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'Water on a Stone':

Protecting religious minorities from mass atrocities through the operationalisation of the Responsibility to Protect.

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I dedicate this and all my work to Mary.

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Abstract

Religious persecution is on the rise around the world, and in some regions, its severity reaches genocidal levels. Unfortunately, under the current system of protection, international action to prevent mass atrocities is often only taken once violence reaches a certain threshold. Nevertheless, there has also been an increased mainstreaming of freedom of religion or belief in foreign policies worldwide, which, the present work argues, may provide the necessary political cohesion for improving the operationalisation of States' Responsibility to Protect. Recognising that atrocity prevention is a multilayer endeavour that cannot be divorced from political considerations, this study identifies opportunities for producing change at the universal, regional and subregional, and inter-State levels.

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1 Introduction

1.1 Background

Religious persecution is on the rise around the world. According to a recent report by Pew Research Center, government restrictions on religion through laws, policies and actions, rose to a record high in 2018.[1] Likewise, social hostilities involving religion – including violence and harassment by private individuals, organisations or groups –[2] has doubled since 2007.[3] By a combined measure of both phenomena, the report also revealed that 80 of the 198 countries and territories assessed had 'high' or 'very high' levels of overall restrictions on religion, including all 20 countries in the Middle East-North Africa region and more than half of the Asia-Pacific nations.[4] Indeed, examples of persecution against religious groups are not scarce in the contemporary world. Some of the most widely covered cases include the genocide committed against the Yazidis by the Islamic State of Iraq and Al-Sham (ISIS),[5] the 'serious human rights violations and abuses continuing to be perpetrated' against the Rohingya Muslims in Myanmar,[6] the recurring targeting of Coptic Christians in Egypt,[7] and the ongoing genocidal acts perpetrated by the Chinese government against the Uyghur people.[8]

These alarming trends were likewise confirmed by the Bishop of Truro in a 2019 report commissioned by the British Foreign and Commonwealth Office, who found that, '[i]n

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[1] Samirah Majumdar and Virginia Villa, 'In 2018, Government Restrictions on Religion Reach Highest Level Globally in More Than a Decade: Authoritarian Governments are More Likely to Restrict Religion' (Pew Research Center 2020) 3.

[2] ibid.

[3] ibid 5.

[4] ibid 13.

[5] Human Rights Council, '"They came to destroy": ISIS Crimes Against the Yazidis' (15 June 2016) Un Doc A/HRC/32/CRP.2.

[6] Human Rights Council, 'Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar: Report of the United Nations High Commissioner for Human Rights' (3 September 2020) UN Doc A/HRC/45/5.

[7] Ewelina Ochab, 'Persecution of Christians In Egypt' *Forbes* (10 April 2017) <https://www.forbes.com/sites/ewelinaochab/2017/04/10/persecution-of-christians-in-egypt/?sh=1108605415ea> accessed 15 January 2021; 'Egypt: Horrific Palm Sunday Bombings: State of Emergency Risks More Abuses' *Human Rights Watch* (Beirut, 12 April 2017) <https://www.hrw.org/news/2017/04/12/egypt-horrific-palm-sunday-bombings> accessed 15 January 2021; See also, Open Doors, 'World Watch List: The Top 50 Countries Where It's Most Difficult To Follow Jesus' (2021), 7 and 26. Egypt is currently ranked in the 16th position.

[8] See, for instance, the U.K. House of Commons' unanimous declaration of China's treatment of Uyghurs as genocide, HC Deb 22 April 2021, vol 692, cols 1211-1246; See also the U.S. Department of State's assertion that '[g]enocide and crimes against humanity occurred during [2020] against the predominantly Muslim Uyghurs and other ethnic and religious minority groups in Xinjiang' in '2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet)'; See also, UN, 'High-Level Virtual Event on the Situation of Uyghurs and Other Turkic Muslim Minorities in Xinjiang' (12 May 2021) UN TV <https://media.un.org/en/asset/k1j/k1j8y3x2jg> accessed 15 May 2021.

some regions, the level and nature of persecution is arguably coming close to meeting the international definition of genocide.'[9] As the Bishop of Truro's report revealed, the eradication of religious minorities was the 'stated objective of extremist groups in Syria, Iraq, Egypt, north-east Nigeria and the Philippines,' and Christians, in particular, risk extinction in certain parts of the Middle East, where their origins are more deeply rooted.[10]

These findings sparked a series of positive responses by national governments worldwide, ranging from express acknowledgement to the building of international coalitions for the advancement of religious freedom globally.[11] However, while these efforts are encouraging, the proliferation of mass atrocities currently committed against religious groups and the impunity with which perpetrators generally operate, provide reasons to remain sceptic. 'Human rights work is like dropping water on a stone' – said the Special Rapporteur on freedom of religion or belief (FoRB), Ahmed Shaheed, when asked about improvements on countries' compliance with their international obligations on religious freedom – 'Given enough time, it will eventually break it down.'[12] However, faith communities facing an imminent risk of extermination may not be keen on sharing such a patient optimism and, thus, the need to explore proactive solutions becomes essential.

Indeed, the recent history of the world shows that action is often only taken once violence reaches a certain threshold (if taken at all), and that national self-interests are at the forefront of States' motives to act in defence of human rights, repeatedly leading to unjust results and a need for enhanced effectiveness.[13] Within the United Nations' (UN) system, States may act to promote or protect human rights in countries that have failed to comply with their international obligations, primarily through diplomacy, sanctions, or other non-violent means.[14] Under some circumstances, however, human rights may serve as standards for a legitimate forceful intervention in the territory of a sovereign State.[15]

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[9] Philip Mounstephen, 'Bishop of Truro's Independent Review for the Foreign Secretary of FCO Support for Persecuted Christians: Final Report and Recommendations' (2019) 16-17.

[10] Majumdar and Villa (n 1) 25-26.

[11] See Section 4 below.

[12] Jayson Casper, '"Water on a Stone": UN Expert on the Hard Work of Religious Freedom' *Christianity Today* (16 November 2020) <https://www.christianitytoday.com/news/2020/november/un-religious-freedom-ahmed-shaheed-irf-forb-ministerial.html> accessed 15 April 2021.

[13] Justin Morris and Nicholas Wheeler, 'The Responsibility Not to Veto: A Responsibility Too Far?' in Alex Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press 2016) 15; Gentian Zyberi, 'The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest' in Cecilia Bailliet (ed) *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019) 440.

[14] Charter of the United Nations (opened for signature 24 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2.3, 33, 41-42; UNGA, 'Responsibility to Protect: Timely and Decisive Response:

In that regard, the UN Charter, establishes two exceptions under which the use of inter-State force may be considered lawful, namely, when carried out in self-defence or if determined necessary by the Security Council (UNSC) to counter a threat to international peace.[16] This framing was also integrated into the doctrine of Responsibility to Protect (R2P),[17] which recognises the obligation of the international community to act 'in a timely and decisive manner' to protect a given state's population from genocide, war crimes, ethnic cleansing and crimes against humanity.[18]

Through its 2005 World Summit Outcome Document (Outcome Document), the General Assembly (UNGA) placed the R2P within the boundaries of the UN framework and aligned it to the prohibition on the use of force.[19] The implications of this framing are that action under the R2P can only become operational upon authorisation by the UNSC, which may condition any legitimate efforts to prevent mass atrocities through forceful means to the discretional use of its permanent members' veto powers. Under these circumstances, States may be impeded from fulfilling, for instance, their duty to prevent and suppress genocide under the Genocide Convention,[20] which, according to the International Court of Justice, should be triggered 'at the instant the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.'[21]

Report of the Secretary-General' (25 July 2012) UN Doc A/66/874-S/2012/578 paras 3, 31-35, 44 and 53; James Nickel, *Making Sense of Human Rights* (2nd edn, Wiley 2007) 2, 19-20;

[15] Nickel (n 14) 83.

[16] UN Charter, arts 51, 39-50.

[17] Ola Engdahl, 'Protection of Human Rights and the Maintenance of International Peace and Security: Necessary Precondition or a Clash of Interests?' in Cecilia Bailliet (ed) *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019) 142.

[18] UNGA, '2005 World Summit Outcome. Resolution Adopted by the General Assembly on 16 September 2005' (24 October 2005) UN Doc A/Res/60/1, paras 138-140; UNGA, 'Implementing the Responsibility to Protect: Report of the Secretary-General' (12 January 2009) UN Doc A/63/677 paras 11(c), 49-66; A/66/874-S/2012/578 (n 14) paras 22-23; UNGA, 'Mobilizing Collective Action: the Next Decade of the Responsibility to Protect: Report of the Secretary-General' (22 July 2016) UN Doc A/70/999-S/2016/620, paras 5, 18-23, 45-52; See also, UN Office on Genocide Prevention and the Responsibility to Protect, 'Responsibility to Protect: Key Documents' <https://www.un.org/en/genocideprevention/key-documents.shtml> accessed 6 August 2021.

[19] Cecilia Bailliet, 'Normative Evolution of the International Law of Peace in a Post-Western Age' in Cecilia Bailliet (ed) *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019) 64-65; A/63/677 (n 18) 3; UNGA, 'Advancing Atrocity Prevention: Work of the Office on Genocide Prevention and the Responsibility to Protect: Report of the Secretary-General' (3 May 2021) UN Doc A/75/863-S/2021/424 para 4; A/70/999-S/2016/620 (n 18) paras 22-24.

[20] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 1.

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 222, para 431.

As a concern with a strengthened emergence in foreign policies worldwide,[22] however, the present work argues that the protection of FoRB has reached an international momentum that has the potential of enhancing the efficiency of the current framework of human rights protection. Therefore, the purpose of this analysis is to explore paths towards a more efficient response to religious persecution that builds on the existing normative framework of international law and uses the R2P as 'a lever in reshaping global order and security.'[23] The search for solutions, however, requires practical approaches that build on the preventive components of negative peace but that are also oriented towards the long-term protection aspirations of positive peace (i.e., a 'sustainable peace').[24]

1.2 Research Questions

The following research questions will serve as a basis for exploring the extent to which the prioritisation of FoRB in foreign policies can influence a more efficient operationalisation of the R2P:

- *How can the concern for protecting religious groups from persecution produce a change in the operationalisation of the R2P that is sufficiently strong to go beyond the national self-interests that dominate foreign relations and often hinder early action under the R2P?*
- *To what extent does the contemporary international interest in the protection and promotion of FoRB differ from past experiences at defending religious groups from mass atrocities, in terms of political cohesion and reach?*
- *What forms could an improved operationalisation of the R2P that is inspired by FoRB realistically adopt, considering the political realities of the world?*

1.3 Structure

This study is structured as follows: Sections 2 and 3 will provide an overview of the legal classification of religious persecution under international law and the existing protections against it. Section 4 will explore the extent to which the shared international concern for the protection of religious minorities has created the conditions to improve the

[22] David Forsythe, *Human Rights in International Relations* (3rd edn, Cambridge University Press 2012), 86, 230.
[23] Lloyd Axworthy, 'Resetting the Narrative on Peace and Security: R2P in the Next Ten Years' in Alex Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016).
[24] Cecilia Bailliet, 'Introduction: Researching International Law and Peace' in Cecilia Bailliet (ed) *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019) 6.

manner in which the world responds to mass atrocities under the Charter-based system of protection and the three-pillar strategy of the R2P. Lastly, Section 5 shall examine the manner in which such concern could contribute to making the operationalisation of the R2P more efficient. In doing so, this thesis does not intend to advocate in favour of one type of international response to mass atrocities over the other, or to equate efficacy with effectiveness. Rather, it seeks to join its voice to those that call for a more proactive international stance against the perpetuation of human suffering.

1.4 Methodology

The present study shall adopt a multidisciplinary approach. Although it will be predominantly normative (doctrinal) and focus on legal rules and authoritative interpretations,[25] it is to a large extent also be guided by contextual considerations (mainly historical and political).[26] In addition to the legal component, the study includes historical, political and institutional elements in its discussion, as well as a contextualised interpretation of the international human rights law framework.[27] Moreover, the discussion in this work shall look through the lens of realistic pacifism, which, as opposed to the principled opposition to all types of armed violence and other, more pragmatic forms of pacifism,[28] accepts the exceptions contained within the UN Charter as legitimate conditions under which intervention through the use of force can be carried out. [29] Therefore, the present study will not suggest additional exceptions to the prohibition on the use of force or try to find alternatives to the UNSC as a source of ultimate authority.[30]

Such an approach is grounded in the author's belief in the utility and potential of the UN system of human rights protection as the most effective effort towards ensuring peace among nations that humanity has produced thus far in its history.[31] Despite its shortcomings, the unprecedented scale of its endeavour and its reliance on the ever-evolving body of

[25] Eva Brems, 'Methods in Legal Human Rights Research' in Fons Coomans and others (eds), *Methods of Human Rights Research* (Intersentia 2009) 3; Zyberi (n 13) 439-441; Jan Smits 'Redefining Normative Legal Science: Towards an Argumentative Discipline' in Fons Coomans and others (eds), *Methods of Human Rights Research* (Intersentia 2009) 53.

[26] Siobhán McInerney-Lankford, 'Legal Methodologies and Human Rights Research: Challenges and Opportunities' in Bård Anders Andreassen and others, *Research Methods in Human Rights* (Edward Elgar Publishing 2017) 49.

[27] ibid 47.

[28] Engdahl (n 17) 4-5.

[29] ibid.

[30] ibid.

[31] Allen Buchanan, *The Heart of Human Rights* (OUP 2013) 107-119.

international law provide reasons to remain reasonably confident that the UN system can be made to perform better from within.[32] Therefore, the subsequent analysis shall not uncritically support the perpetuation of the UN system in its current state, but seeks to enhance its efficacy[33] by identifying evolutionary reform (i.e., operational, non-substantial) possibilities.[34] For that purpose, the study will look at the R2P annual reports by the UNSG (2009-2021), discussions in the UNGA, the historical efforts of the International Commission on Intervention and State Sovereignty (ICISS) to moderate the absolute discretion of the UNSC,[35] as well as individual countries' approach to the international protection of FoRB and engagement with the UN human rights apparatus.

