

Religious Persecution, Refugees, and Right of Asylum

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Introduction

The tragedy of World War II generated an unprecedented number of refugees in Europe. To confront this situation, the United Nations created in 1950 the office of the United Nations High Commissioner for Refugees (UNHCR). His work with the European emergency was generally regarded as successful, and UNHCR was awarded the Nobel Peace Prize in 1954.

UNHCR also asked the United Nations to establish clear international law provisions regarding refugees. On July 28, 1951, the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened in Geneva, Switzerland, under General Assembly resolution 429 (V) of 14 December 1950, and adopted the *Convention Relating to the Status of Refugees*, known as the 1951 Refugee Convention. Although some countries distinguish between “asylum seekers” and “refugees,” in the 1951 Convention a refugee is simply an asylum seeker whose application has been accepted.

To this day, UNHCR regards this convention as “the key legal document that forms the basis of our work” (UNHCR 2017). It was signed and ratified by both China (in 1982) and South Korea (in 1992). However, the 1951 Convention was custom-tailored to solving the problem of post-war refugees in Europe, and some provisions were limited to them.

For this reason, a broader document was signed in New York in 1967, the *Protocol Relating to the Status of Refugees*. The United States, which were afraid of receiving too many refugees after World War II, had not signed the 1951 Refugee Convention but did sign and ratify the 1967 Protocol. Some 40 countries remain outside the Convention-Protocol system, including Jamaica, Nigeria, Saudi Arabia and the Gulf States, India, Pakistan, Indonesia, Thailand, Vietnam, Mongolia, and Malaysia—as well as North Korea (although perhaps not many refugees would seek asylum there...). However, China and South Korea signed and ratified the Protocol.

For the definition of refugee, Article 1 of the Protocol refers to Article 1 of the 1951 Convention, which mentions “any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country or for reasons other than personal convenience, is unwilling to return to it.”. =The Universal Declaration of Human Rights, Art. 14, already established that: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

In general, these documents established that refugee is a person who is outside its own country's territory owing to fear of persecution on protected grounds. “Protected

grounds” include race, caste, nationality, religion, political opinions and membership and/or participation in any particular social group or social activities.

Persecution, in turn, is the systematic mistreatment of an individual or a group by another individual or group. The most common forms are religious persecution, racism and political persecution. The inflicting of suffering, harassment, imprisonment, internment, fear, or pain are factors that may establish persecution, but not all suffering will necessarily establish persecution. The suffering experience by the victim must be sufficiently severe. The threshold of severity, though, has been a source of much debate.

The worst form of persecution is torture. Torture is the act of deliberately inflicting physical or psychological pain in order to fulfil some desire of the torturer or to compel some action from the victim. Torture, by definition, is a knowing and intentional act. Deeds which unknowingly or negligently inflict pain without a specific intent to do so are not typically considered torture. Torture can be carried out or sanctioned by individuals, groups and states. Reasons for torture may include punishment, revenge, political re-education, deterrence, coercion of the victim or a third party, interrogation to extract information or a confession, irrespective of whether it is false.

Torture is prohibited by international law and is one of the most serious violations of human right. Torture is prohibited by the 1987 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by 158 countries, including China in 1988, and South Korea in 1995). Under the Convention, torture means “any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person, committed, or intimidating or coercing him or a third person, or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.”

Rendering true victims of persecution to their persecutors is an odious violation of a principle called *non-refoulement*. The 1987 Convention against torture, Article 3. stipulates: “No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

Two problems were, however, left open. The first was that there was no internal monitoring body for compliance with legally binding Conventions and their Protocols. UNHCR itself is not empowered to enforce the Convention. There is no formal mechanism for complaints against States, though they can be referred by another State to the International Court of Justice. An individual may lodge a complaint with the UN Human Rights Committee under the International Covenant

on Civil and Political Rights or with the UN ECOSOC under the International Covenant on Economic, Social and Cultural Rights. At present, the only real consequences of violation are public shaming in the press and media, and the verbal condemnation of the violator by the UN and by other countries.

The second problem is that interpreting provisions on religious persecution, a serious human rights problem, proved much less simple than international organizations originally believed. International courts were frequently involved, and gave contradictory interpretations. Finally, in 2002, UNHCR and Church World Service, a Christian inter-denominational agency specialized in assisting refugees, convened an international roundtable in Baltimore. One of its conclusions was that UNHCR, as part of its mandate, could and should provide interpretive guidance on the Refugee Convention and the Protocol. As a result, in 2004 UNHCR issued a document called *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*.

