

Counteractive responses to religious persecution

Selective contextualised overview

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Abstract

Advocating on behalf of people who are persecuted on the basis of their religious identities can require a wide range of interventions, including judicial, political or other measures. An appropriate response intended to counteract incidents of religious persecution is essential. Viewed holistically, persecution can comprise a spectrum of concurrent contextual perceptions, which may result in a variety of responses. A fitting response to religious persecution depends on situational awareness; therefore, responses should not be mindlessly reproduced and applied to other contexts. Decisive but sensitive responses can counteract the detrimental impact of religious persecution, especially in relation to religious freedom, and show solidarity with those who have been persecuted.

Keywords religious persecution, counteractive responses, freedom of religion or belief, human rights advocacy, discrimination.

1. Introduction

Even though “religious freedom protections are well established at the international level,”² the global prevalence of religious persecution constitutes a contemporary affront to human dignity, freedom and equality. Manifestations of intolerance, discrimination and hostility against various communities because of their religious beliefs still prevail in many areas of the world,³ limiting people’s right to freely practise their beliefs.⁴ Accordingly, appropriate interventions are required to counteract religious persecution.

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² Knox H. Thames, Chris Seiple, and Amy Rowe, *International Religious Freedom Advocacy: A Guide to Organizations, Law and NGOs* (Waco, TX: Baylor University Press, 2009), 1.

³ UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UNGA Res 36/55, 73rd plenary meeting, 25 November 1981.

⁴ UN Report, *United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001), UN DocA/CONF.189/12, para 59.

Inconveniently, the global phenomena of religious persecution are based on a diversity of contextual understandings, conceptualizations and applications. On one hand, religious persecution may be considered from an international legal perspective, including refugee law, international criminal law and international human rights law. Each of these legal dimensions of 'persecution' has specific contextual understandings and purposes, along with a relatively high threshold of severity of harm. On the other hand, the phenomenon of persecution also includes an existential dimension, which entails sociological, philosophical, psychological and theological perspectives. To complicate matters further, religious persecution may be triggered by a multiplicity of root causes or motives and may be instigated by state or non-state actors, or by a combination of both.⁵ As a result, a holistic view of religious persecution requires a multidimensional understanding.

This scattered spectrum of persecution phenomena may result in a variety of responses to persecution. Determining an appropriate response in a given situation requires 'human rights defenders' and those engaged in advocating on behalf of the religiously persecuted⁶ to possess a working knowledge of the spectrum of possible responses. In this article, I provide a non-exhaustive overview of common responses to persecution by various stakeholders,⁷ including religious communities, governments, humanitarian organizations, religious freedom advocates, human rights mechanisms and international criminal prosecutions.

2. The notion of responses to religious persecution

An appropriate response to incidents of religious persecution is essential.⁸ However, prevention is better than cure. Thus, although adequate responses to persecution may remedy a certain situation; addressing the origins of such discriminatory mindsets is the only way to prevent recurrences of the problem. As the United Nations General Assembly has stated:

⁵ For a discussion of the motivational triggers of religious persecution, see Nel, "International Criminal Accountability for Religious Persecution", 291-309.

⁶ In the context of this study, the term 'religiously' is used in the sense of religiosity, i.e. 'pertaining to a religion' or 'related to religion', and is used so as not to disturb the syntax in certain instances. 'Religiously' is not used in relation to its secondary meaning, signifying a 'devotion' to a cause, acting 'meticulously' or 'regularly.'

⁷ Other perspectives, such as contributions by public and private media, the role of neutral and pluralistic school education, and the appropriate response from civil society organisations, will not be considered in this paper.

⁸ Heiner Bielefeldt, *Freedom of Religion or Belief: Thematic Reports of the UN Special Rapporteur 2010-2016*, 2nd ed. (Bonn: International Institute for Religious Freedom, 2017), 209.

Persecutions and such discrimination constitute a total disregard of the most elementary humanitarian principles and ... give rise to serious and complex social problems requiring urgent remedies, which remedies will, needless to say, be entirely without effect unless the evil is attacked at its root.⁹

Manifestations of religious hatred, discrimination and religious persecution are not natural phenomena but are caused by human action and/or omission.¹⁰ Consequently, humanity itself has the ability, and the shared responsibility, to address such manifestations. The full realisation of basic human rights requires developing effective preventive measures at the national, regional and global levels to deter such manifestations. States and other stakeholders, including political, religious and community leaders, may be the pivot on which the successful implementation of policies and counter-narratives aimed at combatting religious intolerance hinges.¹¹ As a starting point, States must (1) respect all human beings as holders of profound, identity-shaping convictions; (2) commit to an ideology of respectful non-identification in issues of religion; and (3) operate as trustworthy guarantors of religious freedom for everyone.¹²

Even so, an appropriate response requires effective cooperation by governments and their representatives, religious communities, civil society organisations, the media and other relevant stakeholders and role players.¹³ Coping strategies must present a fitting response through diplomatic, judicial and even confrontational measures. However, even in extreme situations affecting national security, measures that restrict religious freedom must comply with all the criteria laid down in respective international human-rights instruments.¹⁴

A suitable entry point for discussing adequate responses to religious intolerance and persecution is the *Rabat Plan of Action*.¹⁵ This programme was the culmination of a series of regional expert workshops concerning the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to real acts of dis-

⁹ UN General Assembly, General Committee: Resolution on Persecution and Discrimination: Request for the Inclusion of an Additional item in the Agenda from the Delegation for Egypt, A/BUR/51, 11 November 1946.

