The UN's Universal Periodic Review and the Prevention of Atrocity Crimes

- The Potential of Integrating the Responsibility to Protect into the UN's Universal Periodic Review

Master's thesis in International Security and Law
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Abstract

In September 2017 the United Nations Secretary-General (UNSG) published the annual report on the United Nations' (UN) doctrine the Responsibility to Protect (R2P), adopted in 2005. The R2P regards states' responsibility to protect populations against the four atrocity crimes genocide, crimes against humanity, war crimes, and ethnic cleansing. Here included the prevention of these crimes. In the 2017 R2P Report, the UNSG highlighted the UN Human Rights Council's (HRC) Universal Periodic Review (UPR), as especially well placed to support atrocity crimes prevention efforts. The UPR involves a review of the human rights situation in all UN member states every four-and-a-half year. In this thesis, it is argued that with the scarcity of research on the subject, the identification of the UPR as especially well placed to support atrocity prevention, remains more or less an untested statement. Therefore this thesis tests the validity of the statement *"The integration of the Responsibility to Protect into the UN's Universal Periodic Review has significant potential for contributing to the prevention of atrocity crimes"*. The potential of the integration is tested by first analysing the compatibility between the R2P and the institutional framework of the UPR. Secondly, state acceptance of the integration is analysed by assessing state statements at relevant international forums, as state acceptance is seen as a precondition for the integration of the R2P. Furthermore, current state practice of incorporating atrocity related issues into the UPR process is analysed to identify the challenges and the potential of using the UPR to support atrocity prevention. As this thesis is an early assessment of the UNSG's 2017 R2P Report and the potential of the UPR, the analysis is intentionally kept open and deals with many examples and case studies of states' UPRs. The case studies focus on countries with different risk and resilience levels for atrocities, and the potential of the UPR to support both long-term atrocity prevention efforts and the prevention of imminent atrocities. Working with a theoretical framework primarily taking outset in research by the scholar Alex Bellamy, long-term prevention and the prevention of imminent atrocities are in this thesis labelled structural- and direct atrocity prevention. For this thesis there have been conducted 12 interviews with diplomats based in Geneva, representatives of foreign ministries, atrocity prevention- and UPR experts. In the conclusion of this thesis, there will be provided recommendations, primarily to states, for how they can work to increase the potential of the UPR to support atrocity prevention. It is concluded that the UPR has significant potential for supporting structural prevention efforts. However, the potential of the UPR is limited in terms of supporting the direct prevention of atrocities.

Abbreviations

A	Accepted
AU	African Union
CAR	Central African Republic
DPRK	Democratic People's Republic of Korea
EEAS	European External Action Service
EEG	Eastern European Group
EU	European Union
GCR2P	Global Centre for the Responsibility to Protect
GNP	Gross National Product
GRULAC	Latin American and Caribbean Group
HRC	United Nations Human Rights Council
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee for the Red Cross
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IL	International Law
LGBT	Lesbian Gay Bisexual Trans
MOISL	Master of International Security and Law
N	Noted
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institutions
OHCHR	Office of the High Commissioner for Human Rights
P	Pending
PoC	Protection of Civilians

R2P	Responsibility to Protect
SC	United Nations Security Council
SDGs	Sustainable Development Goals
SMART	Specific Measurable Achievable Relevant Time-bound
SuR	State under Review
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNSG	United Nations Secretary-General
UPR	United Nations Human Rights Council's Universal Periodic Review
URG	Universal Rights Group
US	United States
WEOG	Western European and Others Group
WSOD	World Summit Outcome Document
ZHRC	Zambia Human Right Commission

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Chapter I: Introduction

1.1. Definition of Concepts

This section will introduce the key concepts used throughout this thesis. This section gives the reader a preliminary understanding of the key concepts. These concepts will be elaborated more in depth later in this thesis.

Atrocity Crimes

Atrocity crimes refer to the four international crimes genocide, crimes against humanity, war crimes, and ethnic cleansing. Ethnic cleansing is not officially defined and recognized as a distinct crime under international law (IL), but the acts of ethnic cleansing can constitute crimes against humanity and be assimilated to specific war crimes (see elaboration in section "3.4. Legal Definitions of the Four Atrocity Crimes", p. 40).[1]

Atrocity Prevention

The prevention of atrocity crimes is the efforts of stopping the perpetration of atrocity crimes. Atrocity prevention is in this thesis divided into two overarching approaches:

1. Direct prevention; addressing cases of impending violence.
2. Structural prevention; focusing on underlying risks of atrocities and building resilient societies (see elaboration in section "2.3.2. The Overarching for Prevention of Atrocity Crimes", p. 17).[2i]

The Responsibility to Protect

The United Nations' (UN) doctrine Responsibility to Protect (R2P) was adopted in consensus by the UN General Assembly (UNGA) in 2005. The R2P builds on existing duties and rights under IL. The R2P is a political commitment by states reaffirming their responsibility to protect populations against the four atrocity crimes genocide, crimes against humanity, war crimes, and ethnic cleansing (see elaboration in section "3.3. The Responsibility to Protect", p. 37).[3]

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[1] UN Office on Genocide Prevention and the R2P, "Ethnic Cleansing", *UN Office on Genocide Prevention and*
[2] Stephen McLoughlin, "Rethinking the Structural Prevention of Mass Atrocities*", Global Responsibility to protect*, Vol. 6 (2014), p. 408 and Alex Bellamy, "Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent*"*, *Policy Analysis Briefs, The Stanley Foundation* (February 2011), p. 3.
[3] UNGA, resolution 60/1, *World Summit outcome 2005,* A/RES/60/1 (24 October 2005) (available at http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf), §138-139.

The UN Human Rights Council's Universal Periodic Review

The UN Human Rights Council (HRC) was created as an organ under the UNGA in 2006, with resolution 60/251. The Universal Periodic Review (UPR) is a charter-based body within the HRC's mandate. The UPR is a state-driven and cooperative process, which involves a review of the human rights situation in all UN member states every four-and-a-half years. During each UPR states give the state under review (SuR) recommendations on how they can improve their human rights record. The recommendations are based on three preparatory reports; a National Report prepared by the SuR, a UN System Report, and a Stakeholder Report based on civil society submissions. The SuR can either accept or reject the recommendations (see elaboration in section "3.2. Human Rights Council resolution 5/1: Institution-building of the UPR", p. 33.).[4] [ii]

1.2. Introduction to thesis topic

"The Human Rights Council's Universal Periodic Review process is especially well placed to support atrocity crimes prevention efforts."

- United Nations Secretary-General (UNSG) António Guterres[5]

In August 2017 the UNSG António Guterres published his first report on the R2P; "Implementing the Responsibility to Protect: Accountability for Prevention". The focus on prevention reflects the new UNSG's broader vision for international peace and security. At the UNSG first meeting with the UN Security Council (SC) in January 2017, Guterres underlined that "*Prevention is not merely a priority, but* ***the*** *priority"*.[6] In the 2017 R2P Report, it is stated that the prevention of atrocity crimes is a legal, political and moral

[4] HRC, resolution 60/251, *Human Rights Council,* A/RES/60/251 (3 April 2006), (available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf) and HRC, resolution 5/1, *Institutional-building of the United Nations Human Rights Council,* A/RES/5/1 (18 June 2007) (available at http://www.ohchr.org/Documents/HRBodies/SP/AMeetings/15thsession/5-1_Institution-building_o_UN_HRC_en.pdf).