The European Union waited for the official publication of the UNHCR Guidelines on April 28, 2004 and, the following day, April 29, published in turn Directive 2004/83, known as the Qualification Directive, on the “minimum standards” for being defined as refugees. It was updated in 2011 as Directive 2011/95, known as the Recast Qualification Directive. Article 2 adopted the same wording of the Refugee Convention, mentioning a “well-founded fear of being persecuted for reasons of religion.” The preamble mentioned, among the conditions for qualifying for refugee status, “the existence of a causal link between the reasons for persecution, namely [inter alia] religion [...], and the acts of persecution or the absence of protection against such acts.”

That not all problems were solved by these definitions was proved by a number of high-profile cases before national courts, the Court of Justice of the European Union, and the European Court of Human Rights. The latter is not part of the European Union but enforces the European Convention of Human Rights, adopted by the Council of Europe in 1950. In this paper, I will review some of the main interpretive problems about the criteria for being recognized as a refugee fleeing religious persecution.

1. What is a Religion?

Article 10 of the European Recast Qualification Directive States that “the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.”

Defining religion is a notoriously intractable subject among scholars. An ambitious survey of existing scholarship sponsored by the European Union produced in 1999 a

tick volume, concluding that academics offer many irreconcilable definitions of religion, and no agreement exists (Platvoet and Molendijk 1999). Being not an academic myself but a diplomat, I agree with the way out found by international institutions: adopting as broad a concept of “religion” as possible. This is precisely what the United Nations did in 1966 in the *International Covenant of Religious and Political Rights*, which most countries have signed and ratified, with the relevant exception of Saudi Arabia and the Gulf states, which did not sign, and of China, who signed but did not ratify. Article 18 mentions the “right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” It is generally understood that “belief” is a broader concept than “faith” or “religion,” and includes spirituality (assuming it can be distinguished from religion) and atheism.

In 1993, as evidence of how difficult defining freedom of religion remains, the Human Rights Committee issued a *General Comment no. 22* as a set of guidelines for interpreting Article 18 of the International Covenant. Number 2 of *General Comment no. 22* is particularly important, as it deals specifically with new religious movements, often discriminated as such:

“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”

As reiterated in Number 5, atheism is included in the protection of the International Covenant. Being persecuted because of one’s atheism is a qualification for refugee status. In 2014, an Afghan citizen obtained refugee status in the U.K. by arguing that his atheism would expose him to persecution in Afghanistan (Baxter 2014).

In light of *General Comment no. 22*, number 2, states have no right to deny refugee status based on the fact that the persecuted belief is related to a “cult,” and “cults” are “not really religions” or are “pseudo-religions.” Apart from the questionable status of such claims, it is clear that the International Covenant protects beliefs not only *of* religions but *about* religion. It protects the right to be irreligious, i.e. atheism, and it also protects the right to be differently religious, or spiritual, or holding unpopular or non-conventional beliefs about religion that some, or even the majority, may regard as “not really religious.”

2. *How Religious Should the Refugee Be?*

Some states and courts, concerned with limiting the number of refugees they accept, have tried to consider as religiously persecuted asylum seekers only those who can prove that they were actively involved in their religion in their home countries. Some have even devised tests to check whether the applicant is knowledgeable enough about his or her religion.

This attitude has been rejected by the 2004 UNHCR Guidelines. They state in paragraph 9:

“It may not be necessary, [...] for an individual (or a group) to declare that he or she belongs to a religion, is of a particular religious faith, or adheres to religious practices, where the persecutor imputes or attributes this religion, faith or practice to the individual or group. [...] It may also not be necessary for the claimant to know or understand anything about the religion, if he or she has been identified by others as belonging to that group and fears persecution as a result.”

Paragraph 10 specifies that even an infant born into a religion, and persecuted as such, may qualify for refugee status based on religious persecution. This confirms that being conversant with the dogmas of the religion is not necessary. What counts is the attitude of the persecutor, not of the persecuted. The persecutor normally attacks all members of a banned community, without applying any theological text or verifying how many religious services they attend.

Paragraph 9 should be read together with paragraph 30, which states:

“Individuals may be persecuted on the basis of their religion even though they have little or no substantive knowledge of its tenets or practices. A lack of knowledge may be explained by further research into the particular practices of that religion in the area in question or by an understanding of the subjective and personal aspects of the claimant’s case. For instance, the level of repression against a religious group in a society may severely restrict the ability of an individual to study or practise his or her religion. Even when the individual is able to receive religious education in a repressive environment, it may not be from qualified leaders. Women, in particular, are often denied access to religious education. Individuals in geographically remote communities may espouse adherence to a particular religion and face persecution as a result, yet have little knowledge of its formal practices.”

