State Department reports.**

The two best current and ongoing sources of information about religious freedom and religious persecution are the reports prepared by the U.N. Special Rapporteur on Religion or Belief and the U.S. Department of State. The Special Rapporteur, Professor Abdelfattah Amor of the University of Tunis, issues two general reports every year.¹⁶³ On occasion, supplementary special reports are issued either as appendices to the general reports or as separate documents. Pursuant to a law enacted in the United States, the International Religious Freedom Act of 1998, the U.S. State Department now issues an *Annual Report on International Religious Freedom*,

¹⁶¹ *Religious Freedom Report 2001*, 481.

¹⁶² *Ibid.*, 481.

¹⁶³ The interim report is issued to the U.N. General Assembly, and the Annual Report is to the Commission on Human Rights. They can usually be found at the website of the U.N. High Commissioner for Human Rights. See “Rapporteur on Freedom of Religion or Belief at <http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset>.

which have been released in September or October since 1999. The Department of State also issues, typically in March of every year, an annual *Country Reports on Human Rights Practices* that covers a wide range of human rights issues, including religious freedom. On a global basis, these U.S. reports provide the single best, up-to-date survey on religious freedom issues.¹⁶⁴

Despite the merits of these reports, which are considerable, it is important to recognize their significant limitations and to note that religious-persecution adjudicators should use them at most only as supplemental sources of information. The Special Rapporteur prepares his reports on a very small budget and with a small staff. Typically he is able to identify only general allegations that have been made and official state responses to them. He also must operate under the severe strictures of the U.N. system, which effectively reduce his ability to speak openly and candidly about his observations. The Special Rapporteur's reports are most useful not for their descriptions about specific circumstances in particular countries, but in their identification of general trends and general problems.

The U.S. Department of States devotes significantly greater resources to its reports, which involve annual reporting by U.S. embassies throughout the world. The drafts of these reports, however, typically are prepared by persons who are relatively new to the countries and who are not necessarily knowledgeable of the circumstances in the countries on which they are reporting. As a general rule, they are prepared by junior foreign service officers who are on their first tour of duty to the country. They are now prepared using prior years as a preliminary draft and are only updated to reflect important developments. There is a relative *over-reporting* on religious communities who have substantial constituencies in the United States and are successful in drawing attention to their plights, and *under-reporting* on groups that are more obscure in the United States, such as Russian Old Believers or Islamic movements in Central Asia. These limitations are not intentional, but simply reflect the practical realities in how the reports are prepared. Moreover, there are some political considerations that enter into the process of reporting on countries. While these political considerations are considerably less problematic than outside observers sometimes imagine, there is a pronounced reluctance by many within the U.S. State Department to criticize countries and there frequently is an attempt to compromise in the language proposed by the Bureau for Democracy, Human Rights and Labor, on the one hand, and the powerful regional bureaus who prefer to modify criticisms on the other hand. Thus the reports need to be understood both as lacking somewhat in rigor as well as consisting of compromise language that may not accurately reflect the seriousness of the problems in particular countries. Therefore, even American asylum courts should be very cautious in relying on State Department reports for a complete and accurate assessment of the situation in any given country.

Conclusion 13: Locating additional sources of expertise. Because of the limitations of general sources of information, adjudicators should pursue,

¹⁶⁴ They are available at <http://www.state.gov>.

and should encourage claimants and governments to pursue, expertise from academe and from objective published works whenever possible.

Adjudicators should be wary of general sources of information about religion and persecution in encyclopedias, yearbooks, and general textbooks. It is important, whenever possible, to seek current, country-specific, religion-specific information wherever possible, including from academic experts and persons intimately familiar with the countries at issue.

F. Evaluating the claimant

Asylum adjudicators typically must assess the credibility of the claimants as individuals as well as the credibility of their claims about the situation in the countries from which they come. Religion cases raise some additional issues of which adjudicators should be aware.

Conclusion 14: Evaluating claimants' knowledge about their religions. Claimants' knowledge about the doctrines, rituals, and histories of their religions may or may not be relevant to the merits of their claims of persecution.

While it is understandable that an adjudicator may inquire into claimants' knowledge about their religion in order to ascertain their credibility, such inquiries may be totally irrelevant to the question of whether the claimants are in fact persecuted on the basis of their religions. As described above, religious persecution may occur for a variety of reasons that have nothing to do with the beliefs that are actually held by a claimant. When a village in Bosnia is destroyed by Serbs because the inhabitants are perceived to be Muslims, it makes little difference whether the Muslim woman is familiar with the Sunna or can name the first four caliphs.

On the other hand, if a male is claiming persecution (in part) because of his conscientious objection to military service, it presumably would be appropriate to inquire into the applicant's knowledge of the religious doctrine and his sincerity in believing it. For a claimant woman who alleges persecution because of her conversion to Christianity, it may be appropriate to inquire into what the conversion meant to her and what she understands it to mean. It should equally be understood, however, that it may be much more important, and perhaps decisive, to know whether others in her home community believe that she has converted to Christianity and whether they are likely to persecute her because of it.

It would be a practical rule of thumb for an adjudicator, when making inquiries about the claimants' actual beliefs and knowledge of their religion, to consider which questions would be appropriate in the analogous case of racial persecution. Thus, by analogy, questions about the applicants' knowledge of their own racial and ethnic history may well be irrelevant to the question of whether they are persecuted on the grounds of race.

Conclusion 15: Evaluating claimants' observance of their religion. Claimants'

observance of the rituals or teachings of their religions *may or may not* be relevant to the merits of their claims of persecution.

Just as claimants' knowledge of their religion may or may not be relevant to their claims of persecution, the same can be said of their observance of their religion. For a Jew fleeing Nazi Germany, it would be irrelevant for an adjudicator to inquire into whether the claimant observed kosher dietary rules or wore a yarmulke. The proper question is whether the persecutor has reason to believe that the claimant is a Jew. Similarly, it would presumably be inappropriate for an adjudicator to inquire into whether a Catholic woman fleeing persecution in Indonesia has had an abortion or attends mass regularly. The questions of observance *may* be relevant when it is the observance of the religion that stands out as the marker in a society that is otherwise mixed ethnically (such as Sikhs in India), or when the *failure* to observe practices of religion could have led to persecution by a religious community that sought to have the claimant conform to the practices of the community.