[5] UNGA and SC, *Implementing the Responsibility to Protect: Accountability for Prevention - Report of the Secretary-General",* A/71/1016 –S/2017/556 (10 August 2017), (available at http://www.un.org/en/genocideprevention/documents/2017%20SG%20report%20on%20RtoP%20Advanced%20copy.pdf) §35.*Future referencing UNSG R2P Report 2017.

[6] António Guterres, "Remarks to the Security Council Open Debate on "Maintenance of International Peace and Security: Conflict Prevention and Sustaining Peace", *UNSG,* 10 January 2017, (available at https://www.un.org/sg/en/content/sg/speeches/2017-01-10/secretary-generals-remarks-maintenance-international-peace-and).

obligation for the international community.[7] Atrocity crimes refer to the universally prohibited crimes: Genocide, crimes against humanity, war crimes, and ethnic cleansing. Despite their universal prohibition, atrocity crimes are continuously perpetrated in armed conflicts and occasionally in situations where no conflict is unfolding. The UNSG's 2017 R2P Report highlights that the HRC's UPR, through its focus on actionable recommendations, their implementation, and follow-up, can play a pivotal role in supporting member states' domestic responsibilities to protect their populations from atrocity crimes.[8] The UPR is a state-driven and cooperative process, meaning that states voluntarily provide a national report on the human rights situation in their country and get recommendations for improvement by other UN member states. The UPR recommendations are seen as the principal currency of the UPR process, and their quantity and quality define the value of the mechanism.[9] In this manner, the UPR is designed to ensure equal treatment of all UN member states.[10] The integration of the R2P into the UPR could thus potentially support atrocity prevention efforts universally. The idea of integrating atrocity prevention into a human rights mechanism builds on the well-established notion that systematic and severe human rights violations can constitute root causes of atrocity crimes.[11] The current UN High Commissioner for Human Rights (UNHCHR) Zeid Ra'ad Al Hussein has described the relationship between human rights violations and the perpetration of atrocity crimes:

"None of these atrocities crimes were unleashed without warning. They built up over years – and sometimes decades – of human rights grievances."[12]

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[7] UNSG R2P Report 2017, *supra* note 5, §35-36.
[8] UNSG R2P Report 2017, *supra* note 5, §35-36.
[9] Marc Limon and Subhas Gujadhur, "Towards the Third Cycle of the UPR: Stick or Twist? Lessons learnt from the first ten years of the Universal Periodic Review", *Universal Rights Group* (July 2016), p. 4.
[10] OHCHR, "Universal Periodic Review", *OHCHR,* 22 December 2016, (available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx).
[11] UNSG R2P Report 2017, *supra* note 5, §14.
*Additional sources establishing the link between severe human rights violations and the commencement of atrocity crimes:

- Adam Lupel, "The Responsibility to Protect Principle is not the Problem: Interview with Jennifer Welsh", *IPI Global Observatory,* 11 December 2013, (available at https://theglobalobservatory.org/2013/12/the-responsibility-to-protect-principle-is-not-the-problem-interview-with-jennifer-walsh/).
- Alex Bellamy, "Reducing Risk, Strengthening Resilience: Toward the Structural Prevention of Atrocity Crimes", *Policy Analysis Briefs, The Stanley Foundation*, (April 2016).

[12] Zeid Ra'ad Al Hussein, "Opening remarks by Mr. Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights at the Seventh Session of the United Nations Forum on Minority Issues - "Preventing and addressing violence and atrocity crimes targeted against minorities", *OHCHR,* 25 November 2014, (available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15344&LangID=E#sthash.GdA2U8uU.dpuf).

The UNHCHR mentions in particular human rights grievances such as "*corrupt governance and judicial institutions; discrimination and exclusion of minorities; inequities in development; exploitation and denial of economic and social rights; and repression of civil society and public freedoms.*"[13] Likewise, the UN Framework of Analysis for Atrocity Crimes from 2014 includes records of serious violations of human rights as a common risk factor for atrocity crimes.[14] [iii]

Scholars such as Kirsten Ainley, Alex Bellamy, and Ekkehard Strauss have too identified the UPR as a potentially beneficial arena for atrocity prevention.[15] These scholars have touched open the issue of using UPR for atrocity prevention, but have not done in-depth research only focusing on this subject. Ainley argues that the UPR offers a holistic view of states human rights records valuable for early warning.[16] Strauss also argues for the potential of the UPR, although he underlines that to increase its potential the UPR requires an atrocity prevention element, where states are requested to include an analysis of a list of agreed risk factors for large-scale violence in their reports.[17] Currently, there exists no agreement among states on a list of risk factors. In the 2017 R2P Report, the UNSG encourages all states to use the UN Framework as a tool for conducting national assessments of risks and resiliencies and identify potential victim groups for atrocity crimes. [18] States are likewise encouraged to include such assessments in their national reports for the UPR and include atrocity prevention related issues in their UPR recommendations.[19] The UN Framework of Analysis for Atrocity Crimes is comprehensive and does not exclusively deal with the human rights aspects of atrocity prevention. The UNSG's 2017 R2P Report does therefore not provide states with guidance on key human rights areas relevant for using the UPR for atrocity prevention, and what they should prioritise in their reporting and recommendations for the UPR. Studying conflict prevention, Helen Quane argues that it is problematic to view the promotion of human rights as a force of prevention, without specifying how particular rights are beneficial for

[13] *Ibid*.
[14] UN, "Framework of Analysis for Atrocity Crimes - A Tool for Prevention", 2014, (available at http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf). *Future referencing "UN Framework of Analysis for Atrocity Crimes".
[15] Bellamy (2016), *supra* note 11 and Kirsten Ainley, "From Atrocity Crimes to Human Rights: Expanding the Focus of the Responsibility to Protect", *Global Responsibility to Protect,* vol. 9, no. 3 (2017) and Ekkehard Strauss, *Institutional Capacities of the United Nations to Prevent and Halt Atrocity Crimes*, in; Jennifer M. Welsh and Serena K. Sharma (ed.), The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention, 2015.
[16] Ainley, *supra* note 15, p. 21.
[17] Strauss, *supra* note 15, p. 9.
[18] UNSG R2P Report 2017, *supra* note 5, §21.
[19] UNSG R2P Report 2017, *supra* note 5, §36.

prevention.[20] This observation is also relevant for the link between the human rights promotion mechanism the UPR and atrocity prevention. The scarcity of research on the relation means that the identification of the UPR as especially well placed to support atrocity prevention remains more or less an untested statement. Other scholars, such as Edward R. McMahon, have extensively studied the UPR but not in relation to atrocity prevention.[21] It is thus necessary to analyse current state practice of incorporating atrocity related issues into the UPR to identify the challenges and the potential of using the UPR to support atrocity prevention. Furthermore, it also remains untested whether the idea of integrating the R2P into the UPR enjoy the acceptance of states, which to a large degree is a precondition for the integration.