¹⁰ Bielefeldt, Freedom of Religion or Belief: Thematic Reports, 214.

¹¹ Bielefeldt, Freedom of Religion or Belief: Thematic Reports, 215.

¹² Bielefeldt, Freedom of Religion or Belief: Thematic Reports, 215.

¹³ Bielefeldt, Freedom of Religion or Belief: Thematic Reports, 275.

¹⁴ Most notably, Article 18 of the United Nations International Covenant on Civil and Political Rights, 16 December 1966.

¹⁵ Office of the UN High Commissioner for Human Rights, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, adopted 5 October 2012 in Rabat, Morocco.

crimination, hostility or violence.¹⁶ The main aim was to conduct a comprehensive assessment of the implementation of effective strategic responses to incitement of hatred, both non-legal and legal in nature. Consequently, the intersection between freedom of expression and hate speech, especially in relation to religious issues, was a core concern for the expert panel.¹⁷ Although a comprehensive discussion of the outcomes of the *Rabat Plan of Action* falls outside the scope of this article, some of its conclusions and recommendations in the areas of legislation, judicial infrastructure and policy may facilitate more effective and appropriate responses to religious discrimination and persecution. Therefore, some of these relevant responses have been incorporated into the following discussion.

3. Response from the perspective of the religious community

From an anthropological viewpoint, perspectives on and consequent responses to persecution may differ inter-religiously and intra-religiously, as well as in terms of temporal and territorial suitability. The various possible responses to persecution are too broad to consider fully in depth here. Instead, the religious communities' response to religious discrimination and persecution will be considered from internal and external perspectives. The internal perspective will consider the appropriate reaction by a religious community in whose name hostility, violence and persecution occur. The external perspective refers to the response by a persecuted religious community.

3.1 Internal response to persecution in the name of religion

An appropriate internal or introspective response by those religious groups in whose name religious persecution is being committed is very important. Arguably, the most important function of responding to persecution in this context is to distance the religion itself from such manifestations.¹⁸ As Bielefeldt observes:

Perpetrators of violence typically represent comparatively small segments of the various religious communities to which they belong, while the large majority of believers are usually appalled to see violence perpetrated in the name of their

¹⁶ Rabat Plan of Action, paras 1 and 2.

¹⁷ Rabat Plan of Action, para 2.

¹⁸ Other appropriate responses, depending on the gravity of such situations, could include immediate and public condemnation combined with, amongst other actions, allowing international and trans-boundary cooperation and investigation, considering the establishment of an ad hoc court or tribunals, referring the matter to the International Criminal Court so as to bring perpetrators to justice, and requesting or allowing humanitarian intervention by the UN Security Council or responsive States where such situations have gone beyond the control of the de facto authority.

religion. It is all the more important for the majorities and their leaders, who do not endorse the violence, to speak out against it.¹⁹

Religious distancing can occur only when the associated religious group “visibly and audibly reject[s] advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence [which] can have very practical effects in discouraging such advocacy, while at the same time showing solidarity and support for their targets.”²⁰ In this regard, religiously motivated extremism is a prime example.

Although religious extremism may be based on radical or fundamentalist interpretations of certain religious texts and teachings, religious persecution and other acts of terror cannot and should not be considered representative of a religious community as a whole.²¹ Making such a distinction prevents inter-religious or intra-religious retaliation by separating the human-rights abuses from their claimed religious affiliation. When we declare that the actions of a religious extremist group do not speak on behalf of a religion,²² we are distinguishing between the extreme or fundamentalist interpretation of the terror group and the nature of the religion in whose name they justify their actions. In the hearts and minds of those affected, the ideology of such a religious extremist group becomes impulsively associated with the religious foundation of the associated religion, resulting in negative stereotyping, hatred, hostility and reprisal, especially in areas of the world where the associated religion constitutes a minority. In any such instance, religious and community leaders must behave in ethically conscious and socially responsible ways, including (1) refraining from using messages of intolerance or expressions which may incite violence, hostility or discrimination;²³ (2) strongly condemning such hatred and violence; and (3) distancing their beliefs and religious ideologies from such atrocities.²⁴

¹⁹ Bielefeldt, *Freedom of Religion or Belief: Thematic Reports*, 267.

²⁰ Bielefeldt, *Freedom of Religion or Belief: Thematic Reports*, 213.

²¹ UN Security Council, *Security Council Resolution 2170 (on threats to international peace and security caused by terrorist acts by Al-Qaida)*, 15 August 2014. However, some maintain that we cannot rule out the possibility that violence and hatred are core choices innate to the origins and development of some belief systems. They therefore reject as idealistic and wishful thinking a neat differentiation between extremist ideology and the supposed ‘real nature’ of a religion in such cases. Nonetheless, this consideration does not detract from the need to prevent escalation and stereotyping.