Understandably, paragraph 32 requires a good knowledge of a religion when refugee status is sought by somebody who claims to be a leader, or “the” leader, of a religious or spiritual group and to be persecuted as such.

In general, however, when a religious or spiritual group is persecuted, members qualify for refugee status irrespective of their knowledge of the religion, fervor in its practice, or age.

3. *Credibility and sur place claims*

Of course, claims to be religiously persecuted should meet a minimum standard of credibility, to avoid frauds by those who simply want to emigrate for economic reasons and seek a refugee status under false pretenses. “Credibility is a central issue in religion-based refugee claims,” states paragraph 28 of the 2004 UNHCR Guidelines. It calls for credibility to be assessed in a good faith dialogue, without placing an unnecessary burden of proof on the asylum seeker.

A particularly delicate case concerns fears of religious persecution arising from a conversion that happened after the applicant’s departure from the country of origin. This is part of the so called *sur place* claims, i.e. requests that a refugee status is recognized because of events that happened not in the country of origin of the applicant but in the country where he or she now lives. The typical case concerns Muslims who left their country as economic migrants and converted to Christianity after settling in Europe. Some of them seek refugee status based on a credible fear of being persecuted as “apostates,” should they return to their native country. In this case, paragraphs 34–36 of the 2004 UNHCR Guidelines recognizes that caution is justified by the fact that conversions may be simulated and only aimed at obtaining refugee status. Paragraph 35 hints at the fact that well-intentioned ONG or churches may organize for immigrants self-serving or simulated conversions in order to protect them from expulsion. On the other hand, these matters should be carefully investigated, as the existence of *sur place* conversions in good faith obviously cannot be excluded.

4. *How Strong Should Be the Persecution?*

Defining persecution is not easier than defining religion. Very few countries, if any, forbids private religious belief. They only sanction the *manifestation* of such belief through public worship, missionary activities, or even wearing certain distinctive dresses or other signs.

Again in the endeavor to limit the number of refugees, some courts have argued that if persecution can be escaped by limiting the public manifestations of one’s religion, then the refugee status can be denied. At least in Europe, this argument should be regarded as a thing of the past after a judgement rendered in 2013 by the Court of Justice of the European Union in the case of *Germany v. Y and Z*. Y and Z were Pakistani citizens, members of the Ahmadi community, which is regarded as heretic by mainline Islam and severely persecuted in several Islamic countries, including Pakistan. Germany had argued that, if Y and Z would live privately their faith in Pakistan, without proclaiming it publicly or proselytizing, the risk would be low, and therefore refugee status in Germany needed not be granted. The European Court found against Germany, concluding that “the fact that a person could avoid the risk of persecution by abstaining from religious practices is, in principle, irrelevant. The authorities cannot reasonably expect the Applicant [for refugee status] to abstain from those religious practices.” It is also not necessary to prove that an asylum seeker is

individually persecuted. The fact that the group he or she belongs to is persecuted is enough.

A very controversial decision by the European Court of Human Rights was *F.G. v. Sweden*. F.G., an Iranian citizen, moved to Sweden claiming he was a political opponent of the government of Iran. Swedish authorities were not persuaded, and did not grant him refugee status on that basis. Once in Sweden, however, F.G. converted to Christianity and claimed he was now seeking refugee status based on his *sur place* conversion and fear of being persecuted in Iran as an apostate. The European Court of Human Rights in 2014 rendered a decision in favor of Sweden, observing that F.G.'s conversion was admittedly genuine, but he had not become a religious activist and the private practice of Christianity is not persecuted in Iran. The fact that the judges divided between themselves, 4-3, confirmed the difficulties of the case. In 2016, on appeal, the Grand Chamber reformed the decision and remanded the case to the Swedish courts for a more in-depth assessments of the possible consequences of F.G.'s conversion in Iran.

Apart from the peculiarities of the case of F.G., the prevailing trend of European courts and authorities is that "persecution" is a broad concept. Freedom of public worship, in addition to freedom of private belief, may be guaranteed and yet there can be "persecution" if, first, there is no freedom of carrying on missionary activities aimed at converting others, and, second, one is severely discriminated in public life because of his or her religion. Coptic Christians in Egypt do enjoy freedom of worship, yet in 2013, in the case *M.E. v. France*, the European Court of Human Rights decided that a Coptic Christian was entitled to refugee status in France because Copts are seriously discriminated in Egyptian society. "Seriously," here, is the operative word. The 2004 UNHCR guidelines state that "all discrimination does not necessarily rise to the level required for recognition of refugee status" (paragraph 17). For instance, the fact that a religion is granted special status in a given country may be regarded as a discrimination against the minority religions but, if members of the latter may live a somewhat normal life, they cannot be recognized as refugees for reasons of religious persecution when they move abroad.