At this year's UNGA Informal Interactive Dialogue on the R2P held on the 6th September, some states voiced their opinions on the integration of the R2P into the UPR: [22]

"The Human Rights Council's Universal Periodic Review is also well placed to support prevention efforts, and we welcome the suggestions made in the Report as to how the UPR could be better utilized." - The Netherlands (on behalf of the Group of Friends of the R2P)[23]

"*The better utilization of the Human Rights Council's Universal Periodic Review process, which undoubtedly contribute to the prevention and early warning of atrocity crimes"*
- Slovakia[24]

These statements reflect some of the positive views on the integration of the R2P into the UPR, and other states voiced more sceptical opinions, which will be accounted for in section "4.2. Current State Acceptance of R2P Integration into the UPR". These examples show that

[20] Helen Quane, "Rights in Conflict? The Rationale and Implications of using Human Rights in Conflict Prevention Strategies", *Virginia Journal of International Law,* vol. 47, no. 2 (2007), p. 503-504.
[21] Edward R. McMahon, *International Organisations and Peer Review: Assessing the Universal Periodic Review Mechanism of the United Nations Human Rights Council* in; Yusuf, A. A. (ed.), *African Yearbook of International Law* (2012), p. 355-377 and Edward R. McMahon and Marta Ascherio, "A step ahead in promoting human rights? The universal periodic review of the UN Human Rights Council", *Global Governance,* vol. 18, no. 2 (2012).
[22] *The UNGA's Informal Interactive Dialogue on the R2P has been held annually since 2009 following the release of the UNSG's annual report on R2P.
[23] The Group of Friends of the R2P, "Statement on behalf of the Group of Friends of the Responsibility to Protect at the UN General Assembly Informal Interactive Dialogue on the Responsibility to Protect", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/gof-of-r2p-iid-statement-final.pdf).
[24] Slovakia, "Statement at the Informal Interactive Dialogue on the Responsibility to Protect", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-slovakia.pdf).

it is not merely scholars and the UN Secretariat who are debating the UPR in relation to the prevention of atrocity crimes states are too.[25]

Taking outset in the arguments brought forward in the UNSG's 2017 R2P Report, as well as in academic research and state debates, this thesis will test the validity of the following statement, which accentuates the argument that the UPR is especially well placed to support atrocity prevention efforts:

"The integration of the Responsibility to Protect into the UN's Universal Periodic Review has significant potential for contributing to the prevention of atrocity crimes" [iv]

[25] GCR2P, "Geneva and the Human Rights Council", *GCR2P*, assessed 15.10.17, (available at http://www.globalr2p.org/our_work/geneva_and_the_human_rights_council).

Chapter II: Methodology and Framework

The following chapter will firstly present the thesis' research design and outline of the thesis. Secondly, the thesis' relevance for the research field of international security and law will be elaborated. Hereafter, the interdisciplinary perspectives applied in the research will be described. The chapter will also provide an assessment of the different theoretical approaches to atrocity prevention. Furthermore, a review of relevant methods for analysing the UPR will be presented. The methodological reasoning behind the thesis' case selection is also assessed hereafter. Interviews made for the thesis will be described. Lastly, the limitations related to the scope of the thesis and the methods used will be discussed.

2.1. Research Design and Outline of the Thesis

To test the validity of this thesis' problem statement: "*The integration of the Responsibility to Protect into the UN's Universal Periodic Review has significant potential for contributing to the prevention of atrocity crimes".* The analysis is divided into five sub-analyses, all guided by working-questions. This section will elaborate on the content of these, the introductory section on legal tools and framework, the discussion, the conclusion, and the section on ideas for further research.

Legal Tools and Framework

The section "3. Legal Tools" will account for the UNGA resolution 60/251 establishing the HRC and HRC resolution 5/1 regarding institution building of the HRC, hereunder the UPR. Furthermore, the legal definitions for the four atrocity crimes (war crimes, ethnic cleansing, genocide and crimes against humanity), the R2P, and the legal obligation to prevent atrocities will be assessed. The section will elaborate on the practicalities of the UPR process, and explain the relevant documents such as states' preparatory national reports and outcome document for the UPR. The purpose of this section is to provide the reader with the necessary knowledge regarding the institutional framework of the UPR and the concept of the R2P. This section leads directly up to the first sub-analysis, which focuses on the compatibility between the R2P and the institutional framework of the UPR.

Compatibility of the R2P and the Institutional Framework of the UPR

Analysis 4.1. Focuses on the working-question: *How can the R2P be integrated into the institutional framework of the UPR?*

To answer this question, the relevant paragraphs of the UNSG's 2017 R2P Report will be presented to analyse R2P's compatibility with the Institution-building Package of the UPR, and the HRC's preventive mandate, established in paragraph 5(f) of UNGA resolution 60/251. Thirdly, the possibility and potential need to reform the HRC, hereunder the UPR, to support atrocity prevention effectively will be discussed. This sub-analysis contributes to the problem statement, by identifying the legal and institutional challenges and opportunities for integrating the R2P into the UPR.

State Acceptance of Integrating R2P into the UPR

Analysis 4.2. Focuses on the working-question: *How is state acceptance of integrating R2P into the UPR reflected in recent debates?*

To answer this question, states' statements at relevant forums will be analysed to assess state acceptance of integrating the R2P into the UPR. The forums analysed include the Informal Interactive Dialogue on the R2P in September 2017, the vote on the R2P as a formal agenda item at the UNGA in September 2017, and the HRC general debate on item 6 (the UPR) in September 2017. Furthermore, the section includes a discussion on key actors for the integration of R2P such as civil society organisations and the Geneva-based Group of Friends of the R2P, which is a group consisting of 50 states. This sub-analysis contributes to the problem statement, by identifying states objecting the idea of integrating the R2P and states or groups that can potentially push the agenda forward.[v]

State Practice of Explicitly Addressing Atrocity Prevention in the UPR

Analysis 4.3. Focuses on the working-question: *How are explicit references to atrocity crimes and R2P language in UPR recommendations affecting the potential for supporting atrocity prevention through the UPR?*

The purpose of this sub-analysis is to discuss the added value of an explicit atrocity lens in the UPR context, compared to a more implicit approach to atrocity prevention. The meaning of an explicit-atrocity lens is that the aim of a recommendation is clearly to support atrocity prevention efforts. The implicit approach can be recommendations relevant for supporting atrocity prevention efforts, but where atrocity prevention is not stated directly as the aim. When analysing recommendations the explicit atrocity lens is either the reference of the four atrocity crimes (war crimes, ethnic cleansing, genocide, or crimes against humanity) or the

use of R2P language. R2P language means the referencing of wording from paragraphs 138-139 of the 2005 World Summit Outcome Document (WSOD). The practice of this will firstly be analysed in relation to the first two cycles of the UPR. Lastly, practice in the third cycle of the UPR will be analysed to identify potential emerging developments after the publishing of the UNSG's 2017 R2P Report. This sub-analysis will not go into depth with whether specific recommendations are supporting direct or structural atrocity prevention efforts. The sub-analysis contributes to the problem statement, by identifying practice of supporting atrocity prevention explicitly in the UPR to determine how this affects the potential for using the UPR for atrocity prevention. This sub-analysis will contribute further to the test of the validity of the problem statement by identifying states actively incorporating an explicit atrocity lens in their recommendations, compare regional engagement, and analyse the focus of explicit recommendations.

State Practice of Direct Atrocity Prevention in the UPR

Analysis 4.4. Focuses on the working-question: *How is the potential for using the UPR to support the direct prevention of atrocity crimes reflected in current state practice?*

To answer this question, the UPRs of three states with on-going or recent atrocity crimes will be assessed, to analyse whether the UPR has supported efforts of direct prevention of atrocities in these cases. In addition, recommendations referencing specific operational tools for the direct prevention of atrocity crimes will be analysed and compared. This sub-analysis will contribute to the test of the validity of the problem statement by assessing the potential of using the UPR to support direct atrocity prevention, drawing on the opportunities and challenges identified in the analysis.