²² However, it is not a law of nature that the ‘silent majority’ always opposes the persecutory acts of extremists. They could also be silently or publicly applauding the acts of extremists while they themselves live peaceful lives. They may even provide financial support.

²³ Rabat Plan of Action, para 24.

²⁴ Rabat Plan of Action, paras 23 and 24.

Furthermore, the teaching of radical or fundamentalist ideology by religious leaders may hamper dialogue between and within religions, thereby resulting in radical or extremist ideological interpretations. Unfortunately, radical and fundamentalist ideologies in the name of religion will continue as long as religious clerics and leaders publicly indoctrinate a radical, literalist interpretation of an associated religion. For example, in Muslim countries such as Saudi Arabia, Qatar and Turkey, radical teachings associated with Islam result in extremist incitement to intolerance and hostility against dissenting religious groups.²⁵ In such a situation, it is the moral obligation of the majority not to remain silent.

3.2 External response to persecution by victimised religious groups

From a broader sociological perspective, the experience of religious groups may differ greatly based on the nature and severity of religious persecution. Religious groups subjected to severe religious persecution experience a relentless assault on their human dignity, equality and basic freedoms.²⁶ Such persecuted communities may remain where they are, living in fear and seeking to endure the oppression and suffering, or they may flee their homes as refugees. In contrast, religious groups subjected to less significant forms of persecution²⁷ may have more response options available to them. Nevertheless, they too suffer religious intolerance, threat of harm, and fear.

Religious groups will differ in their response to discrimination and persecution depending on their theological or ideological doctrines. In this article, for the sake of brevity, only Christian responses to persecution will be considered. This selection should not be construed as a parochial choice or favouritism. Nearly one-third of the world's population are Christians,²⁸ making this the largest and most internationally widespread religious movement. Moreover, available information indicates that Christians have consistently endured the most religiously motivated harassment of any religious group.²⁹ In other words, this focus is justified on the supposition

²⁵ Patrick Sookhdeo, "Editorial: The Two Faces of Islam" (2014), <https://barnabasfund.org/news/Editorial-The-Two-Faces-of-Islam>.

²⁶ UN Office of the High Commissioner for Human Rights, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (IICISAR). Rule of Terror: Living under ISIS in Syria, 14 November 2014, para 2.

²⁷ The use of the term "less significant forms of persecution" should not be construed so as to diminish the harm associated with forms of persecution that may not constitute deprivations of human rights. I do not intend to depreciate the damaging physical and psychological effects such acts may have on individuals or communities.

²⁸ See Todd M. Johnson and Gina A. Zurlo (eds.), *World Christian Database* (Leiden and Boston: Brill, 2018).

²⁹ This claim is based on the number of countries in which each religious group is affected by restrictions of religious freedom and by social hostilities. See Pew Research Center, *Global Uptick in Government*

that “Christians suffer the denial of religious freedom and heavy discrimination more than the members of any other religion.”³⁰ Consequently, some brief observations about Christian responses to persecution may be useful:³¹

- The persecuted Christian community’s response to persecution is based on its theology of suffering, church and culture, which is cultivated by an expectation of persecution and a determination to rejoice in suffering. Specific responses typically include intercession, prayer and solidarity.
- Christian communities most commonly adopt survival strategies, such as going underground, fleeing or displaying respect for repressive regimes in their outward behaviour. These strategies are the least proactive form of opposition to persecution, but they often involve creativity, determination and courage.
- Strategies of association with sympathisers are the second most common response. In this regard, Christian communities seek to strengthen their resilience and secure their religious freedom by developing ties with other actors, including other Christian denominations or communities, non-Christian religions, and secular figures.
- Strategies of confrontation are the least common response. If used at all, they are usually non-violent and, with very few exceptions, do not involve acts of extremism or terrorism. Rather, confrontational strategies bear witness to the faith, expose and publicise injustice with the hope of ending it, mobilise others to oppose injustice, and engage positively with the aim of replacing oppression with religious pluralism. In relatively open political systems, confrontation may take the form of legal intervention, even if the rule of law has failed. Ronald Boyd-MacMillan suggests three positive effects of taking the legal route: (1) providing critical testimony for the exertion of political pressure from outside the country (although political pressure may also be achieved through other advocacy efforts); (2) the “embarrassment effect” of making known a State’s lack of international commitment to the rule of law and human rights, rendering that State vulnerable to foreign criticism and the possibility of other political or economic consequences; and (3) an empowering effect helping the persecuted to stand up for themselves. Other forms of confrontation include

Restrictions on Religion in 2016 (2018), <https://www.pewforum.org/2018/06/21/global-uptick-in-government-restrictions-on-religion-in-2016/>.