2 The Protection against Religious Persecution in International Law

2.1 A Historical Perspective on the Legal Definition and Classification of Religious Persecution

Despite its presence in virtually every civilization in history, 'persecution' has been a traditionally elusive concept in legal terminology.[36] In modern times, persecution has been predominantly associated with the right to asylum, a concept emerging from the vast flows of refugees (mostly of Russian and Armenian origin) in need of international protection in the aftermath of the First World War.[37] Although distinctions were made between forced and voluntary migration,[38] a 'lack of protection' from the government of their former nationality remained the sole criterion for granting refugee status for almost three decades.[39]

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[32] Matthew Waxman, *Intervention to Stop Genocide and Mass Atrocities: International Norms and U.S. Policy* (Council on Foreign Relations Press 2009) 13.

[33] Bailliet (n 24) 4.

[34] Waxman (n 32) 13-14.

[35] Engdahl (n 17); 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (2001) International Development Research Centre, paras 6.28-6.40; Smits (n 25) 51-52.

[36] Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26(2) International Journal of Refugee Law 272, 274-279.

[37] José Fischel de Andrade, 'On the Development of the Concept of "Persecution" in International Refugee Law' (2008) 2 Anuário Brasileiro de Direito Internacional 114, 115.

[38] See ibid, referring to Article 1 of the Convention Concerning the Status of Refugees Coming from Germany, which provided that 'persons who have left Germany for reasons of purely personal convenience' should not be considered refugees.

[39] ibid; See also Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees (1929) 89 LNTS 47-52.

After World War II, the notion of 'persecution' began to be normatively shaped as one of the valid justifications for granting asylum.[40] Indeed, the term 'persecution' was first introduced in 1946 by the Special Committee on Refugees and Stateless Persons in the draft Constitution of the International Refugee Organization (IRO), as a means to determine the 'valid objections' which would entitle a refugee not to be forced to return to Germany or Austria.[41] The definition laid down in the IRO Constitution was innovative because it individualised the term 'refugee' and conditioned the eligibility of such status to an actual or reasonable fear of persecution based on 'race, *religion*, nationality or political opinions.'[42]

Even though the IRO did not prevail, its conceptual novelties would directly influence the functions of its succeeding institution, the Office of the United Nations High Commissioner for Refugees[43] and, soon after, the normative framework of the 1951 Convention Relating to the Status of Refugees (Refugee Convention).[44] For purposes of the present discussion, the following observations are of particular relevance: First, the Refugee Convention lists the same five factors enshrined in Annex 1 of the IRO Constitution as potential grounds for establishing a well-founded fear of persecution on an individualised basis[45]; second, it should be noted that, despite a more sophisticated definition of 'refugee,' the term 'persecution' was deliberately left out of the text of the Convention. This lack of definition can be attributed to the framers' fear of assigning the term a too restrictive meaning.[46] Indeed, the legal and doctrinal debate that followed the adoption of the Refugee Convention has been accurately captured in the words of Storey, who affirms that '[n]ot only do we not find a definition of persecution in the treaty itself, […] but we are met by a Greek chorus of commentators telling us, in hushed and reverent tones, that to define persecution would be sacrilegious.'[47] Thus, uncertainty and disagreement characterised the conceptual debate on 'persecution' throughout the latter half of the 20th Century, leaving much leeway to

[40] ibid 119-120.

[41] ibid; Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3.

[42] See ibid, Annex I, Part I, Section C, 19 (emphasis added).

[43] Fischel de Andrade (n 37) 120-121.

[44] ibid 122.

[45] Convention Relating to the Status of Refugees (opened for signature 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1.

[46] Storey (n 36) 273.

[47] ibid.

States to develop their own definitions of persecution through legislation or judicial interpretation.[48]

Driven by the need to prosecute those responsible for the Holocaust and other atrocities committed during World War II,[49] the legal conceptualisation of religious persecution found its way into the incipient body of criminal law of the time. The Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter) was the first international instrument to include persecution 'on religious grounds' among a list of acts that may constitute crimes against humanity.[50] Soon after, and although not explicitly including crimes against humanity as a distinct category, Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) adopted a similar phrasing to that of the Nuremberg Charter, condemning 'acts committed with intent to destroy, in whole or in part (…) a religious [group]' within its definition of 'genocide.'[51] There are, thus, significant differences in the *mens rea* and *actus reus* requirements of the two crimes as established by the Nuremberg Charter and the Genocide Convention. Crimes against humanity under the Nuremberg Charter could have been committed against individuals and with no specific intent, in contrast to the definition of genocide provided by the Genocide Convention, which requires the intention to destroy a protected group.[52]

Although both instruments would come to directly influence the creation of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda decades later,[53] neither of them offered a definition of persecution.[54] Such situation persisted until the

[48] ibid 274; Fischel de Andrade (n 37) 123.

[49] Ewelina Ochab, *Never Again: Legal Responses to a Broken Promise in the Middle East* (Kairos Publications 2016) 627-628.

[50] ibid 628; Charter of the International Military Tribunal (Nuremberg Charter), Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) 82 UNTC 280, art 6(c); ILC, Draft Articles on Prevention and Punishment of Crimes Against Humanity (DA-PPCAH), with commentaries, Yearbook of the International Law Commission, vol II, Part Two, 29, paras 2-3.

[51] Ochab (n 49) 623.

[52] ibid 634-650; Nuremberg Charter (n 50) 6 and Genocide Convention (n 20) art II; See also *Prosecutor v Akayesu* (Trial Chamber) [1998] ICTR-96-4-T, paras 498, 517-522; Ekkehard Strauss, 'Reconsidering Genocidal Intent in the Interest of Prevention' (2013) 5(2) Global Responsibility to Protect 135-137.

[53] Don Hubert and Ariela Blatter, 'The Responsibility to Protect as International Crimes Prevention' (2012) 33(4) Global Responsibility to Protect, 45-46; ILC, DA-PPCAH (n 50) paras 5-6; Philip De Man, 'The Crime of Persecution in the Case-Law of the International Criminal Tribunal for the Former Yugoslavia' (2009) Institute for International Law 11; Ken Roberts, 'The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia' (2002) 15(3) Leiden Journal of International Law 623.

[54] The ICTY did eventually established a standard definition of the crime of persecution in the *Krnojelac* trial judgement (2002): '[t]he crime of persecution consists of an act or omission which (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds,

adoption of the Rome Statute of the International Criminal Court (Rome Statute), which, by the turn of the century, defined persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.'[55] Moreover, and largely drawing from the Nuremberg Charter and the Statute and jurisprudence of the ICTY, the Rome Statute maintained the classification of persecution as a crime against humanity.[56] It, however, dismissed the condition of the existence of an armed conflict at the time of commission[57] and the possibility for single acts of violence against individuals to reach the necessary threshold.[58] Despite this explicit classification in Article 7(1) of the Rome Statute, the wording of Article 6 implies that persecution can amount to genocide under the Rome Statute if the specific intent to destroy in whole or in part a protected group is established.[59] As explained by Ochab, while the requisite *actus reus* for genocide, crimes against humanity and war crimes under the Rome Statute is fairly similar, the definitions of all three crimes serve to illustrate that 'it is predominantly the perpetrator's intent that is decisive when determining whether atrocities have reached the threshold of genocide.'[60]

Given its short history and the small number of cases brought before it, the International Criminal Court (ICC) has had limited opportunities to deal directly with the issue of religious persecution in its jurisprudence. Some of these include, for instance, the 2019 Pre-Trial Chamber's decision to open an investigation on the situation in the Bangladesh/ Myanmar case, where the ICC found that members of the *Tatmadaw* may have committed 'coercive acts that could qualify as the crimes against humanity of deportation and persecution on grounds of ethnicity and/or religion (article 7(1)(h) of the Statute) against the

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specifically race, religion or politics (the *mens rea*).' *Prosecutor v. Milorad Krnojelac* (Trial Chamber II) [2002] IT-97-25-T, para 431.

[55] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7.2(g).

[56] Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993) UN Doc 808/1993, art 5(h); See also Hubert and Blatter (n 53) and Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, CUP 2016) 709-710; Silvia Fernández de Gurmendi, 'The Importance of the Genocide Convention for the Development of International Criminal Justice' Remarks at Event Commemorating the Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide and the Genocide Victims Day <https://www.icc-cpi.int/itemsDocuments/171208-ICC-President-remarks-at-Genocide-Convention-Commemoration.pdf> accessed 6 March 2021, 3.

[57] Rome Statute (n 55) art 7; Hubert and Blatter (n 53) 46-47; Bantekas and Oette (n 56); ILC, DA-PPCAH (n 50) 30, para 7

[58] Ochab (n 49) 650.

[59] ibid 650-655.

[60] ibid 690; See also William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) 256-257, 270-287; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 132-143.

Rohingya population.'[61] More recently, in December 2020, the Office of the Prosecutor concluded that there were reasonable grounds to believe that in Nigeria, crimes against humanity were committed by members of Boko Haram and its splinter groups through 'persecution on gender and religious grounds.'[62] However, the ICC has recently dismissed the case dealing with the alleged mass deportation and internment of Uyghurs in China, failing to take further action on its claims (which possesses evident religious and ethnic underpinnings).[63]

Despite the ICC's limited jurisprudential developments, and for purposes of the present study, the subsequent discussion will draw upon the contribution of international human rights law, international criminal law and refugee law to the legal definition and classification of religious persecution. The Rome Statute is widely regarded as one of the most authoritative sources when it comes to the conceptualisation of crimes against humanity given its role in elucidating customary international law.[64] Moreover, it has also laid the foundations for the operational aspects of the R2P[65] and influenced the recommendation for a dedicated international treaty on crimes against humanity.[66] However, considering the overlap in their *actus reus* and the possibility for religious persecution to fall within the Rome Statute's definitions of genocide, crimes against humanity or war crimes, the subsequent discussion will refer to these crimes collectively as 'atrocity crimes', following the practice of the UNGA.[67]

2.2 Paradigms of Implementation and Accountability for Atrocity Crimes

[61] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Pre-Trial Chamber III | Decision) [2019] ICC-01/19-27, para 110.

[62] Office of the Prosecutor of the ICC, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria' Office of the Prosecutor of the International Criminal Court (11 December 2020); For more information, see 'Preliminary Examination: Nigeria' <https://www.icc-cpi.int/nigeria> accessed 15 March 2021.

[63] See Office of the Prosecutor of the ICC, 'Report on Preliminary Examination Activities 2020' (14 December 2020) paras 70-76; See also Ewelina Ochab, 'International Criminal Court Will Not Take Further the Case of the Uyghurs' *Forbes* (15 December 2020) <https://www.forbes.com/sites/ewelinaochab/2020/12/15/international-criminal-court-will-not-take-further-the-case-of-the-uyghurs/?sh=19dd40f52fe3> accessed 15 March 2021.

[64] See, *Prosecutor v Anto Furundzija* (Trial Judgment) [1998] IT-95-17/i-T, para 227; Hubert and Blatter (n 53) 47.

[65] See UNSG, 'Responsibility to Protect: From Early Warning to Early Action' (1 June 2018) UN Doc A/72/884-S/2018/525, Summary, fn 1; See also the ILC, DA-PPCAH (n 50), Preamble.

[66]ILC, DA-PPCAH (n 50), 10, para 42, and 30, para 8.

[67] A/72/884-S/2018/525 (n 65).

Although the normative practice of human rights can be said to be well-established, their propagation and implementation by institutions, quasi-institutions, and informal processes vary significantly in their articulation and level of effectiveness.[68] The implementation of human rights was originally envisioned as juridical by their normative framers, in the expectation that they would be integrated into domestic law or at least accepted as public policy priorities.[69] In that sense, States assumed the primary responsibility to investigate and prosecute those responsible for human rights violations (including atrocity crimes[70]) within their jurisdictions.[71] When States violate their obligations or are unable or unwilling to fulfil them, there are a number of means available to induce their compliance.

Moreover, the wide array of international and transnational actors that participate in the implementation of human rights has resulted in a multitude of means of action for inducing compliance among States.[72] With regards to atrocity crimes, legal constraints and lack of political will have often undermined the possibility of timely and decisive action, producing adverse consequences for the victims of abuses and crisis of legitimacy among the various actors of international human rights law.[73] In understanding this abundance of enforcement alternatives and the extent to which they may help prevent and protect from religious persecution, this subsection will largely rely on Beitz's 'paradigms of implementation', a typology of six compliance-furthering mechanisms that includes: 1) accountability, 2) inducement, 3) assistance, 4) domestic contestation and engagement, 5) compulsion, and 6) external adaptation.[74]

The first five paradigms cover the variety of implementation mechanisms intended to influence compliant behaviour among States, 'whether by creating incentives to comply with human rights norms, aiding in the development of the capacities and dispositions needed to do so, or compelling changes in policy or governments.'[75] On the other hand, within the external adaptation paradigm are included the means aimed at helping States meet their obligations,

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[68] Charles Beitz, *The Idea of Human Rights* (OUP 2009) 43; Buchanan (n 31) 111-112.

[69] Beitz (n 68) 32-33; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 150; Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009) 198-204.

[70] A/RES/60/1 (n 18) 138.

[71] Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 1; Buchanan (n 31) 126.

[72] Beitz (n 68) 33; Jørgen Skjold, 'Countermeasures in International Law: Function, Limits and Systemic Relevance' (2021) (DPhil thesis, University of Oslo 2021) 13-16.

[73] Waxman (n 32) 5-6, 15- 16.

[74] Beitz (n 68) 33-42.

[75] ibid 39.

when they are unable to do so for reasons other than lack of resources, capacity, or will.[76] Considering the scope of the present study, however, the discussion on this subsection will address the accountability, inducement, and compulsion paradigms exclusively.

Under the accountability paradigm, a given State may be held responsible vis-à-vis the international community insofar as there is a third-party mechanism with jurisdiction to require the State to provide account of its compliance with human rights standards, the mechanism is empowered to render a judgment on the State's conduct, and may penalise it if found to be in breach of its obligations.[77] This paradigm is perhaps most accurately embodied in the regional human rights systems (particularly the European, but also the Inter-American and the African) and, in a more tempered form, in the UN treaty-bodies' mechanisms (especially those accepting individual and inter-State complaints[78]). The uneven level of compliance between these two types of systems is due, in great measure, to the existence of jurisdictional bodies within the regional systems of human rights protection, which possess the capacity to compel (more or less effectively) the observance of their rulings and do not rely exclusively on the public censure ('naming and shaming') of non-cooperating States.[79]

Indeed, while assuming the task of drafting the Universal Declaration of Human Rights, the Human Rights Commission opted for an abstract implementation scheme based on mechanisms for monitoring and reporting.[80] The task of defining implementation was, thus, left to the drafters of the subsequent Covenants and Conventions that would eventually be known as the 'core' human rights treaties.[81] Each of these treaties provides for the creation of specialised bodies in charge of auditing and monitoring States' compliance with their

[76] Beitz (n 68) 39-40.