State Practice of Structural Prevention and Resilience Building in the UPR

Analysis 4.5. Focuses on the working-question: *How is the potential for using the UPR to support the structural prevention of atrocity crimes reflected in current state practice?*

To answer this question, the UPRs of five states will be analysed. The analysis of each UPR process will focus on the five key areas of resilience towards atrocity crimes; constructive management of diversity, legitimate and capable authority, security of livelihood, vibrant civil society and guarantees of non-recurrence and how these resiliencies and their corresponding risks for atrocities are implicitly addressed in the countries' UPR

recommendations and preparatory reports (see elaboration of key areas of resilience in section "2.3.3. Structural Atrocity Prevention", p. 18). This sub-analysis will contribute to the test of the validity of the problem statement, by assessing whether the UPR is contributing to resilience building and structural prevention of atrocity crimes.

Discussion of Case Studies and Research Results

The discussion will unify the central arguments from the five case studies to discuss the challenges and potential added value of using the UPR for structural prevention universally. The discussion will be divided into six themes of lessons learned from the different case studies, to discuss how the potential of the UPR for structural prevention of atrocities can be increased. The discussion thus primarily focuses on the case studies of sub-analysis "4.5.State Practice of Structural Prevention and Resilience Building in the UPR". Nevertheless, the discussion will also draw on the interim conclusions from the other sub-analyses.

Conclusion and Recommendations for the Way Ahead

Each sub-analysis will have an interim conclusion, which summarises the main conclusions brought forward in the analysis and reflects the arguments of the authors of the thesis. The final conclusion will draw on the discussion and interim conclusions of the sub-analyses and based on the synthesis of these assess the validity of the thesis' the problem statement *"The integration of the Responsibility to Protect into the UN's Universal Periodic Review has significant potential for contributing to the prevention of atrocity crimes"*. Furthermore, recommendations for the way ahead will be provided throughout the conclusion. These recommendations will be made with a special emphasis on practical ways in which states can best increase the potential of using the UPR to contribute to the prevention of atrocity crimes.

Ideas for Further Research

Taking outset in the conclusion, this section will provide suggestions for further research that could be relevant to further the understanding of the UPR's potential for contributing to the prevention of atrocity crimes.[vi]

2.2. Interdisciplinarity

2.2.1. Thesis Subject and the Field of International Security and Law

The Master of International Security and Law (MOISL) integrates political, juridical and ethical perspectives to strengthen competencies to comprehensively assess drivers of conflict and international actors and mechanisms' capacities to help solve such issues.[26] The topic of utilizing UPR for atrocity prevention is therefore highly relevant for the MOISL field, as we are studying both a driver and consequence of conflict i.e. atrocity crimes, and assessing the solving capacities of an international mechanism i.e. the UPR. The MOISL education is focused on closing the gap between theory and practice, and providing analytical skills that can be operationalized in practice.[27] This thesis will contribute to this goal, by assessing a timely debate. Furthermore, this thesis is highly practice-oriented and provides recommendations for "the way ahead" in the conclusion. The MOISL education has enabled us to identify a scientific issue, which cannot be comprehensively analysed without integrating analytical methods in an interdisciplinary manner. The following sections will elaborate on the perspectives of political science and IL applied in this thesis. The ethical dimension of MOISL is not used analytically in the thesis, but more as an underlying focus on the issue of states not fulfilling their moral responsibility to prevent atrocity crimes.

2.2.2. International Law and Political Science Perspectives

This thesis deals with the legally defined atrocity crimes and the legally defined mechanism; the UPR. However, these will primarily be analysed with political science methods, assessing qualitative and to lesser degree quantitative material, to analyse state acceptance and practice. The application of political science methods to a legal issue will contribute to a more nuanced understanding of the political behaviour behind the UPR process. The main contribution of the perspective of IL, when studying state practice and acceptance, is the analysis of material similar to what would be used in a classical legal analysis such as; statements of state representatives, UN resolutions, responses by other states etc. In a classical legal analysis, legal scholars use such material to study state practice and opinio juris to document the existence of a norm under customary law.[28] State practice, within IL, is defined as

[26] University of Southern Denmark, "Learning Outcomes", *University of Southern Denmark,* accessed 15.10.17 (available at http://www.sdu.dk/en/information_til/studerende_ved_sdu/din_uddannelse/kandidat/intsecurelaw/kompetenceprofiler).
[27] University of Southern Denmark, "Learn more About the Program", *University of Southern Denmark,* accessed 15.10.17 (available at http://www.sdu.dk/en/uddannelse/kandidat/securitylaw/mere_om_studiet).
[28] *Customary law is a source of IL, which is evident in practice and accepted as law but does not exist in written form.

widespread practice over a period of time, and can be observed in what states do and say. Opinio juris means that states have accepted a practice as law.[29] In this thesis, we work with the terms "state acceptance" and "state practice" these should not be confused with the terms used for establishing customary law. We are not trying to document the existence of a legal norm, but rather analyse the potential of using the UPR to support atrocity prevention.

State acceptance is analysed based on whether states accept UPR recommendations relevant for the prevention of atrocity crimes, and support the integration of the R2P in official statements. Conclusions are supported by interviews with Geneva Officials, Foreign Ministry Representatives and experts, to whom questions related to state acceptance specifically to the problem statement have been asked (See overview of interview questions in Annex II, p. 156).[vii]

State practice is analysed based on whether states give UPR recommendations relevant for the prevention of atrocity crimes. Furthermore, state practice includes incorporating atrocity prevention related issues in UPR documents such as preparatory material, the outcome document, and implementing relevant recommendations. In this thesis, there is distinguished between practices of implicit vs. explicit atrocity prevention and practices of direct vs. structural atrocity prevention. Conclusions are again supported by interviews and other qualitative and quantitative material.

State acceptance and state practice is very closely linked, why the sub-analyses focusing on state practice in the UPR also will take state acceptance into account. Some level of state acceptance and state practice are seen as preconditions for the integration of the R2P into the UPR, as this is largely depending on states' willingness. The outcome and conclusion of the thesis will thus be highly interdisciplinary as it will contribute with recommendations, based on an (early) evaluation of the policy strategy proposed by the UNSG in 2017 and an assessment of the ability of the legally defined mechanism the UPR, to support this policy strategy. We will analyse, how the legal and institutional framework for the UPR mechanism, influences the opportunities and challenges for using the mechanism for atrocity prevention. The legal perspective will further be used to account for relevant resolutions, understanding

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- *The Statute of the International Court of Justice*, Article 38 (b).

[29] Hugh Thirlway, *The Sources of International Law*, in; Malcolm D Evans (ed.), International law, 4th Edition, 2014, p. 98.

the mandate of the HRC, identifying and interpreting applicable IL, specifically relevant human rights and international humanitarian law (IHL) principles, and assessing the legal status of the obligation to prevent atrocity crimes. As in a legal analysis, special attention will also be given to the wording of UPR recommendations, as the specific wording of these will carry explanatory power on whether and to what extent states accept and in practice use the UPR for atrocity prevention.