5. *Accusations of Common Crimes*

I conclude with what is possibly the most delicate case of them all. Quite often, States claim that leaders or members of certain religious groups are not persecuted because of their religious beliefs but because of their behavior, which has breached general laws whose aim is not to discriminate against certain religions. Russia, for instance, has banned or tried to ban a number of religious groups, including the Jehovah's Witnesses and Scientology, claiming they are prosecuted not because of their religious beliefs but because they violate the Russian provisions against "extremism" or carry on illegal commercial activities. Some states do not recognize conscientious objection and jail those who refuse to serve in the army because of their religious convictions (or of any other reason). China has a list of *xie jiao*, religious groups it

claims are not really religions and are guilty of common criminal wrongdoings. The list includes the Church of Almighty God. Can a member or leader of one of these groups, seeking refugee status, claim that accusations of common crimes are a pretext and prosecution is in fact motivated by his or her religious beliefs?

The question is difficult, but precedents do exist. The 2004 UNHCR Guidelines, paragraph 26, state that “prosecution and punishment pursuant to a law of general application is not generally considered to constitute persecution,” but immediately qualify this statement by adding that “there are some notable exceptions.” The example is conscientious objection: where the law does not recognize that a refusal to serve in the army may be based on genuine religious persuasions and does not offer alternatives (or only “excessively burdensome” alternative) in the forms of non-military community service, those who flee the country may claim religious persecution and become eligible for refugee status.

There are significant precedents even outside the area of conscientious objections. Scientology is the object of legal limitations in various countries, which claim it is not really a religion and it is not prosecuted for its beliefs but for different wrongdoings. In a well-known case, in 1997, a United States Immigration Court granted asylum to a German Scientologist woman, concluding that German measures against Scientology qualified as religious persecution (Frantz 1997). In 2012, although on appeal after a first unfavorable decision, the Australian Refugee Review Tribunal granted asylum in Australia to a Scientologist from Uzbekistan on similar grounds (Australian Visa Bureau 2012).

The more thorough, and important, examination of the issue was conducted by the Swedish Supreme Court when it decided, on October 21, 2005, the case of Gregorian Bivolaru. A Romanian citizen, Bivolaru is the founder of the Movement for Spiritual Integration into the Absolute (MISA), a new spiritual movement that teaches, inter alia, Tantric esoteric sexual techniques. Within the framework of a campaign against MISA instigated by anti-cultists and sectors of the Romanian Orthodox Church, Bivolaru was arrested in 2004, accused of a sexual relation with a 17-year old, M.D. In Romania, the legal age of consent was 15, but the law punished sexual relations between teachers and their students, and Bivolaru was regarded as the yoga teacher of M.D. The crimes of which Bivolaru was accused (and later sentenced to six years in jail) were obviously not of a religious nature. However, Bivolaru argued that they were a mere pretext to censor his spiritual teaching, including his doctrines about sexuality. M.D. herself testified before the Swedish Supreme Court that she was treated harshly by the Romanian police, and denied both any sexual relationship and the fact that Bivolaru personally taught her yoga.

In its landmark decision of 2005, the Swedish Supreme Court ruled that refugee status should be granted to a person accused of common crimes, when it can be presumed that his or her religious opinion or teachings motivated the prosecution, that charges were trumped up, and that because of religious prejudice a fair trial could not be expected. In the case it examined, the Supreme Court concluded that “due to his religious conception, Gregorian Bivolaru runs the risk to be exposed to pursuits of evil character” in Romania, and he was granted political asylum in Sweden.

This Swedish precedent is crucial for the claims of refugee status by members of many new religious movements labeled as “cults”, or “xie jiao” in China, by their opponents and prosecuted for having allegedly committed common crimes, such as fraud, physically assaulting opponents, sexual abuse, or conspiring against the government. There may be cases where evidence of such common crimes is so overwhelming that it would support a denial of refugee status. But the evaluation of this evidence should be very careful, and certainly cannot rely only on documents supplied by the country accused of persecution. The opinion of neutral scholars who have studied the movement should also be sought. And, as the Swedish case demonstrates, when it can be easily presumed that, because of their religion, accusations against the defendants were fabricated and they would not be granted a fair trial, recognizing that they qualify for refugee status is in order.