[77] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), with commentaries (2001) YILC, vol II, Part Two 31-32; Beitz (n 68) 33-34; Robert McCorquodale, 'Impact on State Responsibility' in Menno Kamminga and Martin Scheinin (eds) *The Impact of Human Rights Law on General International Law* (OUP 2009) 237-238.

[78] Eight human rights treaty bodies may, under certain conditions, receive complaints from individuals: HRCttee, CERD, CAT, CEDAW, CRPD, CED, CESCR and CRC. Additionally, some of them also set out a procedure for considering inter-State complaints, in one form or another: HRCttee, CAT, CMW, CED, ICESCR and CRC. For a detailed overview, see OHCHR, 'Human Rights Bodies - Complaints Procedures' <https://ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> accessed 15 March 2021; See also Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 73-74.

[79] Beitz (n 68) 32-34; McCorquodale (n 77); Olivier de Schutter, *International Human Rights Law* (2nd edn, CUP) 981-982; Bantekas and Oette (n 56) 322- 326.

[80] UN Economic and Social Council, 'Report of the Commission on Human Rights Second Session Geneva' (2-17 December 1947) UN Doc E/600, 67 and Supplement 1, 6; UN Dag Hammarskjöld Library, 'Drafting of the Universal Declaration of Human Rights' <https://research.un.org/en/undhr/chr/2> accessed 6 August 2021; Beitz (n 68) 23; See also de Schutter (n 79) 16-17; Philip Alston 'The Commission on Human Rights' in Philip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (1st edn, Clarendon Press 1992) 126.

[81] de Schutter (n 79) 18-21; Bantekas and Oette (n 56) 15-18.

obligations under the relevant instrument.[82] Some of these treaty bodies allow for further redress in the form of inquiry procedures and individual complaint mechanisms,[83] but the actions available for non-compliance are unvaryingly limited to consultation, reporting, and public censure.[84] An illustrative example of this constrained range of action is offered by the reporting record of Iraq before the UN Committee Against Torture (CAT) and the Human Rights Committee (HRCttee), in particular.[85]

In its most recent concluding observations on the human rights situation in Iraq, the CAT expressed its concern 'about the fact that [ISIS] has instituted a pattern of sexual violence, slavery, abduction and human trafficking targeted at women and girls belonging to religious and ethnic minorities.'[86] While the CAT recommended that Iraq 'should take vigorous measures to promote the protection of women and eliminate the impunity enjoyed by the perpetrators of acts of sexual violence,'[87] the follow-up information received by Iraq merely confirmed the initial reports and did not provide evidence to demonstrate that the issues had been addressed effectively.[88] Similar concerns were raised by the HRCttee in its Concluding Observations on the Fifth Periodic Report of Iraq that had a particular focus on indications that 'ISIL may have perpetrated genocide against the Yezidi community, as well as crimes against humanity and war crimes.'[89] The HRCttee recommended that '[a]ll persons under [Iraq'] jurisdiction, in particular those who are most vulnerable owing to their ethnicity or religion, are afforded the necessary protection from violent attacks and gross human rights violations.'[90] The follow-up information provided by Iraq was, yet again, deemed insufficient to consider that it met its international obligations.[91]

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[82] de Schutter (n 79) 18-21, 866-868; Beitz (n 68) 33.

[83] de Schutter (n 79) 882-909; Ulfstein (n 78).

[84] Ulfstein (n 78) 106, 113; Beitz (n 68) 32; Skjold (n 72) 99.

[85] Available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=IRQ&Lang=EN> accessed 20 March 2021.

[86] Committee Against Torture, 'Concluding Observations on the Initial Report of Iraq' (7 September 2015) UN Doc CAT/C/IRQ/CO/1, para 13.

[87] ibid.

[88] CAT, 'Information Received from Iraq on Follow-Up to the Concluding Observations on its Initial Report' (15 June 2020) UN Doc CAT/C/IRQ/FCO/1, para 8; While the State Party's report for the second reporting cycle (CAT/C/IRQ/2) did reveal the re-activation of the judiciary system in areas formerly controlled by ISIS and that reports on the atrocities perpetrated 'are currently being collected', the CAT considered the information to be 'insufficient to assess implementation' (see paras 1 and 21 of CAT/C/IRQ/Q/2).

[89] Human Rights Committee, 'Concluding Observations on the Fifth Periodic Report of Iraq' (3 December 2015) UN Doc CCPR/C/IRQ/CO/5, para 19.

[90] ibid para 20(c).

[91] HRCttee, 'List of Issues in Relation to the Sixth Periodic Report of Iraq' (17 August 2020) UN Doc CCPR/C/IRQ/Q/6, paras 3-4.

Thus, remedies available under the accountability paradigm generate problematic implications for the effective protection against atrocity crimes, as they offer limited and *a posteriori* redress for situations whose very nature require urgent action. Notwithstanding their institutional complexity, engagement with the judicial and quasi-judicial organs of the universal system remains extraordinary and their legitimacy often called into question.[92] In that regard, States have been historically more eager to commit to the *idea* of human rights than to elevate them above self-interests, cautiously calculating the implications and retaining the authority to opt out of their normative application.[93] Likewise, despite the wide acceptance of human rights' standards in the international community, States will seldom pronounce themselves on the abuses committed in a foreign territory, and the attribution of direct responsibility for the lack of compliance with human rights standards is a relatively rare occurrence at the international level.[94]

In addition to the consequences for non-compliance existing under the accountability paradigm, there are a number of alternative, non-coercive means that States and international organisations may employ as incentives to encourage respect for human rights or as disincentives to deter abusive conduct.[95] These mechanisms fall within the scope of Beitz's inducement paradigm and include all such peaceful measures aimed at ensuring compliance with human rights standards, such as diplomatic and economic incentives, commercial partnerships, and conditions to bilateral assistance or recognition.[96]

Perhaps the most representative example among this type of measures are the conditions for membership into the European Union set forth by the European Council in the 'Copenhagen Criteria,' which provide, among other, that any aspiring member 'has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.'[97] These criteria followed a pattern established in the 1970s, when the United States (U.S.) and several other States integrated the promotion and respect of

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[92] Dawidowicz (n 71) 1-2.

[93] ibid; Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009), 58-59, 108-111.

[94] Forsythe (n 22) 77-78; Arguably, there has been a departure from this pattern in recent years. States have become more vocal in denouncing mass atrocities, as in the case of the crimes committed against the Yazidi and the Rohingya. Most such statements are made at the UNGA, but they rarely go beyond paying 'lip-service' to the need for protection. This trend will be further explored in sections 4 and 5 of the present work.

[95] Beitz (n 68) 35; Bantekas and Oette (n 56) 322-326.

[96] ibid.

[97] European Commission, 'Accession Criteria (Copenhagen Criteria)' Presidency Conclusions (21-22 June 1993) 7.A.iii).

human rights into their foreign policy agendas[98] (see section 4 below). For now, it suffices to say that international organisations may also make use of inducement means, as has been the case in the practice of the World Trade Organization's controversial enforcement of human rights through trade measures.[99]

In a similar vein, the Charter-based system calls on States to conduct their international relations peacefully, but there are certain circumstances under which the UNSC may adopt non-forceful measures 'to give effect to its decisions' in the face of abuse, which may include 'economic and diplomatic sanctions, the interruption of maritime and aerial transportation and even the establishment of *ad hoc* tribunals to prosecute core international crimes.'[100] Only when such means are deemed or proven inadequate, the UNSC may also authorise coercive measures aimed at maintaining or restoring international peace at its own discretion.[101] The compulsion paradigm of implementation encompasses such coercive mechanisms, of either a non-military or a military nature.

Compulsion through the use of military force, although a well-established prerogative of the UNSC, has no shortage of polemical implications. The most notable among these are the political and material limitations inherent to the UNSC's institutional configuration,[102] in terms of reaching internal consensus and mustering the 'armed forces, assistance, and facilities'[103] necessary to execute military enforcement measures. Indeed, under the UN Charter, the UNSC may only authorise coercive measures with the approval of eight out of its fifteen non-permanent members and provided none of its five permanent members (P5) vetoes the decision,[104] which impairs the readiness and ability of Member States to take urgent action when the situation so requires.

Moreover, although the UNSC has the legal capacity to assemble a force under its direct command, it does not have any independent military of its own and, in practice, it is entirely reliant on the voluntary contribution of resources from Member States.[105] As a result,

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[98] Beitz (n 68) 35.

[99] ibid 36; Gudrun Zagel, 'The WTO and Trade-Related Human Rights Measures: Trade Sanctions vs Trade Incentives' (2005) 9 (1) Austrian Review of International and European Law Online 119, 120.

[100] UN Charter, arts 1 and 41; Beitz (n 68) 39; Terry Gill, 'The Security Council' in Gentian Zyberi (ed) *An Institutional Approach to the Responsibility to Protect* (CUP 2013) 88; See also A/66/874-S/2012/578 (n 14) paras 22-23.

[101] UN Charter, arts 1 and 42; ARSIWA (n 89) 70; Gill (100) 89-90.

[102] Gill (100) 90-92.

[103] UN Charter, arts 42-45.

[104] UN Charter, art 27.3

[105] Gill (100) 90-92.

coercion through the use of force is highly contingent upon the UNSC's discretion and Members States' capacity (and indeed political will) to assume the risks and burdens associated with a military intervention on foreign soil.[106] No action taken outside of this framework may fall within the exceptions to the prohibition of the use of force recognised by Chapter VII of the UN Charter.

The limitations of the compulsion paradigm, embodied in the UN collective security system, are particularly evident considering the abundance of ongoing mass atrocities and the impunity with which their perpetrators operate. Although the R2P may increase the legitimacy and political acceptability of forced interventions, such doctrine is construed within the same institutional and practical barriers of the Charter-based system and, thus, is bound to the same restrictions. As a natural consequence, unilateral responses to situations involving large-scale violations of human rights have emerged in the last few decades and are likely to continue to proliferate in the years to come. These concerns will be addressed in the following section, as third-party countermeasures and the three-pillar strategy of the R2P are explored in more detail.

3 International Enforcement and the Responsibility to Protect

3.1 Third-Party Countermeasures and the Protection from Atrocity Crimes

Under the UN Charter, the UNSC may request all or some States to cooperate or provide material assistance for the implementation of any set of measures,[107] but they are not allowed, as a rule, to adopt and implement such measures unilaterally. However, contemporary States' practice reveals otherwise.[108] As the limitations of the paradigms discussed in the previous section become apparent, it seems, some would argue, that States feel increasingly more inclined to employ unilateral (or 'third-party') countermeasures to address actual or potential risks to international peace and security.[109] Evidence of such historical trend is perhaps best exemplified in the restrictive measures adopted by the European Union (E.U.) against Russia in response to its actions 'undermining and destabilising the territorial integrity of Ukraine' in

[106] ibid 93-94; James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (OUP 2010) 1-37.
[107] UN Charter, art 43; ibid 84.
[108] Dawidowicz (n 71) 2-3.
[109] ibid 3-4.

2014 and 2020.[110] Likewise, from 2011 to 2012, and despite the UNSC's continuous use of its veto powers,[111] countermeasures were unilaterally imposed on Syria by the Arab League, the E.U. and Turkey for the atrocities committed under the rule of President Al-Assad.[112]

Countermeasures are a mechanism for the decentralised enforcement of international law, which may be taken by a subject of international law in response to a wrongful act committed by another to restore the legal relationship between the two or to induce the responsible subject to comply with its obligations.[113] Given that they are breaches of international law in and of themselves, countermeasures are inherently unlawful, unless they are taken by a reacting State to seek 'cessation and reparation' from a wrongful act by another State.[114]

As pointed out by Skjold, the existing human rights instruments at the universal or regional levels cannot be interpreted to be exhaustive in terms of redress mechanisms and enforcement procedures,[115] as none explicitly preclude the right of States to resort to countermeasures under general international law.[116] Nevertheless, in the *Nicaragua* case, the ICJ asserted that, 'where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.'[117] The present study subscribes to Skjold's idea that the enforcement procedures provided by both regimes exist as two alternatives among which States can freely choose.[118] Indeed, the use of countermeasures under general rules of international law remains available in a residual (and not alternative) capacity to the mechanisms in the UN and regional human rights systems.[119]

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[110] See European Council, 'EU Restrictive Measures in Response to the Crisis in Ukraine' <https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/> accessed 23 March 2021; European Council, 'Council Regulation (EU) No 269/2014 of 17 March 2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine' (16 March 2021) Document 02014R0269-20210316.

[111] Dawidowicz (71) 3.

[112] ibid 3, 6-11.

[113] ARSIWA (n 89) 128, para 1; see also Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP 2011) 154.

[114] ARSIWA (n 89) 75, paras 1-4, and 128, para 1.

[115] Tzanakopoulos (n 113).

[116] Skjold (n 72) 99.

[117] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) (Judgment) [1986] ICJ Rep 14, para 267.

[118] Skjold (n 72) 100-102.

[119] UN Charter, art 33; See also ibid 102.

Nevertheless, the legitimacy and regulation of third-party countermeasures have been traditional sources of controversy among, on the one side, detractors who cautiously warn against potential abuse[120] and, on the other, those who claim that lawful countermeasures are essential in enhancing the effectiveness of obligations *erga omnes* as a 'tool of communitarian law enforcement.'[121] Such polarisation is best summarised by Dawidowicz: 'at one extreme, third-party countermeasures are denounced as a "risk to world peace"; at the other extreme, they are hailed as a possible "saving grace for international law".'[122] The dilemma was also addressed by the International Law Commission (ILC) during the drafting process of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001, but ultimately the question was left open 'to the future development of international law.'[123]

Concerns over the legitimisation of third-party countermeasures are not only grounded on the risks associated with their improper use, but also on the practical implications that may result from their overlap with other regimes of unilateral action.[124] Particularly, for some, a normative regime for third-party countermeasures has the potential of revitalising the debate on unilateral intervention on humanitarian grounds and enabling the perpetuation of incidents like unauthorised involvement of the North Atlantic Treaty Organization (NATO) in Kosovo.[125]

Humanitarian intervention, contrary to non-forcible countermeasures, is the unauthorised threat or use of inter-State force by a State (or group of States) aimed at preventing or ending mass atrocities within the territory of another State.[126] Concerns over

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[120] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Separate Opinion of Judge Padilla Nervo) [1970] ICJ Rep 3, para 246; UNSC, '3988th Meeting' (24 March 1999) UN Doc S/PV.3988, 2-3; Dawidowicz (n 71) 5, 10; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 584.