The political science perspective will enable an understanding of what atrocity prevention is and how social, economic and political circumstances shape risks and resilience towards atrocities. Furthermore, the understanding of international relations, state behaviour and the functioning of the UN is also informed by a political science perspective. The main contribution of the political science perspective will be the explanatory power of analysing (non-legal) quantitative and qualitative data. A number of interviews (fully accounted for in section "2.6 Interviews", p. 29) will function as one of the primary sources of qualitative data; these interviews will give inputs to the analysis with 'on the ground' perspectives of experts and practitioners. The primary source of quantitative material is the Geneva-based NGO UPR-info's database and statistics (see a full presentation of these and a guide to how this data is referenced in footnotes in Annex III, p. 160).[viii]

2.3. Theoretical Framework for the Analysis of Atrocity Prevention

The different approaches to atrocity prevention presented in the following constitute the theoretical framework guiding the entire analysis. Specific methods used to analyse the UPR process will be presented in section "2.4. Review of Relevant Methods Used to Analyse the UPR", p. 23. The theoretical framework for the analysis builds on research conducted by Bellamy, Stephen McLoughlin, Jennifer Welsh, and Serena Sharma. The theoretical understanding of the approaches to atrocity prevention, both provide an underlying understanding of the thesis' topic as well as concrete analytical tools and key concepts. In the 2017 R2P Report the UNSG encourages states to use the UN Framework of Analysis for Atrocity Crimes, the theoretical framework used in the thesis reflects many of the same issues as the UN Framework. Within the last years, researchers have emphasised the importance of resilience indicators in the literature on atrocity prevention. The UN Framework primarily bases its analysis on risks, and only incorporates resilience as part of a risk factor "Risk Factor 6: Absence of Mitigating Factors".[30] We have therefore chosen to primarily focus on

[30] UN Framework, *supra* note 14, p.15.

Bellamy's research and used this throughout the analysis, because of his detailed analysis of all relevant aspects of atrocity prevention including resilience, triggers, and risks.

2.3.1. Atrocity Prevention vs. Conflict Prevention

Atrocity prevention is closely related to conflict prevention, but the two concepts should not be confused. Even though many atrocity crimes are committed in the context of armed conflict, this is not always the case.[31] Bellamy defines conflict prevention as an effort that *"targets several actors in the hope of arriving at a consensual agreement among them."*[32] Compared to conflict prevention, atrocity prevention is efforts aimed at preventing the perpetration of the four atrocity crimes. There will, of course, be many cases where the prevention of an armed conflict will highly decrease the risk of atrocity crimes. Similarly, the prevention of atrocities in armed conflicts will decrease the human cost of armed conflicts. Meanwhile, steps taken to prevent armed conflict can in some cases have a negative effect on the prevention of atrocity crimes; the focus on peace negotiations by the international community as opposed to focusing on halting genocide in Rwanda in 1994 is an example of this.[33] However, it can be difficult to rigidly separate the two concepts in practice, as the preventive tools available for both efforts are very similar. There is one further important difference to keep in mind, the clear legal distinction between the commission of atrocity crimes and armed conflict. The latter can be legal under IL if the use of force is carried out in self-defence under the UN Charter article 51 or if the SC under chapter VII of the UN Charter authorizes the use of force. The commission of atrocity crimes, on the other hand, is never legal.

2.3.2. The Overarching Approaches for Prevention of Atrocity Crimes

The prevention of atrocity crimes is a complex, broad and multi-layered process. The underlying sources of risks and the crises that can trigger atrocity crimes, i.e. political, economic or natural crises, both need to be addressed for atrocity prevention to be effective.[34] Atrocity prevention has often been divided into two overarching approaches in the literature:

1. Direct prevention; addressing cases of impending violence.
2. Structural prevention; focusing on underlying risks of atrocities and building resilient societies.[35]

[31] Bellamy (2011), *supra* note 2, p. 1.
[32] Bellamy (2011), *supra* note 2, p. 6.
[33] Bellamy (2011), *supra* note 2, p. 8.
[34] Bellamy (2016), *supra* note 11, p. 1.
[35] McLoughlin, *supra* note 2, p. 408 and Bellamy (2011), *supra* note 2, p. 3.

The approaches of structural and direct atrocity prevention presented in the following sections do not exclusively deal with risks and resiliencies for atrocities from a human rights perspective, even though the protection of human rights is fundamental in both approaches. As this thesis deals with a human rights mechanism, the scope of the approaches have been limited to analyse risks and resiliencies from a human rights perspective, respectively related to violations of or protection of human rights. This limitation of the approaches automatically happens when taking outset in UPR recommendations and reporting, as these focus on human rights issues. It should be remembered, that in practice, effective atrocity prevention must be complemented by a diverse set of processes not necessarily linked to human rights mechanisms. [ix]

2.3.3. Structural Atrocity Prevention

The approach to structural atrocity prevention is primarily used as an analytical tool in section "4.5 State Practice of Structural Prevention and Resilience Building in the UPR". The aim of structural atrocity prevention is to assist states and societies in reducing sources of risks and building resilience to strengthen the society's capacity to manage and avoid atrocity crimes.[36] Structural prevention is an approach detached from attention-gripping emergencies, which instead focused on long-term preventive efforts.[37] It is, therefore, challenging to identify a *"causal relationship between specific preventive actions and the non-occurrence of atrocities."*[38] Deborah Mayersen points out that there has been an academic focus on cases where genocide has happened as opposed to cases where genocide was prevented or halted. This has made risk factors the focus of much research, which has further resulted in a limited knowledge of resilience factors.[39] McLoughlin and Bellamy too argue that there has been an exaggerated focus on risks and root causes.[40] McLoughlin argues that an exaggerated focus on risks give rise to two main issues: "*first, there is an implicit assumption that root causes lead inevitably to violence, and second, there has been a tendency for international actors to decide, in general and global terms, what counts as root causes and how to ameliorate them, downplaying the role of local contexts and overlooking the preventive work of local and*

[36] Bellamy (2016), *supra* note 11, p. 9.
[37] Bellamy (2016), *supra* note 11, p. 2.
[38] *Ibid*.
[39] Deborah Mayersen, *Deconstructing Risk and Developing Resilience: The Role of Inhibitory Factors in Genocide Prevention*, in; Sheri P. Rosenberg, Tibi Galis and Alex Zucker (ed.), Reconstruction Atrocity Prevention, 2015, p. 278.
[40] McLoughlin, *supra* note 2, p. 407 and Bellamy (2016) *supra* note 11, p.18.

national actors."[41] Therefore, structural preventive efforts must have a balanced focus, so that both risks and resilience are incorporated in atrocity assessments. McLoughlin uses the definition of resilience: *"the ability of a system, community or society exposed to hazards to resist, absorb, accommodate and to recover from the effects of a hazard in a timely and efficient manner".*[42] In a balanced approach, the reduction of risks will help decrease the probability that a state will face a crisis that could give rise to atrocity crimes, while the building of resilience will increase the probability that a state can manage a crisis without experiencing atrocity crimes.[43]

Bellamy has developed models showing the key elements of structural prevention, divided into risks and resilience. Bellamy identifies five categories of structural risk factors:

1. *Background context* i.e. conditions of armed conflict/recent history of atrocities and armed conflict;
2. *Discrimination* i.e. exclusionary ideologies, practices of discrimination against a defined group, and patterns of human rights abuse;
3. *Divisive economies* i.e. average or low wealth, horizontal economic inequalities, and economic elites that stand to benefit from atrocity crimes;
4. *Governance and the rule of law* i.e. unaccountable government, weak rule of law, and impunity for past or present atrocity crimes perpetrated by state- and non-state actors and;
5. *Security sector* i.e. unaccountable security sector and/or physical capacity to commit atrocity crimes.[44]

Even if one or more of these risk factors are evident it does not mean that a society will experience atrocity crimes, on the other hand, societies without any of the underlying risks are unlikely to experience atrocity crimes.[x]

Bellamy has also identified five key areas of resilience that contribute to structural atrocity prevention. The listed examples of relevant elements for each key area is not exhaustive, but are the ones most relevant in relation to human rights and the UPR:

[41] McLoughlin, *supra* note 2, p. 407.
[42] McLoughlin, *supra* note 2, p. 422.
[43] Bellamy (2016), *supra* note 11, p. 2.
[44] Bellamy (2016), *supra* note 11, table 1, p. 6.