³⁰ Daniel Philpott and Timothy S. Shah (eds.), *Under Caesar’s Sword: How Christians Respond to Persecution*, Cambridge Studies in Law and Christianity (Cambridge: Cambridge University Press, 2018), 4. See also Pew Research Center, *Trends in Global Restrictions on Religion*, (2016), 20, <https://www.pewforum.org/2016/06/23/trends-in-global-restrictions-on-religion/>.

³¹ University of Notre Dame, *In Response to Persecution: Findings of the Under Caesar’s Sword Project on Global Christian Communities*, 20 April 2017, <http://ucs.nd.edu/report/>, 5; an in-depth explanation of the findings is on pages 34–44. See also Ronald Boyd-MacMillan, *Faith That Endures. The Essential Guide to the Persecuted Church* (Lancaster, UK: Sovereign World, 2008), 254–83.

resistance by or outside assistance to the persecuted community. These actions may involve methods that contravene legal norms and rules, such as smuggling Bibles to oppressed or 'underground' churches.

- Strategies adopted by persecuted Christian communities may also exhibit intra-denominational differences. Evangelical and Pentecostal Christians are more likely to be persecuted. They are thus more likely to engage in strategies of survival or, on rare occasions, confrontation and less likely to engage in strategies of association. On the other hand, mainline Protestants, Catholics, Orthodox Christians, or other Christians associated with ancient churches are less likely to be persecuted. In response to persecution, they are more likely to respond through strategies of association.
- The intensity or severity of persecution and the level of commitment by adherents only partly explains Christians' responses, implying that the level and type of persecution that Christian communities face do shape, enable and constrain their responses.

Although some of these response strategies have produced tangible results worthy of emulation, the effectiveness of each strategy is related to temporal, geographic and other context-specific factors. Often, the most effective approach takes into careful consideration the particular circumstances, the interests of the target society, and the persecuted community's theology regarding persecution.

4. Governmental responses in line with human-rights obligations

Governmental responses to religious persecution can include a wide spectrum of reactions through different branches of authority (judicial, executive and administrative) and exercised at various levels, including the international level. These possible responses depend on a seemingly endless set of factors, ranging from politics and policy to law and religion. In terms of the focus of this article, a governmental response should be in line with human-rights obligations and responsibilities under national, regional and international law. In this regard, international human-rights law has developed a comprehensive legal system that recognizes, protects and promotes fundamental human rights, especially religious freedom.

Religious freedom forms a core part of human rights and was amongst the first such rights to be recognized and codified as a fundamental human freedom.³² Religious freedom is part of customary international law,³³ implying that such principles

³² Christian Walter, "Religion or Belief, Freedom of, International Protection," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Heidelberg: Oxford University Press, 2009), 864.

³³ UN Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declara-

and values are binding upon all States, regardless of any formal recognition.³⁴ The significance of religious freedom means that its recognition and protection are vital at domestic, regional and global levels.

[F]reedom of thought, conscience and religion is one of the foundations of a 'democratic society' ... [and as such is] one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.³⁵

Religious freedom is an inherent right of all persons, and it places upon States certain responsibilities regarding its protection. Generally, States have a duty to take effective measures to protect and promote religious freedom, equality and tolerance, and to prevent and eliminate discrimination on the grounds of religion or belief.³⁶ The scope of protective and legal obligations of States in this regard is extensive.³⁷ Based on the core international documents regarding religious freedom,³⁸ the following fundamental principles are applicable:³⁹

1. To respect or recognise the normative status of fundamental human rights of all people, including religious freedom, which applies similarly to States and non-state actors as potential perpetrators;
2. To protect, on an equal basis, all its population, whether nationals or not, against infringements of human rights, including religious freedom;

tions under article 41 of the Covenant, 12 May 2004, HRI/GEN/1/Rev.7.

³⁴ Magdalena Sepúlveda et al., *Human Rights Reference Book* (Costa Rica: University for Peace Publisher, 2004), 23.

³⁵ Council of Europe, *Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (June 2007), 12.

³⁶ See UN General Assembly, Resolution 103(I) *Persecution and Discrimination*, 19 November 1946, Articles 2 and 7 of the Universal Declaration of Human Rights and Articles 2 and 3 of the International Covenant on Civil and Political Rights.

³⁷ For a more comprehensive analysis of a State's obligations in relation to the right to freedom of religion or belief, see Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford: Oxford University Press, 2016), 33-38, and also Rabat Plan of Action, para 8 regarding recommendations to States.

³⁸ The core international documents regarding religious freedom include Article 18 of the Universal Declaration of Human Rights (UDHR); Article 18 of the International Covenant on Civil and Political Rights of 1966, written by the UN Human Rights Committee, General Comment No. 22: *The Right to Freedom of Thought, Conscience, and Religion in Terms of Article 18 of the ICCPR*; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 (Religious Discrimination Declaration); and the various reports of the UN Special Rapporteur on freedom of religion or belief.

³⁹ See also Bielefeldt et al., *Freedom of Religion or Belief: An International Law Commentary*, 33.