[121] Dawidowicz (n 71) 11-12; Giorgio Gaja 'The Protection of General Interests in the International Community: General Course on Public International Law' (2011) Collected Courses of the Hague Academy of International Law, Volume 364, 9.

[122] Dawidowicz (n 71) 13.

[123] ibid; ARSIWA (n 89) art 54.

[124] See, for instance, the motives behind the creation of the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights at UNGA, 'Human Rights and Unilateral coercive Measures: Resolution Adopted by the Human Rights Council' (3 October 2014) UN Doc A/HRC/RES/27/21 para 22; See also The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000).

[125] See also UNGA, 'Summary record of the 24th Meeting' (16 November 2000) UN Doc A/C.6/55/SR.24, 11, para 64 (Cameroon) and S/PV.3988 (n 120) 2-3 (Russian Federation); Dawidowicz (n 71) 8-9; Michael Byers and Simon Chesterman, 'Changing the Rules About Rules?' in JL Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention Ethical, Legal and Political Dilemmas* (CUP 2003) 177-179, 181-184.

[126] Advisory Committee on Human Rights and Foreign Policy and Advisory Committee on Issues of International Public Law, 'The Use of Force for Humanitarian Purposes: Enforcement Action for Humanitarian Purposes and Humanitarian Intervention' Advisory Report No 15; JL Holzgrefe, 'The Humanitarian Intervention

this type of action were also made present in article 50 of ARSIWA, in which the ILC included a list of 'sacrosanct' international obligations that are immune to derogation by way of countermeasures.[127] In such a manner, the ILC made clear its position that States may not adduce another subject's non-compliance as grounds for derogating from the UN Charter prohibition on the use of force or from any other peremptory obligations under international law.[128]

However, the fear that the regime of third-party countermeasures could enable States to resort to unilateral coercive action based on humanitarian motives may not be as well-founded as it might appear, at least in terms of precedent or recurrence. As Dawidowicz notes, '[S]tates use non-forcible third-party countermeasures cautiously and are remarkably reluctant to openly justify their use (…) on humanitarian or other grounds.'[129] In that sense, third-party countermeasures remain a mostly peaceful category and, in practice, States have prudently distinguished among forcible interventions and non-forcible third-party countermeasures in their responses to grave humanitarian crises.[130] The United Kingdom's (U.K.) contributions to the debate on the legality of military action in Syria following an attack of chemical weapons in 2013 are particularly illustrative of this point. Indeed, in its legal position policy paper, the U.K. government presented a set of criteria under which the use of force should be permitted 'as an exceptional measure on grounds of overwhelming humanitarian necessity'[131], circumventing, when necessary, the UNSC. The arguments vested in the U.K.'s position sought to justify the use of force to alleviate human suffering as part of a *lex ferenda* doctrine of humanitarian intervention, independent from the regime of third-party countermeasures.

Debate' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 18; Pattison (n 106) 12-15.

[127] ARSIWA (n 89), 131, para 1; These provisions were mostly influenced by the ICJs rulings in *Nicaragua v United States of America* (n 117) para 249 and in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 6, in which the Court respectively held that '[w]hile an armed attack would give rise to an entitlement of collective self-defence, a use of force of a lesser degree cannot (...) produce any entitlement to take collective counter-measures involving the use of force' and observed that 'armed reprisals in time of peace (...) are considered to be unlawful'; See also Dawidowicz (n 71) 308-310, 316-317; Tzanakopoulos (n 113) 197-198; Skjold (n 72) 133.

[128] ARSIWA (n 89) 131-32; The prohibition of forcible countermeasures under Article 50(1)(a) ARSIWA is consistent with earlier pronouncements by the ICJ in the *Corfu Channel case* (*United Kingdom of Great Britain and Northern Ireland v. Albania*) (Merits) (Judgment) [1949] ICJ Rep 4, 35; See also James Crawford, *State Responsibility: The General Part* (CUP 2013) 690-691.

[129] Dawidowicz (n 71) 317.

[130] ibid 318-319.

[131] Prime Minister's Office (U.K.), 'Chemical Weapon Use by Syrian Regime: UK Government Legal Position' (29 August 2013) <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version> accessed 25 March 2021; Engdahl (n 17) 135-136; Dawidowicz (n 71) 318.

The U.K.'s main argument that a coercive intervention to avert a humanitarian catastrophe is legitimate when certain conditions are met, raises important questions on the means available to the international community when the UNSC is unwilling to act, and other lawful alternatives are unsuccessful. The R2P has come to fill, to some extent, the political aspects of such aspirations, but the concepts of humanitarian intervention and forcible third-party countermeasures have no clear and generally accepted legal foundation.[132] The remainder of the analysis will focus on exploring potential areas of improvement within the operational framework of the R2P.

3.2 The Genesis and Evolution of the Intervention Debate Within the Doctrine of the Responsibility to Protect

The UN's approach to mass human rights violations has experienced major changes since the UN Charter came into force in 1945.[133] In its early stages, the UN's fundamental approach was to dismiss cases arising from human rights violations in Member States, [134] based on the widespread belief that a State's consent was a *sine qua non* condition for international scrutiny.[135] This reluctance would also dominate the debate on the use of force as a means to impede human rights violations, a notion widely considered to be superseded by the principle of non-intervention contained in Article 2(7) of the UN Charter.[136]

However, the codification of international human rights law and the establishment of their monitoring mechanisms during the 1950s-1970s, helped to broaden earlier conceptions that regarded human rights as a solely domestic concern by transforming the treatment of individuals by their own State into a matter of international interest and opening States' compliance records to the scrutiny of the world.[137] By the 1990s, the deployment of human

[132] A/63/677 (n 18) para 7.

[133] Nigel Rodley, 'R2P and International Law: A Paradigm Shift?' in Alex Bellamy and Tim Dunne (eds) *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 1-3.

[134] ibid 2.

[135] ibid.

[136] Roberta Cohen, 'From Sovereign Responsibility to R2P' in Frazer Egerton and WA Knight (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge 2012) 7.

[137] ibid; Indeed, in an advisory opinion dated 30 March 1950, the International Court of Justice held that it was competent to interpret the Peace Treaties with Bulgaria, Hungary and Romania, as such interpretation should be considered a 'question of international law' and not an intervention in 'matters that are essentially within the domestic jurisdiction of a State'. See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) (First Phase) [1950] 1950 ICJ Rep 65, 70-71.

rights investigative and monitoring bodies to certain countries was no longer perceived as a form of undue interference.[138]

In the closing years of the 20th century, a critical gap became evident between the principle of non-intervention and States' duty to 'take joint and separate action' to promote 'universal respect for, and observance of, human rights' provided by Articles 55 and 56 of the UN Charter.[139] In particular, the precedent of Rwanda made it clear that a more efficient and timely intervention could have prevented much of the atrocities committed in 1994,[140] becoming a historical 'symbol of international inaction in the face of genocide.'[141] Likewise, the polemic of the 1999 NATO-led intervention in Kosovo ignited discussions on the legitimacy of interventions carried without explicit UNSC authorisation,[142] in situations where the international community is divided and a veto from a P5 member is likely to result in a humanitarian tragedy.[143] In 2000, this dilemma was addressed by the then Secretary General of the UN, Kofi Annan, in the following terms: 'If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violations of human rights?'[144]

Merely a year later, in 2001, the ICISS presented its influential report on R2P,[145] which grounded the intervention debate on States' responsibility to protect peoples from gross human rights violations rather than on any interpretations suggesting the existence of a 'right to intervene.'[146] In addition, the ICISS Report provided for a *lex ferenda* alternative to bypass UNSC authorisation mechanism when human rights are 'significantly at stake' or when the time for deliberation exceeds reasonableness.[147] However, such recommendation did not manage to get sufficient international support and was not ultimately integrated into the Outcome Document, the conceptual articulation of the R2P doctrine within the UN system.[148]

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[138] Cohen (n 136) 9-10.

[139] ibid 7.

[140] Engdahl (n 17), 142-143.

[141] Ramesh Thakur, 'Intervention, Sovereignty, and the Responsibility to Protect' in Ramesh Thakur and others (eds), *International Commissions and the Power of Ideas* (United Nations University Press 2005) 180.

[142] Morris and Wheeler (n 21) 232.

[143] Ramesh Thakur 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS' (2002) 33(3) Security Dialogue 323, 324.

[144] 'We the Peoples': The Role of the United Nations in the 21st Century (Millennium Report of the Secretary-General), as cited in Engdahl (n 17) 136.

[145] ibid, 128.

[146] Ibid 130; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press 2008) 31–54.

[147] ICISS Report (n 35) para 6.28; Engdahl (n 17) 130.

[148] Engdahl (n 17) 128; Morris and Wheeler (n 21) 6; Axworthy (n 23) 7.

Indeed, the final draft of the Outcome Document did not include any reference to the criteria proposed by ICISS, thus perpetuating the primacy of the UNSC as the sole body able to authorize coercive action.[149] ICISS's proposal served to highlight one of the most prevalent flaws in the arguments raised by those who seek to defend the legality of unilateral humanitarian intervention: that they are often detached from the political and moral implications of their implementation.[150] More often than not, such proposals imply a radical transformation of international law that is 'as unwarranted as it is unsound'.[151] Recent related efforts have made it abundantly clear that agreeing on the rules governing intervention outside the framework of the UN Charter would prove to be a nearly impossible task and, in any event, would be to the detriment of the significant and lawful progress made in the fields of human rights protection and conflict prevention during the past half-century.[152] The same is true for the 'exceptional illegality' espoused by the concept of forcible third-party countermeasures that risk undermining fundamental principles of the international rule of law through operational ambiguity.

Moreover, many scholars dispute the claim that a justification for humanitarian intervention has emerged through customary state practice,[153] particularly in light of the mixed international reactions to the military interventions in Kosovo and the 1991 creation of a no-fly zone in northern Iraq.[154] Likewise, few interventions in the past have been justified on a humanitarian basis, while others (Liberia, Somalia, Bosnia, Haiti, and Rwanda) have been conducted under UNSC authorisation, and in some cases at the invitation of the targeted state.[155] Additionally, States' repeated (and often unanimous) affirmation of the principle of non-intervention at the UNGA provides further confirmation that no customary rule permitting unilateral intervention can be inferred from the practice of States.[156] In order to be

[149] Morris and Wheeler (n 21) 6.

[150] Byers and Chesterman (n 125) 178-179.

[151] ibid.

[152] ibid.

[153] See, for instance, Daniel Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm' (2002) 13(3) European Journal of International Law 597; See also Dapo Akande, 'The Legality of Military Action in Syria: Humanitarian Intervention and the Responsibility to Protect' (*EJIL:Talk*, 28 August 2013) <https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> accessed 25 March 2021.

[154] Byers and Chesterman (n 125) 183-184.

[155] ibid; Georg Nolte, *Intervention Upon Invitation – Use of Force by Foreign Troops in Internal Conflicts at the Invitation of a Government under International Law* (Springer 1999); Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (OUP 2002).

[156] Byers and Chesterman (n 125) 184; See 'Ministerial Declaration on the Occasion of the Twenty-third Annual Ministerial Meeting of the Group of 77' (1999)' <https://www.g77.org/doc/Decl1999.html> accessed 25 March

fruitful, the discussion should be among those who seek to establish reasonable criteria for the authorisation of the use of force and those who seek to preserve the *status quo* at the UNSC. The R2P, as a primarily political doctrine, has come to fill the structural necessities of both groups, by framing the possibility of intervention on humanitarian grounds within the Charter-based system of protection.

Indeed, the UNSG's 2009 annual report laid out a three-pillar strategy for the implementation of the R2P in line with paragraphs 138 and 139 of the Outcome Document.[157] Although not legally binding *per se*, such framework provides useful guidance on the scope of State's political commitments under the R2P. Pillar one reaffirms that sovereignty implies the responsibility of each State to protect its own population from atrocity crimes in accordance with pre-existing legal obligations.[158] Pillar two asserts that the international community plays a supplemental role and that its conduct should be oriented towards assisting individual States in discharging their primary responsibility of protection.[159] Pillar three underscores that, when States are manifestly failing to protect their populations, the international community must take action using the range of peaceful and non-peaceful means available under Chapters VI, VII and VIII of the UN Charter.[160]

None of the pillars is meant to function in isolation from the others.[161] The assistance and cooperation measures encompassed by pillar two are designed to supplement the policy tools under pillar one and the enforcement mechanism of pillar three. Likewise, there is no set sequence of steps that must be completed in order to advance from one pillar to the other or a list of 'triggers' for action.[162] All three must be ready to be used at any point and must contribute equally to sustaining the structure of the R2P.[163] Nevertheless, there are different thresholds for the conducts contemplated by each of the pillars. Indeed, as described by the UNSG, '[t]he more robust the response, the higher the standard for authorization.' [164] Therefore, pillar two's protection through capacity-building and prevention implies, naturally,

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2021, para 69, where the Foreign Ministers of the Group of 77 affirmed that 'the so-called right of humanitarian intervention' was illegal under international law.

[157] A/63/677 (n 18) para 11.

[158] ibid paras 11, 14, 16-17

[159] ibid paras 11, 28-48.

[160] ibid para 11, 49-66.

[161] ibid para 29.

[162] ibid para 50.

[163] ibid para 12.

[164] ibid para 12.

a lower threshold than coercive responses under pillar three.[165] Likewise, the standard for pillar three measures also varies depending on the type of action sought, establishing a lower threshold for peaceful enforcement under Chapter VI of the UN Charter than for the forceful means available under Chapter VII.[166]

Pillars two and three of the R2P strategy resemble, to a great extent, some of Beitz's accountability paradigms discussed in section 2.2, as they are intended to influence States' compliance through external action. Indeed, in his follow-up report on the implementation of the R2P, former UNSG Ban Ki-moon explained that the international community's pillar-two obligation to assist States in meeting their protection duties under the first pillar can be discharged through encouragement, material assistance, and capacity-building.[167] 'While the first form of assistance implies persuading States to do what they ought to do' – the former UNSG states – the remaining two suggest 'mutual commitment and an active partnership between the international community and the State.'[168] Thus, pillar two can be said to encompass the reporting, auditing and jurisdictional mechanisms of international organisations under the accountability paradigm, the diplomatic incentives and disincentives of the inducement paradigm, and the relief and capacity-building support under the assistance paradigm. Likewise, recourse to coercive measures under pillar three, in the form of sanctions or military intervention, falls within the compulsion paradigm.