1. *Constructive Management of Diversity* i.e. inclusive ideologies and non-discriminatory constitutions, laws and policies that protect human rights and equality across groups of different religious, ethnic, cultural, wealth, employment, and health backgrounds, consensual modes of government, strong and independent national human rights institutions (NHRI), and capacity for peaceful resolution and management of conflicts.[45]
2. *Legitimate and Capable Authority* i.e. legal equality and equal access to justice, separation of powers, independent judiciary, accountable, transparent and inclusive government decision-making, institutional accountability to the law, professional security forces and civil control and management of these, and monopoly of means of organized violence in the hands of the state.[46]
3. *Security of Livelihoods* i.e. economic growth and wealth accumulation, secure asset bases at the community level, legitimate, transparent, and well-managed land laws, legitimate and accountable management of natural resources, and limited or absence of corruption.[47]
4. *Vibrant Civil Society* i.e. a civil society that hold justice system and security forces accountable through monitoring and advocacy, civil society and free press that reports crimes and abuses to the international community, capacity for early warning of atrocity crimes, non-state capacities for the resolution, mediation, and management of conflict, advocacy for preventive action, R2P and related norms, capacity to provide education for peace and conflict resolution and understanding of lessons of history, and non-state actors that challenge discrimination in policies and action.[48]
5. *Guarantees of non-recurrence* i.e. legal accountability for past perpetrators, truth and recognition of past crimes, legal empowerment of marginalized groups, physical security and stability, and memorialization of past crimes through culture to build understanding and empathy.[49] [xi]

2.3.4. Direct Atrocity Prevention

The approach to direct prevention is primarily used as an analytical tool in section "4.4. Practice of Direct Atrocity Prevention in the UPR". Direct atrocity prevention is defined as

[45] Bellamy (2016), *supra* note 11, table 2, p. 10.
[46] Bellamy (2016), *supra* note 11, table 3, p. 12.
[47] Bellamy (2016), *supra* note 11, table 4, p. 13.
[48] Bellamy (2016), *supra* note 11, table 5, p. 15.
[49] Bellamy (2016), *supra* note 11, table 6, p. 16.

the prevention of impending cases of atrocities.[50] In the literature, the prevention of atrocity crimes that are imminent is also labelled operational prevention[51] and targeted prevention.[52] Compared to structural prevention Bellamy argues that there has been more development of the concept and institutionalization of direct prevention.[53] This is partly related to the fact that direct prevention of atrocity crimes is more reactive than proactive; direct prevention efforts address a clear and pressing need to prevent. Bellamy argues that direct prevention responds to human rights emergencies that may include atrocity crimes.[54] This further entails that in some cases direct prevention of atrocity crimes is essentially the prevention of escalation of further perpetration of atrocities. The move from underlying or structural risks to the imminent risk of atrocity crimes is often triggered by political, economic or environmental crises.

Bellamy highlights three overarching categories of crises that trigger the commission of atrocity crimes:

1. Political crises i.e. armed contest, unconstitutional regime change, state incapacity, and revolutionary government.
2. Economic crises i.e. scarcity that increases competition for resources, authoritarian grab of power by promising economic renewal and scapegoating minorities, and economic crises that sparks spontaneous scapegoating and attacks on minorities.
3. Environmental crises i.e. drought, famine, and floods. [55]

Bellamy's account of triggering crises, to a large degree, mirrors the triggering risk factors identified in the UN Framework of Analysis for Atrocity Crimes.[56] The existence of crises will not necessarily lead to the commission of atrocity crimes, but contribute to an increased and more imminent risk of these.[57] Welsh and Sharma have developed a framework for atrocity prevention that builds on a temporal understanding of atrocity crimes. They argue that the focus of atrocity prevention should be put on the two phases: 1) *Upheaval and mobilization*, i.e. when general risk for atrocity crimes is transformed into the likelihood of

[50] McLoughlin, *supra* note 2, p. 3.
[51] Bellamy (2016), *supra* note 11, p. 1.
[52] Jennifer M. Welsh and Serena K. Sharma, *Conclusion*; in Jennifer M. Welsh & Serena K. Sharma (ed.), The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention, 2015.
[53] Bellamy (2016), *supra* note 11, p. 2.
[54] *Ibid.*
[55] Bellamy (2016), *supra* note 11, p. 7-9.
[56] UN Framework of Analysis for Atrocity Crimes, *supra* note 14, p. 17.
[57] Benjamin Valentino, *Anticipating and Preventing Mass Killing,* in; Robert J. Art, Robert Jervis, and Stephen M. Walt (ed.), Final Solutions: Mass Killing and Genocide in the 20th Century, 2004, p. 235.

these and 2) *Imminent emergency*, i.e. characterized by more incidences of violent clashes, increased violations of physical integrity, systematic targeting of victims, and intense efforts of self-protection by the victim population.[58] Sharma and Welsh analyse the targeted prevention tools relevant for the *Upheaval and mobilization* and *imminent emergency phases*. Bellamy has also compiled a list of operational tools for direct prevention. The following list of direct prevention tools is a combination of the two. The list is not exhaustive, but includes the tools that potentially could be relevant for states to reference in their UPR recommendations:

1. Diplomatic measures, fact-finding, and mediation;
2. Countering atrocity justifying ideologies and support indigenous conflict resolution;
3. Referrals to the International Criminal Court (ICC);
4. Sanctions, banning travel, embargoing trade and arms, and imposing diplomatic sanctions;
5. Military measures, SC resolutions, preventive deployments, and threats of rapid deployment.[59]

2.3.5. Atrocity Prevention and the R2P

The R2P has elements connected to both structural and direct prevention. As will be elaborated in section "3.3. The Responsibility to Protect", p. 37, the R2P consists of three pillars. Structural atrocity prevention is closely related to pillar one and two of the R2P, as pillar one focuses on domestic capacity-building and pillar two on third states responsibility to provide technical- and other assistance to states in order to ensure that they meet their obligation to protect their population against atrocity crimes. The R2P's pillar three is relevant to apply when states manifestly fail to protect their populations against atrocity crimes and will therefore be part of direct prevention efforts. The fact that pillar three only applies when states manifestly fail to protect distinguish it from the broader definition of direct prevention, as direct prevention also addresses crises that are impending, and hence has a slightly lower threshold than the R2P's pillar three. Despite this difference, the tools available under the R2P's pillar three are almost identical to the tools of direct prevention. The third pillar offers both peaceful and coercive tools. The more coercive tools such as military measures can only be mandated with SC approval.