3. To enact constitutional and legislative reforms that bring domestic law in line with international law and, if applicable, regional human-rights obligations;
4. Obligations on all spheres of government and at different levels to take all appropriate measures in compliance with their international obligations and with due regard to their respective legal systems. These include, amongst others:
 - Refraining from discriminatory practices or policies, whether they amount to formally prescribed (*de jure*) or actual (*de facto*) discrimination;⁴⁰
 - Committing to a deliberate ideology of impartiality or 'respectful non-identification' in relation to all religions or beliefs, in order to be equally fair, open and inclusive to all people living on the State's territory;⁴¹
 - Implementing a consistent policy that prohibits and condemns any discrimination on the grounds of religion or belief as a serious violation of a fundamental human right;
 - Preventing and eliminating discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms, which again applies similarly to non-state actors as potential perpetrators;
 - Promoting and encouraging, through legislative, judicial, administrative, educational and other means, understanding, tolerance and respect in all matters relating to religious freedom in order to cultivate a general climate of societal openness and acceptance in which all citizens can actually enjoy their human rights;
 - Condemning any advocacy of religious intolerance or hatred that constitutes incitement to discrimination, hostility or violence;
 - Refraining from inciting violent stereotypes, discrimination or persecution, both nationally and in other countries;
 - Guaranteeing equality and effective protection under the law and in legal proceedings, including effective remedies for victims of discrimination at national, regional and international levels; and
 - Exercising its criminal jurisdiction over those responsible for serious forms of religious discrimination and persecution and, if such infringements amount to international crimes, applying the principle of *aut dedere aut judicare* (duty to extradite or prosecute) with regard to such persons.⁴²

⁴⁰ De jure discrimination refers to discrimination enshrined in laws, whereas de facto discrimination results from the effect of laws, policies and practices; see Bielefeldt et al., *Freedom of Religion or Belief: An International Law Commentary*, 316.

⁴¹ Heiner Bielefeldt, "Misperceptions of Freedom of Religion or Belief," *Human Rights Quarterly* 35(1): 53.

⁴² See M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare. The Duty to Extradite or Prosecute*.

In the context of religious persecution, States are responsible for ensuring that a culture of impunity does not exist within their territory. Participants who commit or who are complicit in acts of violence and persecution on the basis of religion must be brought to justice.⁴³ In this regard, States should consider enacting a penal code of international crimes, including crimes against humanity of religious persecution, into national law.⁴⁴

5. International humanitarian responses

A decline in the territorial autonomy of States, along with the increased awareness that mass atrocities and gross deprivations of human rights do not fall exclusively within the internal affairs of States, constitutes a significant and progressive development in international human-rights politics and law.⁴⁵ Consequently, States' respect for, protection of, and promotion of human rights have become matters of international concern.⁴⁶ Furthermore, following the transition from a State-centric to an individualistic approach, the recognition, protection and enforcement of human rights filtered into international criminal law.⁴⁷ As a result, the international community has created a number of appropriate responses directly aimed at stopping severe human-rights violations and providing early warning of developing human-rights concerns, including violations and abuses of religious freedom.⁴⁸ These responses, which will be referred to as humanitarian responses to persecution, relate to actions or reactions aimed at saving human lives and mitigating human suffering. They encompass, amongst others, assistance to persecuted communities through humanitarian aid; asylum and refugee protection; and traditional international humanitarian law responses.⁴⁹

Hereafter, two specific humanitarian responses are discussed: human-rights protection mechanisms and individual criminal responsibility for persecutors who have committed gross deprivations of human rights.

cute in International Law (Leiden: Martinus Nijhoff, 1995).

5.1 Religious freedom advocacy and human-rights protection mechanisms

In view of the fundamental influence that religious freedom has in shaping a person's sense of belonging, identity, conception of life, and engagement with society, deprivations or impermissible restrictions of religious freedom transcend regular categories of harm.⁵⁰ Religious pluralism and religious freedom depend continuously on advocates and human-rights defenders to ensure their normative development and protection.⁵¹ Therefore, advocacy for those persecuted on the basis of their religious identity is best approached with an eye towards protecting human rights. Such religious freedom advocacy efforts may take many forms and avenues, whether judicial, political or administrative. Unfortunately, a detailed discussion in this regard falls beyond the scope of this article, so only a few relevant observations are considered.⁵²

Human-rights defenders come in various forms, and they serve as "indispensable counterparts to States in advancing freedom of religion or belief."⁵³ The term "human-rights defenders" generally refers to those persons who, individually or with others, act to promote or protect human rights through various efforts.⁵⁴ In relation hereto, some human-rights defenders advocate specifically for persecuted religious groups or simply for religious freedom generally.⁵⁵

In a general sense, religious freedom advocacy refers to the efforts of all individuals, institutions and even governments, operating at the international, regional, national and local levels, that tirelessly confront oppression, discrimination and persecution on behalf of those who are persecuted because of their religious identities.⁵⁶