The Korean Refugee Act of 2013 and the Church of Almighty God

I will now quickly apply the five criteria deriving from the prevailing international interpretation of the 1951 Refugee Convention and the 1967 Protocol to the situation of the Chinese members of the Church of Almighty God seeking asylum in Korea under the 2013 Korean Refugee Act. I am not an expert of Korean law and can only offer some general comments and recommendations on how to protect the rights of these refugees, based on the fact that Korea signed and ratified the Convention and the Protocol and is bound by their principles.

1. The Church of Almighty God is a new religious movement. Some mainline Christian churches regard its beliefs as not orthodox. The CCP labels all religions it does not approve of as “pseudo-religions.” However, the Convention and the Protocol do not limit their definition of religion to sets of beliefs and practices approved, or recognized as religious, by other religious bodies or the governments. They protect even atheism and other beliefs *about* religion. Value judgments on the quality or truth of these beliefs are irrelevant. Nobody can seriously doubt that, for the purpose of the Convention and the Protocol, the beliefs and practices of the Church of Almighty God constitute a religion.
2. As we have seen, the 2004 UNHCR Guidelines explicitly state that it is not necessary to prove that one is a fervent, specially knowledgeable, or particularly active member of a persecuted religion. It is enough to prove that the asylum seeker is part of a persecuted group and, as such, may reasonably “fear persecution.” Korean decisions requiring Church of Almighty God asylum seekers to prove that they were specially active members of the Church or were individually involved in anti-government protests and activities are inconsistent with the Guidelines. “Ordinary believers” of a persecuted group are eligible for refugee status under the Convention and the Protocol as interpreted by the Guidelines.
3. The Guidelines do require credibility, and are aimed at preventing that economic immigrants may claim religious persecution in order to be granted

refugee status. It is indeed very important to distinguish those persecuted because of their religion from those who leave their countries for economic reasons. Credibility, however, means actual participation in the activities of a persecuted religion. In the Korean cases, it should be enough to prove that applicants are members of the Church of Almighty God and do not simply *pretend* to be members in order to achieve refugee status.

4. From what has been reported to me about Korean cases, it seems that the most problematic aspect is the interpretation of “persecution.” It appears that Korean authorities require evidence that the single asylum seeker is *individually* persecuted, and even consider the fact that somebody left China with a tourist visa evidence of the absence of such persecution. This is against the prevailing international interpretation of the Convention and the Protocol, regarding as sufficient that the individual *belongs to a persecuted group*. Of course, the evidence that the Church of Almighty God as a group is persecuted in China is overwhelming. There are even official campaigns threatening the members of the Church and asking citizens to report them to the police. How the applicant managed to leave the country should also be regarded as irrelevant. Obviously, nobody would be authorized to leave a country by announcing that the purpose is to protest religious persecution and seek asylum.
5. Although this does not seem to be a factor so far in the Korean cases, the fact that the Church of Almighty God is accused of common crimes in China is also irrelevant. The applicants are not accused of having personally participated in such crimes and, even if they were accused, as members of a group persecuted as a *xie jiao*, they could not expect a fair trial in China.

Conclusion

These are no easy times for refugees. From United States to Europe, politicians may win elections by claiming that too many refugees are arriving, and something should be done to limit their numbers. Clearly, among those seeking refugee status there are those who submit false or fraudulent claims, and appeals to caution are not unreasonable.

On the other hand, international agencies specialized in religious liberty continue to publish reports showing that the number of those persecuted for their religion is unfortunately still very high in our tormented world. These persons have a genuine right to be recognized as refugees, based on international laws and on conventions very few countries have refused to sign and ratify. It is important to understand that these conventions also protect members of new religious movements, irrespective of whether the persecuting country regards them as religions, or “pseudo-religions,” “cults,” or “*xie jiao*.” Even accusations of common crimes against these groups should be handled with caution, as they are often a tool or a pretext used to persecute them. As the Bivolaru case demonstrates, when leaders or members of “cults” or “*xie*

jiao” are accused of common crimes but, because of the official hostility to “cults,” cannot expect a fair trial, then asylum should be granted.

The social problems created in certain countries by the growing number of refugees are very much real. But it is also true that religious liberty is a fragile and endangered right. Among the various categories of refugees, those really escaping persecution because of their beliefs particularly deserve our generosity and sympathy.

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[Note: Easily accessible texts of international conventions and decisions by major courts are not included in the references.]

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