Arguably the most relevant instance in the application of the R2P's pillar three came in the form of the 2011 UNSC decision to intervene in Libya to stop President Gadhafi from committing further atrocities.[169] The R2P was explicitly mentioned by the UN in its resolution authorising the use of force and the main purpose of the operation was largely a success,[170] but the lack to follow it through (a responsibility 'to rebuild') created a power vacuum that resulted in further factional conflicts.[171] Moreover, while the UNSC decision to intervene in Libya caused optimism among those who hoped that the abstentions from Russia and China

[165] ibid para 50.
[166] ibid para 50.
[167] ibid para 28.
[168] ibid para 28.
[169] Axworthy (n 23) 7.
[170] ibid; UNSC, 'Resolution 1973' (17 March 2011) UN Doc S/RES/1973 para 4.
[171] Axworthy (n 23) 7.

could signify a softened exercise of their veto powers, a deadlock at the UNSC over the situation in Syria soon after served to dismiss any expectations in that regard.[172]

As the UNSG would explain in 2015, the UNSC-mandated intervention in Libya, and the international community's inability to respond effectively to the subsequent crisis in Syria, had a significant negative impact on the operationalisation of the R2P and have led to wider misconceptions that its main concern is the use of force.[173] These challenges, along with a rise in borderless human rights issues,[174] call for new insights into the operationalisation of the R2P doctrine.[175] Section 4 shall demonstrate that there is sufficient reason to count the international protection of FoRB among the political trends that may ignite a paradigm shift in the current system of human rights protection.

4 An Agenda Shift: The Protection of Freedom of Religion or Belief as a Key Concern of Foreign Policies

4.1 The Political Influence of Freedom of Religion or Belief in International Agendas

The protection of religious minorities played a central role in the post-Westphalian international order and, particularly in the 19th century, was widely regarded as a major justification for intervention.[176] Indeed, despite laying the foundations of what would eventually develop into the concepts of sovereignty and non-intervention,[177] legal theorists of this period developed a number of doctrinal justifications for interventions grounded on 'humanitarian' motives and the principle of international community as an expression of States' autonomy.[178] Among these justifications, Kroll argues, the protection of religious minorities is one of the most discussed in 19th century (and mainly European) legal literature,

[172] Morris and Wheeler (n 21) 1; See also OHCHR, 'Statement on the Situation in Syria' (12 June 2015) <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=16075&LangID=E> accessed 25 March 2021.

[173] UNSC, 'A Vital and Enduring Commitment: Implementing the Responsibility to Protect' (13 July 2015) UN Doc A/69/981–S/2015/500, para 9; Engdahl (n 17) 133.

[174] Axworthy (n 23) 3, 14.

[175] A/70/999–S/2016/620 (n 18) 7-17.

[176] Stefan Kroll, 'The Legal Justification of International Intervention: Theories of Community and Admissibility' in Fabian Klose (ed), *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present* (CUP 2015) 74.

[177] Antje von Ungern-Sternberg, 'Religion and Religious Intervention' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 308.

[178] Kroll (n 176) 76-79.

since ‘hardly any chapter on humanitarian intervention in an international law treatise could refrain from taking a position in regard to the issue of religion.’[179]

Authors like Franz von Liszt and William E. Hall, for instance, argued that any intervention in non-Christian nations on grounds of FoRB would necessarily have to encompass other complementary considerations in order to be legitimate in their contemporary world.[180] On the other hand, and taking the Russian intervention in the Ottoman Empire during the Crimean War as a point of reference, other scholars argued in favour of interventions on religious grounds, emphasising the legitimacy of any efforts ‘to protect Persons, subjects of another State, from persecution on account of professing a Religion not Recognised by that State, but identical with the Religion of the Intervening State.’[181]

These approaches were, naturally, infused with the ethnocentric motivations of their time and mainly intended to protect Christian co-religionists that found themselves within non-Christian environments as a consequence of European expansion.[182] Nevertheless, and despite these nuances, the validity of these arguments for the subsequent development of international law cannot be undervalued. Similar reasonings remained relevant in the first decades of the 1900s, but the international protection of FoRB struggled to find a proper legal articulation. By the second half of the 20th century, it became framed within the protections of the individual provided for in international human rights law, international humanitarian law, refugee law, and, indirectly, international criminal law.[183] The remainder of this subsection focuses narrowly on the political developments in the U.S. as a key player in the international promotion of FoRB. The discussion lays the foundation for the later analysis of the integration of similar concerns in foreign policies worldwide.

4.1.1 The Rise of the ‘American Model’ of International Religious Freedom

The fall of the Soviet bloc opened spaces that had been traditionally hostile to religious organisations and helped shed light on the perils that millions of believers continue to endure

[179] ibid 80-81.
[180] ibid 81-82.
[181] ibid 83, citing Robert Phillimore, *Commentaries Upon International Law* (T&JW Johnson Law Booksellers 1854) 315 (capitalisation as in original); See also von Ungern-Sternberg (n 177) 310.
[182] Kroll (n 176) 87.
[183] ibid; von Ungern-Sternberg (n 177) 313; Engdahl (n 17) 129, 142.

throughout the world.[184] Efforts to recognise the protection of religious minorities as a just ground for international action gained particular relevance in the American political discourse of the 1990s, especially among social conservatives who advocated for the adoption of legislative measures that would enable the automatic application of sanctions to countries that failed to uphold religious freedom.[185] The persistent persecution against religious minorities worldwide was a primary factor in the formation of a joint coalition of lay and religious organisations in the U.S., which would place religious freedom at the centre of its foreign policy by the turn of the century.[186] These efforts would constitute the basis for the creation of an 'American model' that would inspire several Western countries to make the protection and promotion of international religious freedom a pivotal part of their agendas.[187] The objectives of this model were articulated in the 1998 International Religious Freedom Act, which managed to institutionalise the fight for religious freedom, but, in practice, its effects would be significantly weaker than envisioned.[188]

Indeed, while the American model became a reference point for the Western world,[189] its material impact would be undermined by the alternating agendas and level of commitment of the administration in turn.[190] Failed strategic implementation and a secularist scepticism among foreign policy officials resulted in the limited impact of the Act during its first two decades of existence.[191] History would demonstrate that, in practice, neither Clinton nor Bush accorded high priority to international religious freedom during their mandates, and, in countries where the U.S. was more actively engaged (Pakistan, Afghanistan, Iraq, and Egypt), 'freedom is on the decline, persecution on the rise' by most accounts.[192] Likewise, the U.S.

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[184] Pasquale Annicchino, *Law and International Religious Freedom: The Rise and Decline of the American Model* (Routledge 2018) 21; Lee Marsden, 'International Religious Freedom Promotion and US Foreign Policy' (2020) 11 Religions 260, 262.

[185] Forsythe (n 22) 230.

[186] Annicchino (n 184); U.S. Department of State, 'Report of the Commission on Unalienable Rights' (2020) <https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/index.html> accessed 1 April 2021, 45-48.

[187] ibid 97-98; Forsythe (n 22) 230.

[188] Annicchino (n 184) 97.

[189] See ibid 65-72, discussing the efforts by former ministers of foreign affairs Franco Frattini (2002-2004, 2008-2011) and Giulio Terzi di Sant'Agata (2011-2013) to prioritise religious freedom in Italian foreign policy, French diplomacy's interest in the protection of religious minorities through the lens of national security during the past decade, and the U.K.'s attempt to make the protection and promotion of FoRB a renewed priority on the national international scenes through the creation of ministerial roles and parliamentary intergroups.

[190] ibid 98; Marsden (n 184) 268.

[191] Forsythe (n 22) 230; Annicchino (n 184) 98; Marsden (n 184) 269-270.

[192] Thomas Farr, 'Back to the Beginning: Rebuilding an Intellectual Consensus for Religious Freedom' (2012) 10(3) The Review of Faith & International Affairs, 43-50; Thomas Farr, 'Our Failed Religious Freedom Policy:

experience in Afghanistan and Iraq was evidence of the little regard given to interfaith dialogue and, in the global mindset, led to associating protection efforts with unilateral armed intervention in Muslim majority countries.[193]

As expressed by Thomas Farr, former director of the Office of International Religious Freedom, in a 2013 statement before the House of Representatives: '[I]t would be difficult to name a single country in the world over the past fifteen years where American religious freedom policy has helped to reduce religious persecution or to increase religious freedom in any substantial or sustained way.'[194] Farr would support his claims arguing that, despite growing documented instances of persecution and restrictions on FoRB throughout the world, barely any initiative to sanction or hold countries to account for their behaviour on religious rights had been taken by the U.S. government under the International Religious Freedom Act.[195]

Moreover, the American model has experienced no shortage of criticism from those who believe that the protection of religious freedom should receive no special treatment in foreign policies[196] and that the Act, on which it is based, is no more than an expression of a 'long-standing American nationalist narrative.'[197] Fierce opponents of privileging religion over other human rights argue that the advocacy regime created by the Act inevitably problematises all issues and events as religious and without regard to historical, social, and political realities.[198] For Hurd, the International Religious Freedom Act is yet another effort to advance American exceptionalism through the disguise of universal values, which ends up 'funnelling people into predefined religious boxes and politicizing their differences.'[199]

The IRFA Has Not Been Adequately Implemented' (*First Things*, November 2013) <https://www.firstthings.com/article/2013/11/our-failed-religious-freedom-policy> accessed 1 April 2021.

[193] Marsden (n 184) 264-265.

[194] Thomas Farr, 'Examining the Government's Record on Implementing the International Religious Freedom Act' (13 June 2013) Testimony before the House Committee on Oversight and Government Reform-Subcommittee on National Security; See also Annicchino (n 184) 97.

[195] Annicchino (n 184) 98; Marsden (n 184) 268.

[196] For a recent take on this, see U.S. Department of State, 'Secretary Antony J. Blinken on Release of the 2020 International Religious Freedom Report' (12 May 2021) Remarks to the Press <https://www.state.gov/secretary-antony-j-blinken-on-release-of-the-2020-international-religious-freedom-report/> accessed 15 May 2021.

[197] Elizabeth Shakman Hurd, 'Religious Freedom, American-Style' (2014) 22(1) Quaderni di Diritto e Politica Ecclesiastica 231, 236–237; Annicchino (n 184) 99-100; Marsden (n 184) 269.

[198] Hurd (n 197); Gregorio Bettiza, *Finding Faith in Foreign Policy: Religion and American Diplomacy in a Postsecular World* (OUP 2019) 92, 95; Annicchino (n 184) 7-9, 99-100; Marsden (n 184) 269.

[199] Annicchino (n 184) 101; Elizabeth Shakman Hurd, 'The Hegemony of Religious Freedom' (*The Globe and Mail,* 17 October 2012) <https://www.theglobeandmail.com/opinion/the-hegemony-of-religious-freedom/article4617004/> accessed 6 August 2021.

Although there is indeed some merit in this critique, the main concern of its proponents is that religious actors' influence in international politics, and in American foreign policy in particular, may lead to a desecularization process in global institutions.[200] The present study does not intend to provide an assessment of the arguments raised by opponents of the American model. Rather, it seeks to highlight the relevance of U.S.-led efforts in positioning FoRB in the international political spotlight, despite the meagre and divisive effects of the Act in terms of practical implementation.

Notwithstanding the progress made in the field of international religious freedom, the American model would remain insufficient to inspire action that surpasses the traditional economic and diplomatic interests that dominate the global arena in the first years of the new millennium.[201] Nevertheless, the past decade saw an unprecedented engagement by both individual states and multilateral institutions with the phenomenon of religious persecution, an issue that had remained mostly underreported and which leaders around the world had traditionally been 'strangely and inexplicably reluctant to confront.'[202] As the following subsection will demonstrate, these initiatives constitute a 'second wave' of international efforts to uphold the primacy of religious freedom in foreign policies worldwide. As was the case with the regime created by the International Religious Freedom Act, this new wave is also spearheaded by the U.S. and found a more fervent reception in Europe than ever before. These renewed efforts, framed within the doctrine of R2P, have the potential of creating a new regime of international religious freedom that truly addresses the needs of those persecuted by reason of their beliefs.

4.2 A 'Second Wave' in the Prioritisation of the Protection of Freedom of Religion or Belief Worldwide

Although the Obama era was characterised by a departure from the unilateralist practices of preceding administrations and openness to inter-faith dialogue, its rhetoric was, noticeably, not translated into action on the ground.[203] Following the 2016 presidential election, however, the U.S. experienced an intense revitalisation of its approach to the promotion and protection of international religious freedom. In particular, the appointment of Mike Pompeo as U.S.

[200] Marsden (184) 272.
[201] Forsythe (n 22) 230; Annicchino (n 184) 106.
[202] Mounstephen (n 9); Marsden (n 184) 273.
[203] Marsden (n 184) 264-278; Annicchino (n 184) 37.

Secretary of State in 2018 brought a renewed zeal to FoRB, placing it as a 'top priority' of the Trump administration.[204] This prioritisation was made clear at the inaugural Ministerial to Advance Religious Freedom, which, convened by Pompeo barely three months after taking office, was a first-of-its-kind event with more than 1,000 civil society and religious leaders brought together to discuss 'the unalienable human right of religious freedom.'[205] It could be argued that such an approach was then-President Trump's attempt at appealing to his political base, which much like the movements that influenced the adoption of the International Religious Freedom Act in the 1990s, consisted mostly of Evangelical Christians.[206] Whatever the case may be, it is undeniable that no past administration had so vociferously and enthusiastically committed to the protection of FoRB.

Indeed, the strength of these efforts remained steady for the duration of Trump's presidency and, in June 2020, the U.S. issued the Executive Order 13926 on 'Advancing International Religious Freedom' pledging to 'respect and vigorously promote' FoRB globally as 'a moral and national security imperative.'[207] For the first time in American history, an executive order specifically incorporated the protection of religious freedom worldwide as a central priority for U.S. foreign policy and diplomacy, and through a series of measures aimed at inducing compliance, the order has the potential of producing much-needed change at the global arena.[208] As expected, the results of the 2020 U.S. presidential election brought a departure from many of the policies of the Trump-era approach to FoRB and no intention to prioritise it over other human rights.[209] However, the effects of the Executive Order 13926 remain unaffected by this apparent reversal and the incumbent administration's commitment to re-engage with the work of the UN[210] may fill the international collaboration gap that Trump, in his disdain for multilateralism,[211] created.