In a more formal sense,⁵⁷ religious freedom advocacy implies taking certain official measures to act as a catalyst for change.⁵⁸ Such measures may include, amongst others, making use of legal protections and remedies in the domestic arena; petitioning and leveraging those who wield political influence regarding policy matters, whether they are governmental authorities, political leaders or international officials; collaborating with non-governmental organisations (NGOs), international institutions and other concerned groups committed to religious freedom;⁵⁹ utilising individual human-rights complaint measures at a regional and/or international level; and researching and reporting on compliance to monitoring bodies.⁶⁰ It is imperative that when advocating for policies that impact on religious freedom, such proposals must strive for universal religious pluralism, and they must appropriately prevent and react to incidents of religious discrimination and persecution.⁶¹

In terms of regional and international human-rights instruments, complaint recourse mechanisms offer judicial recourse through international courts or quasi-

⁶¹ Other aims include building public trust, imparting an atmosphere of inclusiveness, and furthering public discourse, freedom of speech, debate and critical thought on issues of religion or belief.

judicial review systems, in pursuit of justice for those deprived of rights.⁶² As a general course of action, a matter should be escalated to a regional or international level only if the situation is life-threatening, if the right to judicial remedies in the national legal system has been exhausted, or if domestic legal recourse has proven to be unsuitable in providing a proper response.⁶³ Similarly, international control mechanisms must be viewed as a last resort, should regional systems prove inadequate or if the country of concern fails in its legal duties.

At the international and regional levels, various international human-rights mechanisms address issues related to freedom of religion or belief.⁶⁴ Under the UN system, there are three main ways to bring complaints about violations of human-rights treaties before the appropriate treaty bodies: (1) individual complaints, (2) inter-State complaints, and (3) inquiries upon receipt of reliable information on serious, grave or systematic violations by a State party of the conventions that the treaty body monitors.⁶⁵

Furthermore, within the scope of the UN's special procedure mechanisms, the Human Rights Council mandates that independent experts must report and advise on human-rights aspects from a thematic or country-specific perspective.⁶⁶ Religious freedom is one of the identified themes. In this regard, the special rapporteur on freedom of religion or belief is an independent expert acting in his or her personal capacity without financial remuneration. In principle, the special rapporteur is mandated "to identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief and present recommendations on ways and means to overcome such obstacles."⁶⁷

⁶² Thames et al., *International Religious Freedom Advocacy*, 4.

⁶³ Thames et al., *International Religious Freedom Advocacy*, 5.

⁶⁴ For a detailed discussion of these mechanisms, see Bielefeldt et al., *Freedom of Religion and Belief: An International Law Commentary*, 41-51.

⁶⁵ See the UN Office of the High Commissioner for Human Rights (OHCHR) website, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>. Two of the established committees are directly engaged with control mechanisms regarding deprivations of religious freedom and the elimination of religious discrimination, respectively. Under the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination (CERD) may consider individual petitions or inter-State complaints or conduct inquiries regarding alleged infringements. Similar mechanisms are provided for in the ICCPR, affording the Committee on Economic, Social and Cultural Rights (CESCR) the capacity to consider complaints regarding infringements of any of the relevant rights, including the right to freedom of thought, conscience, religion or belief.

⁶⁶ For more information, see the OHCHR web page on special procedures of human-rights bodies, <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx>.

⁶⁷ Thomas Schirrmacher, "The United Nations Special Rapporteur on Freedom of Religion or Belief: An Introduction to the Role and the Person," in Bielefeldt, *Freedom of Religion and Belief: Thematic Reports*, 17. For a detailed analysis of this mandate, see Michael Wiener, "The Mandate of the Special Rapporteur on Freedom of Religion or Belief: Institutional, Procedural and Substantive Legal Issues,"

5.2 The suitability of international criminal prosecutions as a response to religious persecution

In the context of religious persecution that results in *severe* deprivations of human rights, the responses outlined above may be inadequate or insufficient to properly address injustice. In such instances, those who commit or are complicit in “grievous religious persecution”⁶⁸ must be brought to justice.⁶⁹ The international community views such gross human-rights violations as a global concern, justifying direct criminal intervention in some instances. In this regard, the two relevant legal fields – international human rights and international criminal law – are not mutually exclusive but can be applied simultaneously and in support of each other. Although most, if not all, international crimes have harmful consequences for human rights, not every denial of a human right will be directly punishable under international criminal law.⁷⁰ Direct criminalisation and subsequent individual criminal responsibility are limited to serious deprivations of fundamental human rights. This represents the highest level of protection that specific human rights can achieve under international law.⁷¹

International human rights law “has expanded or strengthened, or created greater sensitivity to, the values to be protected through the *prohibition* of attacks on such values.”⁷² In furtherance hereof, international criminal law has contributed “significantly to strengthening and further developing the protection of human rights”⁷³ by suppressing, prosecuting and punishing individuals responsible for committing mass crimes and/or severe human-rights deprivations. Thus, international criminal prosecutions speaks to the right to judicial remedies for breaches of human rights,⁷⁴ in order to counteract impunity and establish accountability for those most responsible for international crimes; render justice to the victims and

Religion and Human Rights – An International Journal 2(1/2), (2007): 3-17.