[58] Welsh and Sharma, *supra* note 52, p. 374-376.
[59] Welsh and Sharma, *supra* note 52, p. 377-389 and Bellamy (2011), *supra* note 2, p. 5

In essence atrocity prevention and the preventive aspect of the R2P are closely related, and the two terms are often used simultaneously to describe preventive efforts. Due to the close kinship, the terms atrocity prevention and R2P are also used simultaneously throughout this thesis. In situations where the two terms are conflicting this will be highlighted. However, it should be noted that atrocity prevention is a broader concept than the R2P. The R2P is a result of state negotiations, and its definition was adopted in consensus at the UNGA. The R2P is narrowly defined as states' responsibility to protect populations against the four atrocity crimes war crimes, crimes against humanity, genocide, and ethnic cleansing. Compared, atrocity prevention is a broader academic theory and tool, which is not the result of state negotiations. The concept is not strictly defined and can encompass all kinds of efforts and targets different actors aiming at preventing atrocity crimes. In this thesis, the approaches of structural and direct atrocity prevention are used as analytical tools to understand the potential the UPR. [xii]

2.4. Review of Relevant Methods Used to Analyse the UPR

The UPR is currently at the beginning of its third cycle and has been a functioning international human rights mechanism since 2008. Given the innovative nature of the process, its universal application and the broad range of issues it addresses, it is no surprise that a substantial number of pages have been dedicated to analyse it. Some scholars have focused on specific states and their behaviour in the UPR process or in the preparation phase leading up to the review.[60] Some scholars have assessed a larger sample of cases analysing regional behaviour in the UPR,[61] while others again have chosen to analyse the UPR process focusing on a specific human rights issue, its relation to the UPR or the realized impact or potential of using the UPR to support a given agenda.[62] The content of this thesis falls under the last of these categories, as it analyses the potential of using UPR to support the prevention of atrocity crimes. Countless other perspectives and examples could be mentioned here. Instead

[60] *See for example:
Andrea Cofelice, **"**Italy and the Universal Periodic Review of the United Nations Human Rights Council. Playing the two-level game", *Italian Political Science Review*, vol. 47, no. 2 (2017) and Thi Kim Ngan Nguyen, **"**The Process of Viet Nam's Preparation of the National Report under the United Nations Human Rights Council's Universal Periodic Review"**,** *Asia-Pacific Journal on Human Rights and the Law*, vol. 17, no. 1 (2016).

[61] Rhona Smith, "A Review of African States in the First Cycle of the UN Human Rights Council's Universal Periodic Review", *African Human Rights Law Journal*, vol. 14 (2014).

[62] *See for example:
Kate Gilmore, Luis Mora, Alfonso Barragues and Ida Krogh Mikkelsen, "The Universal Periodic Review: A Platform for Dialogue, Accountability, and Change on Sexual and Reproductive Health and Rights"*, Health and Human Rights,* vol. 17, no. 2 (2015) and Natalie Baird, "The Role of International Non-Governmental Organisations in the Universal Periodic Review of Pacific Island States: Can Doing Good Be Done Better", *Melbourne Journal of International Law*, Volume 16, No. 2 (2015).

the following section will present literature especially important for the methods used in this thesis; McMahon's model for categorizing UPR recommendations and Lijiang Zhu's use of tailored themes to analyse the use of IHL in the UPR. The sections will also address the criticism of McMahon's method brought forward by Marc Limon and Subhas Gujadhur, and present additional literature that provides methods to complement McMahon's models.

2.4.1. McMahon and UPR-info: Categorising Action and SMART Recommendations

McMahon published an article reviewing state behaviour (generally) in the UPR, after the end of the first cycle of the UPR in 2012. Arguing that there is little knowledge of the actual functioning of the UPR, McMahon examines how effectively the UPR mechanism contributes to the fulfilment of the HRC's mandate to promote human rights worldwide.[63] McMahon goes about his analysis very systematically using quantitative methods that allow the analysis of the large sample size of recommendations. He catalogues all the recommendations given in the first five sessions of the UPR. The recommendations are catalogued in the categories: "*A) Session Number; B) State under Review (SuR); C) Regional Group of the SuR; D) State making Recommendation; E) Regional Group of the State making Recommendation; F) Recommendation; G) Action Level; H) SuR Response to Recommendation; and I) Issue(s) addressed"*.[64]

Categories A-F contain factual information. Category G-I reflects McMahon's analysis of the UPR, and they are especially interesting tools for understanding the functioning and effect of the UPR. Category G *Level of Action* divides the recommendations into five categories of action, as expressed in the wording (verbs) of the recommendations given to the SuR. UPR-info has adopted this approach for categorization in their database and statistics of UPR recommendations. UPR-info uses the category *Action* and divides all recommendations into categories based on the verbs used in the recommendation. The five categories are: 1) Minimal action; 2) Continuing action; 3) Considering action; 4) General action; and 5) Specific action.[65] Category 1 represents the recommendations that require the least action of the SuR and hence are expected to be perceived as the least politically costly for the state to accept. Category 5 on the other end of the scale represents the recommendations that require the most from the SuR, hence the most politically costly type of recommendations.[66] McMahon states that his research has shown that non-actionable recommendations are a

[63] McMahon, *supra* note 21, p. 357.
[64] McMahon, *supra* note 21, p. 363-364.
[65] UPR-info Database.
[66] McMahon, *supra* note 21, p. 364.

waste, and argues that the substantial use of recommendation falling under action category 4 and 5 recommendations imply that states take the UPR mechanism seriously.[67xiii]

Table 1 explains the categorizations for *Action.* [68]

Level of action:	**Description:**	**Examples of verbs used in recommendations:**
Category 1 *Minimal Action*	Recommendation directed at non-SuR states, or calling upon the SuR to request technical assistance, or share information	Call on, seek, and share
Category 2 *Continuing Action*	Recommendation emphasizing continuity	Continue, maintain, persevere, persist, and pursue
Category 3 *Considering Action*	Recommendation to consider change	Analyse, consider, envisage envision, examine, explore, reflect upon, revise, review, and study
Category 4 *General Action*	Recommendation of action that contains a general element	Accelerate, address, encourage, engage with, ensure, guarantee, intensify, promote, speed up, strengthen, take action, and take measures or steps towards
Category 5 *Specific Action*	Recommendation of specific action	Conduct, develop, eliminate, establish, investigate, undertake, abolish, accede, adopt, amend, implement, enforce, and ratify

[67] McMahon, *supra* note 21, p. 369-370.
[68] *Content based on:
- UPR-Info, "UPR Info's Database – Action Category", 2014, (available at https://www.upr-info.org/database/files/Database_Action_Category.pdf).

This use of the quantitative method of categorizing recommendations enables a structured and systemised analysis of the UPR recommendations. In this thesis, the categorizations will be used to see what types of actions related to the prevention of atrocity crimes are requested by recommending states and accepted by SuRs. McMahon's framework for categorizing has been criticised in a report by the URG for having an exaggerated focus on actionable recommendations. The authors of the URG report argue that recommendations should not be perceived as 'good' simply because they are actionable, as this is irrelevant if e.g. the SuR does not have the capacity to implement them.[69] As we agree that McMahon's action categorising tool cannot stand alone, the SMART framework, which is an analysis tool presented and used by the UPR-info, will also be used throughout the analysis.[70] This framework builds on the argument that the ideal UPR recommendation should be *Specific* which means addressing a specific right or violation, *Measurable* which means that its implementation can be assessed, *Achievable* which means that the recommendation is made taken into account the material capacity of the SuR, *Relevant* which means that it proposes a solution adapted to a specific problem and human rights situation, and *Time-bound* which means that a time-frame for implementation is indicated.[71]

2.4.2. McMahon and UPR-info: Response and Issue Categories

McMahon's Category H *SuR Response to Recommendations* is used to catalogue the recommendations into the response-categories: *Accepted, Rejected, No Response, and General Response.*[72] UPR-info has adopted a similar approach that will be used in the thesis. UPR-info categorises recommendations as: *Accepted (A), Noted (N) or Pending (P). Accepted* recommendations are announced as accepted by the SuR during the review. *Noted* recommendations are either directly rejected orally by the SuR or not directly accepted by the SuR. *Pending* recommendations are recommendations that the SuR has given no response to during the review, hereafter the SuR is allocated a reasonable time frame to respond to the outcome report, which is adopted by the HRC at the regular sessions. Depending on the SuR's response to the recommendation, it will be labelled as *Accepted* or *Noted.*[73] The