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[204] See Michael Pence's remarks at the Ministerial to Advance Religious Freedom (26 July 2018), as cited by Marsden (n 184) 266, fn 12.

[205] Executive Office of the President of the U.S., 'Executive Order on Advancing International Religious Freedom' (2 June 2020) Order No 13926; Marsden (n 184) 266.

[206] See, for instance, Jeffrey Haynes, 'Donald Trump, the Christian Right and COVID-19: The Politics of Religious Freedom' (2021) 10(6) Laws 1; Tisa Wenger, 'Religious Freedom after Trump' (*Berkley Forum*, 7 December 2020) <https://berkleycenter.georgetown.edu/responses/religious-freedom-after-trump> accessed 6 August 2021.

[207] Executive Order 13926 (n 205).

[208] ibid.

[209] U.S. Department of State (n 196).

[210] U.S. Department of State, 'U.S. Decision to Reengage with the UN Human Rights Council' (8 February 2021) Press Statement <https://www.state.gov/u-s-decision-to-reengage-with-the-un-human-rights-council/> accessed 2 April 2021; See also U.S. Department of State, 'Pledges and Commitments of the United States of America: Seeking Election to the UN Human Rights Council' (2021) <https://www.state.gov/wp-

Across the Atlantic, progress in the terrain of FoRB during the past decade is difficult to assess. While the political aims of the E.U. Guidelines on the Promotion and Protection of Freedom of Religion or Belief and the creation of the position of the Special Envoy for the promotion of Freedom of Religion or Belief outside the E.U. were hailed as ground-breaking signs of commitment,[212] it is unclear whether or not they were instrumental in producing any positive change, in the absence of any clear and measurable results.[213] However, significant breakthrough was made at the individual nations' level, which, either jointly or separately, have produced several initiatives seeking to mainstream the protection of FoRB within and beyond their jurisdictions.[214] Among them, the appointment of FoRB envoys or ambassadors by Germany, Denmark, Norway and Finland is worthy of mention,[215] as is the case with the Freedom of Religion or Belief Learning Platform created by the Nordic Ecumenical Network on International Freedom of Religion or Belief.[216]

Likewise, the publication of the Bishop of Truro's findings in 2019, which highlighted the plight of millions of persecuted Christians and other religious minorities across the globe,[217] served to consolidate the U.K.'s commitment to FoRB. Indeed, in a remarkable intervention by Lord Ahmad of Wimbledon at the second Ministerial Conference to Advance Religious Freedom, the U.K. announced its intention to implement all of the recommendations contained in the Bishop of Truro's report,[218] which included taking action that ensures 'the protection and security of Christians, and other faith minorities, in their

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content/uploads/2021/05/HRC-Pledge-Long-Form-Brochure-FINAL-Accessible.pdf> accessed 15 May 2021, 1-4.

[211] See, i.e., 'US President Trump says Countries have 'Absolute Right' to Protect their Borders' (*UN News*, 24 September 2019) <https://news.un.org/en/story/2019/09/1047252> accessed 15 May 2021.

[212] Council of the European Union, 'EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief' (2013) Foreign Affairs Council Meeting; Annicchino (n 184) 53-55; ibid.

[213] European Parliament, 'Res EU 2018/2155(INI): Guidelines and the Mandate of the EU Special Envoy on the Promotion of Freedom of Religion or Belief Outside the EU' (15 January 2019) paras 21-26; See also Adina Portaru, 'The EU Needs to Show Real Commitment to Religious Freedom' (*Euractiv,* 25 June 2019) <https://www.euractiv.com/section/freedom-of-thought/opinion/the-eu-needs-to-show-real-commitment-to-religious-freedom/> accessed 2 April 2021; Peter van Dalen, 'Seven Years of Freedom of Religion or Belief at the EU, but What Future?' (23 June 2020) <https://www.neweurope.eu/article/seven-years-of-freedom-of-religion-or-belief-at-the-eu-but-what-future/> accessed 2 April 2021.

[214] Mounstephen (n 9) 119; Knox Thames 'Forging a Trans-Atlantic Partnership on Religious Freedom' (2014) 12(3) The Review of Faith & International Affairs 1, 2.

[215] Mounstephen (n 9) 119

[216] 'The Freedom of Religion or Belief Learning Platform' <https://www.forb-learning.org/about.html> accessed 5 April 2021; ibid.

[217] Mounstephen (n 9).

[218] 'Human Rights and Democracy: The 2019 Foreign and Commonwealth Office Report' (2020) V <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2019 > accessed 5 April 2021.

respective countries' and that allows UN observers to monitor the problem of persecution.[219] As described in an October 2020 progress statement, the U.K. government has so far implemented over half of the 22 recommendations,[220] resulting, *inter alia*, in the adoption of a 'ground-breaking' Global Human Rights sanctions regime that will allow the U.K. to protect people of all religions against human rights violations 'and ensure the perpetrators are sent a clear message that the U.K. will not tolerate their atrocious actions.'[221]

Initiatives from Poland and Hungary to protect FoRB are perhaps deserving of a separate study, given that they are often associated with the increasingly nationalistic tendencies found in Central and Eastern Europe.[222] The promotion and protection of FoRB have become of growing interest to European institutions, particularly in the last decade, due to the significant migratory flows caused by the rise of movements tied to political Islam in the Middle East and North Africa.[223] As described by Annicchino, 'a rising number of people, fleeing political persecution due to their religious faith, are requesting asylum in various European countries, which now must face new political and legal problems, both with regard to accepting asylum requesters and the assigning of refugee status.'[224] While the responses to the 2015 'refugee crisis' across the continent were varied, it became a source of particular tension between Hungary, Poland and the E.U. [225]

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[219] Mounstephen (n 9) 132.

[220] U.K. House of Commons, 'Progress on the Bishop of Truro's Independent Review of Persecution of Christians and Freedom of Religion or Belief' (2020) Debate Pack CDP 110, 4.

[221] ibid 7; The Global Human Rights Sanctions Regulations, Order 2020, SI 2020/680; For the first sanctions package imposed under this regime, see Foreign, Commonwealth & Development Office, UK Sanctions Perpetrators of gross Human Rights Violations in Xinjiang, Alongside EU, Canada and US' (22 March 2021) Press Release <https://www.gov.uk/government/news/uk-sanctions-perpetrators-of-gross-human-rights-violations-in-xinjiang-alongside-eu-canada-and-us> accessed 10 May 2021.

[222] Bartosz Rydlinski, 'Viktor Orbán - First among Illiberals?: Hungarian and Polish Steps towards Populist Democracy' (2018) 26 On-line Journal Modelling the New Europe 95, 96; 'Europe and Right-Wing Nationalism: A Country-by-Country Guide' (*BBC News*, 13 November 2019) <https://www.bbc.com/news/world-europe-36130006> accessed 5 April 2021.

[223] Annicchino (n 184) 60-61; See also Katie Reilly, 'Global Restrictions on Religion Increased Following the Arab Spring' (*Pew Research Center*, 8 July 2013) <www.pewresearch.org/fact-tank/2013/ 07/08/global-restrictions-on-religion-increased-following-the-arab-spring/> accessed 6 August 2021.

[224] Annicchino (n 184) 60.

[225] See, *Commission v Poland, Hungary and the Czech Republic* (Judgment) [2020] Joined Cases C-715/17, C-718/17 and C-719/17, where the Court of Justice of the European Union found that Poland, Hungary and the Czech Republic failed to fulfil their obligations under European Union law by refusing to comply with the temporary mechanism for the relocation of applicants for international protection; See also UN Refugees and Migrants, 'Input of Hungary to the UN Secretary General's report on the Global Compact for Safe, Orderly and Regular Migration' Contributions from Member States and Other Stakeholders <https://refugeesmigrants.un.org/sites/default/files/stocktaking_hungary.pdf> accessed 6 August 2021; E.U. External Action Service, 'Speech by High Representative/Vice-President Federica Mogherini at the European Parliament Plenary Session on the Progress on the UN Global Compact for Safe, Regular and Orderly Migration and UN Global Compact on Refugees' (13 March 2018) <https://eeas.europa.eu/headquarters/headquarters-

Despite their controversy, the unique approaches of Poland and Hungary to the protection and promotion of FoRB have produced a number of undeniably fruitful initiatives. Launched by the Hungarian government in 2017 under the premise that 'help must be taken to where the trouble is', the Hungary Helps Program has fought 'the root causes of migration' by providing humanitarian support 'in crisis areas and areas hit by man-made or natural disasters.'[226] Aimed particularly at alleviating the suffering of persecuted Christians, such program has, since its creation, 'enabled 100,000 people to stay in their homeland or its immediate region instead of migrating, which poses both security and health risks.'[227]

Likewise, Poland has taken a marked diplomatic approach, affirming that one of its priorities on the international stage is to 'is to consistently call for multilateral organisations (…) to ensure freedom of religion and belief as well as protection of victims of religious persecution.'[228] In 2019, for instance, Poland was instrumental in the adoption of a UNGA resolution to designate 22 August as an annual International Day Commemorating the Victims of Acts of Violence Based on Religion or Belief.[229] Soon after, through a 2020 memorandum of understanding that formalised their shared commitment to 'Christian and humanistic values', Poland and Hungary agreed to work together to counteract threats to FoRB and support persecuted religious groups worldwide.[230] The same year, in line with these actions, Poland hosted the third Ministerial to Advance Religious Freedom, with a particular emphasis on the challenges to FoRB posed by the COVID-19 pandemic.[231]

Thus, the foundations laid by the American model of international religious freedom, together with an increased awareness of the issue of persecution and the root causes of large-scale migratory flows, produced a ripple effect on the international community during the past decade, reshaping foreign policies worldwide. As evidenced by the initiatives from individual countries and inter-State coalitions, as well as by the Ministerial to Advance Religious

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homepage/41272/speech-highrepresentativevice-president-federica-mogherini-european-parliament-plenary_en> accessed 6 August 2021.

[226] 'The Hungary Helps Program' <https://hungaryhelps.gov.hu/programme-landing/> accessed 6 August 2021; Mounstephen (n 9) 120.

[227] ibid.

[228] Ministry of Foreign Affairs of the Republic of Poland, '2020 Ministerial to Advance Freedom of Religion or Belief' <https://www.gov.pl/web/diplomacy/2020-ministerial-to-advance-freedom-of-religion-or-belief> accessed 6 August 2021.

[229] UNGA, 'Resolution 73/296: International Day Commemorating the Victims of Acts of Violence Based on Religion or Belief' (3 June 2019) UN Doc A/RES/73/296, 2.

[230] Ministry of Foreign Affairs of the Republic of Poland 'Poland and Hungary to Help Religious Persecution Victims Together' (18 August 2020) <https://www.gov.pl/web/diplomacy/poland-and-hungary-to-help-religious-persecution-victims-together> accessed 6 August 2021.

[231] Ministry of Foreign Affairs of the Republic of Poland (n 228).

Freedom, leaders and civil society have increasingly come together for the shared purpose of exploring better means to address persecution.[232] The creation of the International Religious Freedom Alliance (IRFA) in February 2020 is the materialisation of this trend and represents the currently most coordinated international effort 'to combat discrimination and persecution based on religion or belief' around the world.[233] IRFA's choice of words when describing its 32 members as 'like-minded' countries is noteworthy,[234] as similar calls for a more efficient system of international response have been often considered to '[f]all victim to coalitions of the unwilling, unable and unlike-minded.'[235]

While the protection of FoRB is yet to pass its most arduous test – i.e., that of international politics and national self-interests – the purpose of the present section has not been to assess these initiatives on their merits or likelihood of succeeding in their aspirations. Rather, its intention has been to demonstrate that, for the first time in modern history, the world seems to be approaching a consensus on the value of orienting international action towards the protection of religious minorities. Moreover, given the contemporary abundance of atrocity crimes committed against faith groups, it is a matter of time before the inertia of international FoRB protection overlaps with the political limitations of the R2P. Their potential synergy shall be examined in the subsequent sections of the present work.

5 Breaking the Stone Down: The Protection of Freedom of Religion and Enhanced Response Mechanisms

5.1 What Would it Take? Preconditions for Efficient Atrocity Prevention

Section 4 demonstrated that the protection of religious minorities worldwide has been integrated as a key priority of the foreign policies of some of the most powerful countries in the world as part of a 'second wave' of prioritisation of FoRB. The question then arises if this renewed international affinity for FoRB would be successful in making the international community live up to its commitments under the R2P and to the promise of 'never again'

[232] U.S. Department of State, 'Ministerial to Advance Religious Freedom' < https://www.state.gov/ministerial-to-advance-religious-freedom/> accessed 6 August 2021.

[233] U.S. Department of State, 'Declaration of Principles for the International Religious Freedom Alliance' (5 February 2020) <https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/> accessed 6 August 2021.

[234] ibid.

[235] Thakur (n 143) 337.

allowing the horrors of atrocity crimes.[236] While this inquiry could not possibly be answered straightforwardly given the ever-evolving interests that mould international relations, there are two essential assertions whose recognition must be the departing point for any realistic attempt to create a more efficient system of protection: First, there is no room for legitimate responses outside the UN Charter-based mechanisms. Second, peaceful means and de-escalation strategies should be prioritised over military intervention.

Starting with the first of these preconditions, the previous sections have demonstrated that recourse to forcible countermeasures (in the form of humanitarian intervention or otherwise) is never permissible under international law, and that any attempts to enforce respect for human rights through such means, however laudable they may be, risk compromising international peace. 'One may like or dislike this state of affairs, but so it is under *lex lata*' [237], would describe Antonio Cassese while reflecting on the dangers of a growing reliance on unilateral forcible countermeasures by the international community in the aftermath of the NATO's 'illegal but legitimate'[238] intervention in the former Yugoslavia. He would also add:

> Standards of conduct designed to channel the action of states are necessary in the world community as in any human society (…) To suggest realistic but prudent parameters in line with the present trends in the world community might serve the purpose of restraining as much as possible recourse to armed violence in a community that is increasingly bent on conflict and bloodshed.[239]

The reality was then, and still is now, that any attempt at producing a more effective system of humanitarian protection is viable to the extent that it subscribes to the general prohibition on the use of inter-State force.[240] As seen elsewhere in this study, the UN Charter-based system was supplemented by the R2P, a doctrine that, arguably, came to provide an operational framework for the 'standards of conduct' envisioned by the late judge Cassese.[241]

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[236] OHCHR, 'Genocide: "Never Again" Has Become "Time and Again"' (18 September 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/Genocide0918-7808.aspx> accessed 15 April 2021; See also Ewelina Ochab, 'What Happened to the Promise of Never Again?' (*Forbes*, 20 December 2020) <https://www.forbes.com/sites/ewelinaochab/2020/12/20/what-happened-to-the-promise-of-never-again/?sh=43e4cf9d2339> accessed 6 August 2021.