⁶⁸ ‘I have coined the term “grievous religious persecution” to refer to situations that satisfy the intensity threshold for crimes against humanity of religious persecution in terms of the Rome Statute of the International Criminal Court, Doc. A/CONF.183/9 of 17 July 1998, in force 1 July 2002 (Rome Statute). It serves to distinguish such extreme forms of persecution from other ‘subsidiary’ forms of persecution.

⁶⁹ Bielefeldt, Freedom of Religion or Belief: Thematic Reports, 275.

⁷⁰ Gerhard Werle and Florian Jessberger, Principles of International Criminal Law (Oxford: Oxford University Press, 2014), 53; see also Robert Cryer et al., An Introduction to International Criminal Law and Procedure (Cambridge, Cambridge University Press, 2007), 10.

⁷¹ Werle and Jessberger, Principles of International Criminal Law, 53.

⁷² Antonio Cassese at al., International Criminal Law, 1st ed. (Oxford: Oxford University Press, 2016).

⁷³ Werle and Jessberger, Principles of International Criminal Law, 53.

⁷⁴ Article 8 of the UDHR; Articles 2(3), 9(5) & 14(6) of the ICCPR; and Article 2(1) of the ICESCR.

give them a voice; deter further crimes;⁷⁵ and protect and encourage respect for fundamental human rights.⁷⁶

The idea of humanity as the foundation for human-rights protection and of international criminal law is particularly influential concerning persecution. It has led to the notion that persecution, more directly than any other crime against humanity, attacks the core aspects of humanity.⁷⁷ In essence, religious persecution attacks two fundamental features of ‘humanness’:

1. The persecuted victim’s individuality, given that persecution reduces a victim to a specific religious identity based on his or her identification with or membership in a group; and
2. The victim’s ability to freely choose a religious identity, and in terms thereof, associate with others.⁷⁸

As a result, ‘grievous religious persecution’ finds itself naturally placed between international criminal law (as it is an underlying inhumane act of crimes against humanity) and international human-rights law (as it involves the discriminatory deprivation of fundamental human rights, constituting a global human-rights problem).⁷⁹ Consequently, international concern and criminalisation of ‘grievous religious persecution’ are justified. However, despite the internationalised concern for victims of grievous religious persecution, international courts and tribunals cannot prosecute all persons suspected of having perpetrated such crimes. For international criminal justice truly to be achieved, the national legal order has the primary responsibility to prosecute the great majority of offenders.

National prosecutions of international crimes are often preferable to international prosecutions, for various political, sociological and practical reasons. National prosecutions are more directly grounded in justice for the affected people and circumvent the legitimacy concerns of international law and the political pitfalls of international relations. Unfortunately, in many cases the government itself, through State organs or government officials, commits or participates in, at least tacitly, the commission of persecution and is effectively above national law.⁸⁰ In

⁷⁵ Miša Zgonec-Rožej (principal author), *International Criminal Law Manual* (International Bar Association, 2013), 77. Other aims include the following: to restore and maintain peace and security; to help in the process of reconciliation and peace building; to provide for a historical record of events and crimes; to strengthen the rule of law; and to assist in reforming or setting up national judiciaries.

⁷⁶ Dinah Shelton, “Human Rights, Remedies,” in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011), 1097.

⁷⁷ Helen Brady and Ryan Liss, “The Evolution of Persecution as a Crime Against Humanity,” in Morten Bergsmo et al. (eds.), *Historical Origins of International Criminal Law*, vol. 3 (Brussels: Torkel Opsahl Academic EPublisher, 2014), 430.

⁷⁸ Brady and Liss, “Evolution of Persecution,” 554.

⁷⁹ Article 7(1)(h) read with Article 7(2)(g) of the Rome Statute.

⁸⁰ Emily Chertoff, “Prosecuting Gender-Based Persecution: The Islamic State at the ICC,” *Yale Law Jour-*

such instances, the relevant national legal system may not be willing or in a position to properly prosecute mass atrocities or severe human-rights deprivations.⁸¹ Without the internationalisation of human-rights protection in such cases, victims would remain unprotected and impunity would prevail. Accordingly, where national prosecutions fail to provide an effective and unprejudiced remedy, international prosecution systems should be invoked in the pursuit of criminal accountability for the protection of fundamental human rights and the punishment of grievous religious persecution.⁸²

Although various human-rights conventions explicitly authorise criminal prosecutions of related violations,⁸³ individual criminal responsibility for international crimes remains a mechanism of last resort. However, in some instances, States have chosen to deal with crimes committed during a war or civil turmoil by seemingly opting for peace to the exclusion of justice. Such ‘alternatives’ to criminal prosecutions often include the granting of amnesties⁸⁴ and/or the establishment of Truth and Reconciliation Commissions.⁸⁵ Although both alternatives might be effective tools in the process of national reconciliation, both allow for immunity in law from criminal responsibility for gross human-rights abuses. It is doubtful that utilising such alternatives exclusively can ever produce a lasting and meaningful peace,⁸⁶ especially in the context of ethnic, religious or political discrimination and persecution. Therefore, it is argued that “peace and justice go hand in hand.”⁸⁷ In societies transforming themselves after a period of pervasive human-rights abuses, the restoration of peaceful relations and national reconciliation can truly be achieved only

nal (2017): 1066.