[237] Antonio Cassese, '*Ex Iniuria Ius Oritur*: Are We Moving Towards Legitimation of Forcible Humanitarian Countermeasures in the World Community' (1999) 10(1) EJIL 23, 25.

[238] Forsythe (n 22) 85, 221.

[239] ibid 30.

[240] Cassese (n 237) 798.

[241] A/75/863-S/2021/424 (n 19) 11; Strauss (n 52) 130; Yasmine Nahlawi, *The Responsibility to Protect in Libya and Syria: Mass Atrocities, Human Protection, and International Law* (Routledge 2021) 51.

Thus, any discussion on improving international responses to mass atrocities must necessarily address the widely accepted principles of the R2P, which integrate the political reality of the international community in its conceptual understanding and operationalisation.

Secondly, while the R2P pillars are not designed to operate sequentially, there is consensus that preventive and responsive tools should follow a gradual implementation.[242] Thus, there may be times in which national action under pillar one must be supplemented by external assistance under pillar two, but the focus should persistently be on early warnings and reducing the risk of escalation into violence. For responses under pillar three, moreover, the international community has generally agreed that peaceful means are preferred over other types of non-peaceful action and that military force should be a measure of last resort.[243]

As observed by Aloyo, empirical evidence suggests that non-violent measures are more efficient than violent means in achieving positive outcomes in autocratic regimes.[244] Leading studies have demonstrated that non-violent resistance is twice as likely as violent means to overthrow authoritarian regimes successfully,[245] and that peaceful campaigns significantly increase the chances that an autocracy will transition into a democracy.[246] On the same note, peaceful means seem to be favoured not only for their efficacy, but also for their role in avoiding the political costs of military intervention. Indeed, even if the threshold is met, action under pillar three would still need to be authorized by the UNSC,[247] conditioning forceful interventions to the political will of the P5 and to the resources of cooperating States. Moreover, in their *opinio juris*, States have been reluctant to recognise the R2P's pillar three as a legally binding obligation[248] and many have cautiously regarded it as a means to legitimising interventionist agendas.[249]

As repeatedly argued throughout this work, political considerations cannot be divorced from international law and any change in the operationalisation of the R2P must respond to

[242] A/70/999-S/2016/620 (n 18) 20-21.

[243] ibid.

[244] Eamon Aloyo, 'Conceptualising Mass Atrocity Prevention, Nonviolent Resistance, and Politically Feasible Alternatives' (2018) 10(4) Global Responsibility to Protect 448, 457-458

[245] ibid; Erica Chenoweth and Maria Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (Columbia University Press 2011) 66–67, 72–73.

[246] Aloyo (n 244); Mauricio Rivera Celestino and Kristian Skrede Gleditsch, 'Fresh Carnations or All Thorn, No Rose? Nonviolent Campaigns and Transitions in Autocracies' (2013) 50(3) Journal of Peace Research 385-400.

[247] A/70/999-S/2016/620 (n 18) 22.

[248] UNGA, '97th Plenary Meeting' (23 July 2009) UN Doc A/63/PV.97, 17–18 and UNGA, '100th Plenary Meeting' (28 July 2009) UN Doc A/63/PV.100, 12; Nahlawi (n 241) 50; See also Patrick Quinton-Brown, 'Mapping Dissent: The Responsibility to Protect and Its State Critics' (2013) 5 Global Responsibility to Protect 260.

[249] UNGA, '98th Plenary Meeting' (24 July 2009) UN Doc A/63/PV.98, 28; Nahlawi (n 241) 50.

the decisive role that national self-interests play,[250] or else risks vanishing into the realm of the overly idealistic. A more efficient operationalisation should, therefore, assimilate these realities and be nourished by the system of early warnings and de-escalation approach of the R2P. Otherwise, and particularly with regards to armed force, it would have no hope of succeeding against the international community's increasing protectionism and fear of ceding too much of their sovereignty to international law.[251] If we choose to believe that the protection of FoRB internationally has indeed re-shaped the *opinio necessitatis* of the world, how could its potential influence on the operationalisation R2P thrive in the highly politicised arena of international responses to mass atrocities? The next subsection shall address these concerns and suggest three levels at which positive change could be realistically produced.

5.2 Opportunities for Improvement in the Operationalisation of the Responsibility to Protect

The Outcome Document and the UNSG's annual reports have made abundantly clear that individual States are primarily responsible for protecting their populations from atrocity crimes (pillar one),[252] and that their duties towards other States in this regard are limited to supplementary assistance (pillar two).[253] Thus, most of the influence that the 'second wave' of FoRB mainstreaming could exert on the operationalisation of R2P would be reflected on pillar-two inter-State support, which, as discussed in subsection 3.2, encompasses Beitz's paradigms of accountability, inducement and assistance. Although the renewed interest in protecting religious minorities from atrocity crimes has already motivated new series of sanctions within the scope of the compulsion paradigm,[254] forceful intervention under pillar three of the R2P should continue to be reserved for extreme circumstances.

In a realistic understanding of the contemporary world, the strengthened interest in promoting FoRB internationally may increase the efficacy of responses to atrocity crimes at three different levels: universal, regional and subregional, and inter-State. The remainder of this section shall explore areas of opportunity in each of these levels and discuss the extent to

[250] Pattison (n 106) 236-237.
[251] Nahlawi (n 241) 50; A/63/PV.98 (n 249).
[252] A/63/677 (n 18) 11-17, 13-27.
[253] ibid 28-48.
[254] See U.K. House of Commons (n 220) and subsection 2.5.3 below.

which FoRB could actually become 'the water that breaks down the stone'[255] of untimely and inefficient action.

5.2.1 The Universal Level

As part of their commitments under the Outcome Document, States pledged to support the UN in establishing the 'early warning capability' necessary for the effective assessment of potential atrocity crimes.[256] Efforts in this arena are led by the joint Office on Genocide Prevention and the Responsibility to Protect (the Office), which coordinates the work of the Special Advisers on the Responsibility to Protect and on the Prevention of Genocide.[257] The Office collects information, conducts assessments, provides training and technical assistance, and raises awareness 'of the causes and dynamics of atrocity crimes and of the measures that could be taken to prevent them'.[258] Nevertheless, risk assessments and capacity building are insufficient if atrocity prevention is not a priority of the foreign policies of every State (or at least of those with the willpower and resources to act).[259]

Indeed, the gap between international commitment to the R2P and the continuous reality of populations exposed to atrocity crimes,[260] evidences a deficit in translating early warning into action.[261] Signs of an imminent genocide were present years before ISIS unleashed its violent campaign against religious minorities in its attempt to establish a purely Islamic State in Iraq and Syria.[262] Evidence of mass atrocities being committed against the millions of forcibly-displaced Rohingyas in Myanmar was there, but the world stood idly as their situation aggravated.[263] We saw the red flags, yet we failed to act. Early warning

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[255] Casper (n 12).

[256] A/RES/60/1 (n 18) 138-140; UNGA, 'Early Warning, Assessment and the Responsibility to Protect' (14 July 2010) UN Doc A/64/864 paras 1-4.

[257] Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes: A Tool for Prevention' (2014) <https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf> accessed 6 August 2021, 4.

[258] ibid 4-5.

[259] A/73/898-S/2019/463 para 28; See also Ewelina Ochab, 'We Are Not Equipped to Prevent Genocide' (*Forbes,* 10 June 2019) <https://www.forbes.com/sites/ewelinaochab/2019/06/10/we-are-not-equipped-to-prevent-genocide/?sh=7caecd9145e8> accessed 6 August 2021.

[260] A/75/863-S/2021/424 (n 19) 49

[261] A/70/999-S/2016/620 (n 18) 28.

[262] Ochab (n 259).

[263]Ewelina Ochab, 'Why Does No One Care About Genocide?' (28 December 2020) <https://www.forbes.com/sites/ewelinaochab/2021/12/28/why-does-no-one-care-about-genocide/?sh=45473822001d> accessed 6 August 2021.

mechanisms for identifying imminent risks under the first two pillars of the R2P are essential for successful prevention,[264] but as admitted by the UNSG in its lessons learned report:

> …the window for effective atrocity prevention closes when situations escalate. In the early stages of a crisis, factors associated with atrocity crime risks are normally identified, but not assessed as constituting a risk of the commission of an atrocity crime. As a result, the nature of the risk is not always sufficiently understood until a relatively late stage, when the range of available responses becomes more limited.[265]

Nevertheless, this work subscribes to Harff's idea that recent human rights catastrophes have been characterised not by a lack of early warnings, but by 'late reports of ongoing atrocities.'[266] In that regard, the international community's renewed interest in ending religious persecution could influence an improved operationalisation of the R2P by strengthening States' collaboration with the UN, particularly through the timely flow of 'reliable and relevant information about the incitement, preparation or perpetration of [attrocity crimes]' on which the work of the Office relies.[267] Considering the relevance of the protection of FoRB in the atrocity-prevention work of the UN, enhanced cooperation in the collection and assessment of information related to early signs of mass atrocities seems a sufficiently feasible possibility. Indeed, as explained by the UNSG in his latest annual report, the Office has prioritised the prevention of incitement to violence through engagement with religious leaders in its range of peaceful responses to assessed risks,[268] given its key role as 'both an early warning indicator and a potential trigger of [atrocity crimes]'.[269]

However, in order to be effective, a more efficient flow of information should be guided by the Framework of Analysis for Atrocity Crimes, a comprehensive tool for prevention developed by the Office's Special Advisers to '[systematise] the collection of information and assess the presence of risk factors associated with atrocity crimes.'[270] While the analysis mechanism of the Framework establishes a common focus and procedure, shared commitment and determination to end mass atrocities are equally essential for the effective identification of early warnings. An improved early warning and response system should,

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[264] A/75/863-S/2021/424 (n 19) 12-15, 19.
[265] A/73/898–S/2019/463 (n 19) 20.
[266] Barbara Harff, 'How to Use Risk Assessment and Early Warning in the Prevention and De-Escalation of Genocide and Other Mass Atrocities' (2009) 1(4) Global Responsibility to Protect 506.
[267] A/63/677 (n 18) 10.
[268] A/75/863-S/2021/424 (n 19) 39.
[269] ibid 40.
[270] ibid 12; Office on Genocide Prevention and the Responsibility to Protect (n 257) iii (Foreword).

therefore, seek to be complemented by the work of UN human rights monitoring mechanisms, the Special Rapporteur on FoRB and the Human Rights Council (HRC).[271]

In particular, the HRC's unique role as an inter-governmental forum for dialogue on human rights issues[272] makes it the ideal setting for enhancing discussions on the issue of religious persecution and mainstreaming atrocity prevention within the UN system.[273] In fact, the UNSG has explained that the protection responsibilities of States under pillar one of the R2P, include providing assistance to the HRC 'in sharpening its focus as a forum for considering ways to encourage States to meet their obligations relating to the responsibility to protect and to monitor (…) their performance in this regard.'[274] Moreover, in its most recent annual report, the UNSG has also called on States '[t]o consider the inclusion of an atrocity prevention dimension in [HRC] mandates, as well as the inclusion of such a dimension in national reports produced under the universal periodic review'.[275]

Signs of Member States' increased engagement with the HRC on the issue of religious persecution are already visible and its role as a hub for discussion on FoRB matters will hopefully be consolidated. Examples of this trend can be identified at the recently concluded 37th session of the HRC's universal periodic review, in which repeated concerns were raised over the situation of persecuted religious minorities in States under scrutiny.[276] However, as admitted by the UNSG, '[i]nformation is a necessary but hardly sufficient condition for an effective collective response'[277] and can in no way provide assurance that the political will to fulfil the pledges of the Outcome Document will exist.

The road ahead must necessarily be marked by increased international cooperation and assistance, so that the effectiveness of the existing protection mechanisms at the universal level can be reinforced and bring the world closer to ending persecution permanently.

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[271] A/63/677 (n 18) 35; Office on Genocide Prevention and the Responsibility to Protect (n 270) 5.

[272] UNGA, 'Resolution 60/251: Human Rights Council' (3 April 2006) UN Doc A/RES/60/251, para 5(b); See also U.S. Department of State (n 210).

[273] Lyal Sunga, 'The Human Rights Council' in Gentian Zyberi (ed) *An Institutional Approach to the Responsibility to Protect* (CUP 2013) 157-162, 175-178; Ekkehard Strauss, 'UN Human Rights Council and High Commissioner for Human Rights' in Alex Bellamy and Tim Dunne (eds) *The Oxford Handbook of the Responsibility to Protect* (OUP 2016).

[274] A/63/677 (n 18) 16.

[275] A/75/863-S/2021/424 (n 19) 49(e); See also OHCHR, 'Maximizing the Use of the Universal Periodic Review at Country Level: Practical Guidance'(2020) <https://www.ohchr.org/Documents/HRBodies/UPR/UPR_Practical_Guidance.pdf > accessed 6 August 2021, 8-12.

[276] UNGA, 'Report of the Human Rights Council on its Thirty-Seventh Session' (2 November 2020) UN Doc A/HRC/37/2, 67-131.

[277] A/63/677 (n 18) Annex, para 5.

Therefore, improved communication should also be connected to broader prevention initiatives and conducted in consultation with faith-based actors, organisations, scholars, and activists.[278] In this particular regard, the Fez Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes, as well as the #Faith4Rights toolkit would gain special relevance in empowering faith actors to contribute to fostering peaceful societies.[279]

5.2.2 Regional and Subregional Arrangements

Regional and subregional arrangements have played a pivotal role in the maintenance of peace and security since the creation of the UN system,[280] sharing much of the burden for conflict prevention internationally.[281] Their relevance in ensuring the pacific settlement of local disputes was acknowledged in Chapter VIII of the UN Charter,[282] which also provided that the UNSC may utilize such regional and subregional arrangements for the enforcement of Chapter VII action.[283] As discussed in section 3.2. of the present work, the Outcome Document reaffirmed the primacy of UNSC authorisation in situations requiring the use of inter-State force and stated that global–regional cooperation under Chapter VIII of the UN Charter will be sought 'as appropriate.'[284]

The broad language of the UN Charter was subsequently complemented by the annual reports of the UNSG, particularly by the 2011 report on the role of regional and subregional arrangements in implementing the R2P.[285] As described by Carment *et al*, '[a]lthough these reports have been careful to emphasize the central responsibility that states have to protect their own populations, a considerable amount of effort has also gone into clarifying the role of regional and subregional organizations.'[286] Indeed, the UNSG has elaborated on the nature of

[278] A/75/863-S/2021/424 (n 19) 32.

[279] Office on Genocide Prevention and the Responsibility to Protect, 'Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes' (2017) <https://www.un.org/en/genocideprevention/documents/Plan_of_Action_Religious_Prevent_Incite.pdf> accessed 6 August 2021; OHCHR, '#Faith4Rights Toolkit (2019) <https://www.ohchr.org/Documents/Press/faith4rights-toolkit.pdf> accessed 6 August 2021.

[280] UNGA, 'The Role of Regional and Subregional Arrangements in implementing the Responsibility to Protect' (28 June 2011) UN Doc A/65/877-S/2011/393 paras 2-9

[281] ibid; David Carment and others, 'The Role of Regional Organizations: A Responsibility Gap?' in Alex Bellamy and Tim Dunne (eds) *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 336-338.

[282] UN Charter art 52; A/65/877-S/2011/393 (n 280) 5.

[283] UN Charter art 53; Carment and others (n 281).

[284] A/RES/60/1 (n 18) 170; Carment and others (n 281) 337.

[285] See A/65/877-S/2011/393 (n 280).

[286] Carment and others (n 281) 337.

the regional and subregional dimension of R2P implementation by explaining the added value that such arrangements may bring to the three-pillar strategy.

With regards to pillar one, it asserted that, through a 'neighbours helping neighbours' approach, regional and subregional arrangements can encourage States to recognise their primary duty to protect their populations from atrocity crimes and to 'identify and address sources of friction within their societies.'[287] The regional and subregional contribution to international assistance and capacity-building under pillar two is perceived as either structural or operational in nature.[288] Regional and subregional arrangements can help strengthen the structural-prevention component of the second pillar, which, closely linked to the first pillar, encompasses the 'development of norms, standards and institutions that promote tolerance, transparency, accountability, and the constructive management of diversity', as well as 'preparedness and planning (…) in reducing the ill effects of both man-made and natural disasters.' Operational prevention, on the other hand, is closely linked to pillar three and seeks to strike a balance between the maintenance of peace and States' duty to prevent mass atrocity crimes through early warning and timely action.[289] Similarly, the global-regional dialogue in terms of pillar three is reflected on interactive analytical processes, information exchange, political pressure and the use of other, more 'dramatic' coercive policy tools, such as targeted sanctions and military intervention.[290]

In terms of the scope of the present work, the UNSG's annual reports also help identify a number of areas in which regional and subregional concerns for FoRB could contribute to a more effective operationalisation of R2P. As argued by both the ICISS and the UNSG,[291] contextual proximity and affinity can be essential in ensuring region-wide cooperation, since States are often more prone to listen to or allow assistance from their neighbours.[292] Concerning pillar one and the structural component of pillar two, regional and subregional actors could serve as guardians of religious groups within their circumscriptions by bringing international attention to the issue of persecution, developing specialised investigative commissions and monitoring bodies, and through cross-regional comparative exercises on shared experiences with other regional or subregional actors.[293]

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[287] A/65/877-S/2011/393 (n 280) 10-20.
[288] ibid 21; Carment and others (n 281) 337.
[289] A/72/884-S/2018/525 (n 65) 21; Zyberi (n 13) 441; Carment and others (n 281) 337.
[290] A/72/884-S/2018/525 (n 65) 30-37.
[291] ICISS Report (n 35) 6.31-6.32; A/72/884-S/2018/525 (n 65) 6-8.
[292] A/72/884-S/2018/525 (n 65) 17; A/63/677 (n 18) 22; See also Pattison (n 106) 236-237.
[293] A/72/884-S/2018/525 (n 65) 16-17

Moreover, regional and subregional organisations could also serve as 'political and operational bridges between global standards and local and national action'[294] by using the wide range of policy tools available under the UN Charter to encourage States' accession to relevant human rights conventions and compliance with their R2P obligations.[295] Likewise, in line with the accountability paradigm discussed earlier, regional tribunals may also investigate and hold States responsible for atrocity crimes against religious groups when domestic remedies cannot be properly exhausted, and contribute with normative developments in the area of FoRB. This gains particular relevance in regions like Latin America, where, despite the 'cardinal contributions' made by the Inter-American System of Human Rights to atrocity prevention,[296] religious persecution continues to be on the rise in some of its Member States[297] and FoRB has rarely been discussed by its two main organs.

Finally, regarding the operational element of pillar two and pillar three, regional and subregional arrangements may also play a crucial role in ensuring the timely protection of religious groups when situations demand the use of coercive policy tools. Such measures include collective political pressure under the inducement paradigm, as well as the regimes of non-forcible countermeasures and military intervention under the compulsion paradigm.[298] In discussing the former, the UNSG has emphasised the relevance of exploring how diplomatic sanctions from regional and subregional actors could be aligned to the prevention of atrocity crimes, just like other types of abuses have warranted membership and representational exclusion from international organisations.[299] The present study would like to take a step further and suggest the inclusion of criteria related to FoRB as valid grounds for diplomatic shunning at the regional and subregional levels.

Regarding recourse to compulsory means of implementation, the renewed interest in FoRB could inspire regional and subregional actors to engage more actively with the UN in assessing the risks and implications of coercive action. In this particular regard, as expressed

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[294] ibid 11.

[295] A/72/884-S/2018/525 (n 65) 17.

[296] ibid 20; Carment and others (n 281) 343-344; OH Sobers, 'The Inter-American System of Human Rights' in Gentian Zyberi (ed), *An Institutional Approach to the Responsibility to Protect* (CUP 2013).

[297] Observatory of Religious Freedom in Latin America, 'Biannual Report' (2020) <https://platformforsocialtransformation.org/download/religiousfreedom/Biannual-Report-July-December-2020.pdf> accessed 6 August 2021; See also, Open Doors (n 7), where Colombia and Mexico rank 30 and 37 in the list of top 50 countries where it is most difficult to be a Christian.

[298] See subsections 2.2 and 3.2 above.

[299] A/72/884-S/2018/525 (n 65) 328, discussing the exclusion of Libyan Arab Jamahiriya from the League of Arab States and the HRC, as well as the stance of the African Union and subregional organisations to suspend the membership of countries in which military coups have overthrown established Governments.

by Pattison, it is essential to strengthen African organisations such as the African Union and the Economic Community of West African States, 'given the large number of humanitarian crises on this continent and the general reluctance of other agents to intervene in what are regarded as African quagmires.'[300]

5.2.3 International Affinity and Coalitions of the Willing

This work has sought to demonstrate that the mainstreaming of FoRB in foreign policies worldwide has provided the necessary political cohesion for aligning national self-interests towards a common aim, namely, that of protecting religious groups from atrocity crimes. This collective interest, as seen in section 4, is grounded on a growing international affinity for persecuted religious groups, which Midlarsky defines as the existence of 'any affine population or government (ethnoreligiously similar or ideologically sympathetic) with the power and influence to actively intervene or provoke intervention on behalf of the victims.'[301] Such affinity, if channelled properly, could become a vehicle for *en bloc* cooperation at the level of inter-State coalitions and favour a more efficient implementation of the three-pillar strategy of the R2P.[302]

The recent creation of the IRFA has demonstrated that the protection of FoRB is instrumental in mobilising States towards the cause of ending mass atrocities and provides an unprecedented example of the manner in which consensus can positively influence the operationalisation of the R2P. Regarding the first two pillars, the shared concern for persecuted religious groups and the advancement of FoRB set a parameter against which the conduct of members of inter-State coalitions can be assessed. Likewise, it offers a common aim based on which members of coalitions can align their diplomatic and assistance efforts, seek to expand their membership to broaden consensus, and bring attention to the issue at international fora. Indeed, as expressed by the UNSG, '[w]hen these messages are reinforced by parallel and consistent Member State diplomacy, they will be more persuasive. Dialogue often achieves more than grandstanding.'[303]

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[300] Pattison (n 106) 237; Tom Kabau, 'The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions' (2012) 4(1) Goettingen Journal of International Law 49, 88-92.

[301] Manus Midlarsky, 'International Affinity and the Prevention of Genocide: Implications for R2P' in Stephen McLoughlin, *Mass Atrocities, Risk and Resilience* (Brill | Nijhoff 2015) 91.

[302] A/70/999–S/2016/620 (n 18) 31-37.

[303] A/63/677 (n 18) 30.

Valuable insights into these possibilities can be drawn from the IRFA's approach to multilateral engagement with FoRB. Indeed, the IRFA has asserted the necessity of collaborating and complementing existing work on FoRB 'within the [UN] and other competent multilateral and regional organizations (…) and others that collaboratively develop responses to these challenges.'[304] These efforts to prioritise FoRB 'across all areas of international engagement'[305] are, likewise, clearly visible in the active participation of Alliance's members at the annual Ministerial to Advance Religious Freedom[306] and their joint contribution to the 45th session of the HRC.[307] At the latter, particularly, the IRFA called on HRC members to join their efforts and reaffirmed its commitment to complement 'existing work of the UN and other competent international organizations', one of the preconditions identified in section 5.1 for the viability of any attempt at improving the operationalisation of the R2P.

Concerning the third pillar of the R2P, the prioritisation of FoRB at the level of inter-State coalitions can influence the design and implementation of sanctions packages to deter religious persecution in States that fail to fulfil their primary protection obligations.[308] Recent instances of this practice include the coordinated sanctions imposed by the U.K., E.U., U.S. and Canada against several Chinese officials for the human rights abuses committed against the Uyghur and other religious minorities in the Xinjiang region.[309] Likewise, when authorised by the UNSC and the situation so requires, States moved by these ideals could also contribute more readily with the military and material means for a timely intervention.[310] Inspiration could be drawn from the IRFA's stated vision for advancing FoRB, which, although not referencing the R2P specifically, expressed the willingness of its members to

[304] U.S. Department of State, 'A Shared Vision for Advancing Freedom of Religion or Belief for All: Joint Statement from the Ministers' Forum of the International Religious Freedom or Belief Alliance' (17 November 2020) <https://www.state.gov/a-shared-vision-for-advancing-freedom-of-religion-or-belief-for-all/> accessed 6 August 2021.
[305] ibid.
[306] USCIRF, '2021 Annual Report' <https://www.uscirf.gov/annual-reports> accessed 6 August 2021, 7
[307] IRFA, 'Joint Statement led by Brazil on the International Religious Freedom or Belief Alliance' (22 September 2020).
[308] A/72/884-S/2018/525 (n 65) 36.
[309] Foreign, Commonwealth & Development Office (n 241); European Council, 'Decision (CFSP) 2021/481 Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses' (22 March 2021) Official Journal of the European Union L99I; U.S. Department of the Treasury, 'Treasury Sanctions Chinese Government Officials in Connection with Serious Human Rights Abuse in Xinjiang' (22 March 2021) Press Release <https://home.treasury.gov/news/press-releases/jy0070> accessed 5 June 2021; Government of Canada, 'Special Economic Measures (People's Republic of China)' (22 March 2021) Regulations SOR/2021-49.
[310] A/70/999–S/2016/620 (n 18) 45-52.

respond to atrocity crimes targeting religious minorities by taking 'all the appropriate diplomatic, humanitarian, political and other available steps.'[311]

The scope limitations of the present work, however, do not allow for an assessment of the impact that a more expedient response system under the compulsion paradigm may have in the elimination of the root causes of religious persecution. As made abundantly clear by the numerous military interventions of the past decades, efficacy does not always translate into effectiveness. In any event, it remains clear that broad consensus on the necessity to protect religious minorities already exists, but any intended action must necessarily be accompanied by context-sensitive considerations and determined on a case-by-case basis.

6 Conclusion

Religious persecution is a widespread phenomenon that has accompanied humanity throughout its history, although with varying levels of severity and scope. Violence in the name of religion or directed against religious minorities seems to have been, in one way or another, a trait of every civilization in the world. After humanity witnessed the atrocities systematically perpetrated against the Jewish population of Europe during World War II, it came together to create the UN system of human rights protection, serving as a platform for the prevention of grave human rights breaches and to solve inter-State disputes. Under such framework, States have the primary responsibility to protect their population against atrocity crimes. When they fail to do so, however, the international community has an obligation to act against such abuses. This international duty, enshrined in Chapter VII of the UN Charter and as the third pillar of the R2P doctrine, requires States to work through peaceful means primarily and to only make use of military force as a last resource measure.

Nevertheless, as history has also shown, persecution can escalate rapidly, and peaceful means may prove ineffective in situations where urgent action is required. Given that the pillar three action is conditional upon the authorisation of the UNSC, political considerations and national self-interests are usually at the forefront, resulting in action being taken once it has reached a certain threshold, if taken at all. In the face of these limitations, discussions on possible ways to bypass UNSC authorisation on moral grounds have proliferated since the creation of the UN Charter-based system but have yielded very limited results. While a regime of non-forcible third-party countermeasures does exist alongside Chapter VI peaceful

[311] U.S. Department of State (n 304).

mechanisms, forceful countermeasures in the form of unilateral intervention are widely perceived as being unlawful.

Section 4 of the present work has argued that the international community's renewed (and unprecedentedly coordinated) interest in the global protection of FoRB may be a sufficiently strong consideration to improve the operationalisation of the R2P. Imperfect as it is, the Charter-based system of protection is supported by the vast majority of countries and is the result of balancing States' fear of compromising their sovereignty with the need to intervene in their territory in cases of such gravity that concern the international community. Proposals for unliteral enforcement mechanisms are simply unrealistic and, even if implemented, would imply eroding the purposes of the current system. Thus, section 5 has proposed three possible levels at which change could be produced if driven by the motivation of protecting religious minorities, namely, the universal, regional, and inter-State levels.

Such proposals cannot be divorced from the political interests that dominate international relations, however, and must seek to steer them towards a common goal. Likewise, preventing atrocity crimes is a multilayer endeavour that requires active collaboration among political actors and civil society, and that, as a general rule, is better served by recourse to peaceful mechanisms in order to avoid the escalation of violence. In that sense, the present work has not set out to describe a one-size-fits-all formula for preventing religious persecution. Rather, it has proposed several possibilities in which the renewed international interest in FoRB could help overcome the current institutional challenges to the efficient operationalisation of the R2P, reserving any assessment on their effectiveness for subsequent studies.

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