⁸¹ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, 2nd ed. (Beck Publishers, 2008), 24.

⁸² Theo Van Boven, “Racial and Religious Discrimination,” in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009), 22.

⁸³ In the context of religious persecution, see the UN General Assembly resolution, Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 16 March 2009, A/RES/63/181, para 9(b).

⁸⁴ Amnesty laws have been defined as a “sovereign act of forgiveness for past offences.” See Micaela Frulli, “Amnesty,” in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 243. Blanket amnesties are, at least in general, considered impermissible by international law in cases of serious international crimes or gross human-rights atrocities. Consequently, domestic amnesties do not prevent prosecution before international criminal courts or ad hoc tribunals.

⁸⁵ Truth and Reconciliation Commissions provide a forum where perpetrators are encouraged, with the incentive of immunity, to disclose the whole truth about their misdeeds, which the victims of repression seek so desperately. See *Azanian People’s Organization (AZAPO) and Others v. President of the Republic of South Africa* (1996) 4 SA 562 (CC), para 17.

⁸⁶ Zgonec-Rožej, *International Criminal Law Manual*, 357.

⁸⁷ Antonio Cassese, President of the International Criminal Tribunal for the former Yugoslavia, made this statement in November 1995, upon the conclusion of the Dayton Peace Agreement.

by balancing the legal accountability of perpetrators with non-judicial mechanisms aimed at contributing to a sense of truth and justice, which is essential in the healing process of victims and witnesses.

Thus, in relation to occurrences of grievous religious persecution, international criminal prosecution mechanisms constitute a justifiable and appropriate response, and they may be complemented by other non-judicial measures intended to promote reconciliation and sustainable peace. Unfortunately, international prosecution mechanisms are a legal and political minefield. As a result, the current system often lacks adequate resolve to address emerging patterns of human-rights atrocities.

6. Conclusion

Responding appropriately and effectively to religious persecution depends on various contributing factors, including the nature of the victim group, the nature of the relevant concerned role-players, the nature and severity of the harm caused, and other surrounding circumstances. Remaining conscious of the underlying systemic root causes of religious persecution and the surrounding circumstances in each case will help to guide the most fitting response in a particular situation. In this article, several possible responses have been considered:

1. An introspective response by fellow believers, sincerely and unequivocally denouncing the justification of religious persecution as a manifestation of devotion in the name of their religion.⁸⁸ It is crucial for the majority of members of a religious group and their leaders, who do not endorse such religious persecution, to publicly condemn it. Appropriately distancing a religion from discriminatory or extremist religious ideologies shows solidarity with and support for those persecuted, and it may prove pivotal in preventing inter-religious or even intra-religious stigmatisation, hatred and reprisals against members of associated religious groups.
2. Response strategies useful to a persecuted religious community, based on documented observations about Christian responses to persecution. How the persecuted religious group responds will depend on that religious community's theology of suffering, persecution and martyrdom. While enduring extensive and consistent persecution, some Christian communities have adopted theologically based strategies of responses that have produced tangible results and deserve measured emulation. These approaches were described as a strategic model of a predominantly non-violent and non-extremist response to persecution.

⁸⁸ Bielefeldt, *Freedom of Religion and Belief: Thematic Reports*, 213.

3. Governmental response in line with human-rights obligations and responsibilities. In the context of religious persecution, States have a duty to take effective measures to protect and promote religious freedom, equality and tolerance, and to counteract impunity by bringing persecutors to justice.
4. Finally, humanitarian responses to religious persecution based on the internationalised concern for severe deprivations of human rights, including freedom of religion or belief. In this regard, religious freedom advocacy efforts broadly entail identifying existing and emerging obstacles to the enjoyment of religious freedom and utilise legal, political, co-operative, or international control mechanisms to overcome such obstacles. In addition, it was noted that the most appropriate response to pernicious human-rights deprivations requires the use of criminal prosecution systems in the pursuit of criminal accountability. Although national prosecutions of international crimes are often preferable, international criminal prosecution mechanisms constitute a justifiable and appropriate response to grievous religious persecution if the relevant national prosecution system proves unwilling or unable to properly bring to justice those responsible. Disconcertingly, the criminalisation of religious persecution has failed to materialise in consistent and reliable criminal prosecutions.

Advocating on behalf of those who are persecuted on the basis of their religious identities calls for the use of any conceivable interventions. Most importantly, a fitting response to religious persecution depends on situational awareness and respect for the wishes of the affected religious group. Although certain response strategies may produce tangible results worthy of measured emulation, counteractive responses should not be mindlessly replicated and applied to other occurrences of religious persecution. Responding decisively and sensibly to religious persecution reiterates the significance of religious freedom and acknowledges the severe impact that religious discrimination and related persecution may have on human dignity, freedom and equality. A meaningful response may serve to counteract the detrimental impact of religious persecution and demonstrates solidarity with those who have been persecuted.