[69] Limon and Gujadhur, *supra* note 9, p. 29.
[70] UPR-info, "Beyond promises: the impact of the UPR on the ground", 2014, (available at https://www.upr-info.org/sites/default/files/general-document/pdf/2014_beyond_promises.pdf), p. 8.
[71] UPR-info ("Beyond promises"), *supra* note 70, p. 60.
[72] McMahon, *supra* note 21, p. 366.
[73] UPR-info, "Methodology Responses to Recommendation", 2014, (available at https://www.upr-info.org/database/files/Database_Methodology_Responses_to_recommendations.pdf).

response category is pivotal for the analysis of the state acceptance and practice related to the use of the UPR for the prevention of atrocity crimes. The combination of the response category and action category will be used to analyse whether states accept the use of UPR for the prevention of atrocity crimes, and further what types of recommendations states are willing to accept, and which recommendations are deemed unacceptable by states. Lastly, both McMahon and UPR-info categorize UPR recommendations into *Issues* such as Justice, Woman's Rights, International Instruments, and IHL.[74] This thesis will when relevant make use of the statistics made by UPR-info on recommendations sorted into issue categories, looking at the issue-categories that are especially relevant for the prevention of atrocity crimes. Furthermore, the issue category statistic for specific countries will also be used in case studies when relevant (see a full presentation of these and a guide to how this data is referenced in footnotes in Annex III, p. 160).

2.4.3. Zhu: International Humanitarian Law in the UPR and 'Tailored Themes'

Zhu published an article in 2014, analysing the integration of-, and states use and acceptance of IHL in the UPR. Zhu concludes that states' acceptance and use of IHL in UPR have increased since the UPR cycles started.[75] This has made UPR the only forum for inter-state policy recommendations on the implementation of IHL.[76] This conclusion is relevant for this thesis' analysis, but it should be kept in mind that states' acceptance of IHL in the UPR, will not necessarily lead to the acceptance of using the UPR to prevent atrocity crimes.

To analyse states' acceptance of IHL in the UPR, Zhu has carried out an empirical survey of the UPRs. Zhu takes a slightly different methodological approach than McMahon. Where McMahon narrowly categorise and systematise recommendations made in the UPR in e.g. *Issues* and *Responses of Recommendation* and thus encompassing all recommendations in his analysis, Zhu structures his analysis around legally based themes e.g. *General reference to IHL* and *Geneva Law*.[77] Analysing each of these themes Zhu gives examples of concrete recommendations where states have referred to a given theme, hence clearly demonstrating how they are each used and perceived by states. The addition of more 'tailored' themes in this thesis, similar to those used by Zhu, will enable a deeper and more focused assessment of the problem statement as it limits the scope of the analysis and guides the direction of the

[74] McMahon, *supra* note 21, p. 367 and UPR-info, "UPR-info's Database - Issue categorisation", 2016, (available at https://www.upr-info.org/database/files/Database_Issues_explanation.pdf).
[75] Lijiang Zhu, "International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council", *Journal of International Humanitarian Legal Studies*, vol. 5 (2014), p. 187-188.
[76] Zhu, *supra* note 75, p. 188 and McMahon, *supra* note 21, p. 357.
[77] Zhu, *supra* note 75, p. 201-207.

analysis. The case studies, which will be presented in the following, are all in different ways build up around tailored themes.[xiv]

2.5. Case Selection

The following section will present the methodological reasons for the case selection made for the three sub-analysis on state practice. The selection of cases and examples in each sub-analysis differ, why they will be presented separately. The case selections that are recommendation-driven are constructed around relevant specific wording, which enables the best use of the UPR-info database and statistics, where data can be found with the use of keywords (See other filters available in UPR-info's database, Annex III, p. 160).

For the sub-analysis "4.3. Practice of Explicitly Addressing Atrocity Prevention in the UPR" the case selection is recommendation-driven, meaning that the examples analysed are selected based on the specific wording and language in recommendations. This method for case selection is chosen because the sub-analysis aims to give an assessment of the overall state practice of providing UPR recommendations with wording explicitly related to the R2P and the four atrocity crimes. This case selection enables an assessment of many and diverse examples that can provide a good overview. This sub-analysis will due to its purpose not include in-depth analysis of specific country cases.

For the sub-analysis "4.4. Practice of Direct Atrocity Prevention in the UPR" cases are selected with two different approaches. The first sets of cases are examples of states (Syria, Myanmar, and Kyrgyzstan) with on-going or recent atrocity crimes because direct prevention of atrocity crimes only applies to cases with a relatively high-risk level, which is increased in such cases. These cases are also selected because they represent examples of states with serious human rights- and IHL violations. The second set of examples are selected with a recommendation-driven approach, as the examples included in the analysis are selected based on the reference to specific tools for direct prevention in UPR recommendations (See tools in the section "2.3.4. Direct Atrocity Prevention", p. 20). The combination of these two approaches enables a thorough analysis of the potential of the UPR to support direct atrocity prevention, as it both provides focused state cases and contribute with an assessment of the state practice of using the UPR to support specific tools for direct prevention.

The sub-analysis "4.5. Practice of Structural Prevention and Resilience Building in the UPR" differs significantly from the two other practice sub-analyses, as only five cases are selected; Argentina, Czechia, Sri Lanka, Switzerland and Zambia. The aim of this sub-analysis is to

examine the use of the UPR for structural prevention. The five cases analysed in this sub-analyses are all selected from the 28th UPR session held in November 2017, because these cases are the most recent and also the first examples of UPRs made after the UNSG 2017 R2P Report. One country case from each of the UN regional groups is selected to provide a certain level of regional diversity. Furthermore, states with different atrocity risk-levels are selected. The case selection for this sub-analysis is limited to five cases and based on regional and risk-level consideration because this is deemed to ensure a both diverse and in-depth understanding of the opportunities and challenges of using UPR for structural atrocity prevention that can be identified in current state practice.[xv]

2.6. Interviews

For this thesis, there have been conducted 12 interviews. There have been interviewed two atrocity prevention experts; Savita Pawnday Deputy Executive Director at the Global Centre for R2P (GCR2P), and Alex Bellamy the Director of the Asia Pacific Centre for the Responsibility to Protect. There have further been interviewed two UPR-experts Aoife Hegarty Programme Manager at UPR-info and Marc Limon the Executive Director of the URG. Moreover, there have been interviewed four Geneva-based diplomats one from Australia and three others from member states of the Western European and Others Group (WEOG) and the Asia-Pacific Group, one European External Action Service (EEAS) Official, and three representatives of the national foreign ministries of Switzerland and Argentina and one from another member state of the WEOG. A full list of names, dates of interviews, and locations of these can be found in Annex I p. 154.

Respecting the wishes of the interview-persons, the diplomats and one of the foreign ministry representatives will not be quoted with country affiliation. Direct quotes by the Australian diplomat, interviewed for this thesis, are referenced anonymously as “Geneva-based diplomat”. In these interviews, anonymity was prioritized to allow frank and open conversations.

Interviews with Geneva-diplomats contribute with a practitioner point of view and a substantial understanding of the Geneva context and the UPR’s functioning in practice. The Representatives of different foreign ministries are included to supplement the diplomat interviews and contribute with a better understanding of the domestic foreign ministries view on the UPR and the potential integration of the R2P into the mechanism. The representatives

of the two Geneva-based NGOs UPR-info and the URG contribute with expertise on the UPR process. Lastly, the interviews with Savita Pawnday and Alex Bellamy contribute with expert knowledge on atrocity prevention. The questions for each type of interview have been formulated focusing on each interview person's specific area of expertise and practical experience. Interview questions can be read in Annex II, p. 156.

During the process of writing this thesis, we have contacted 34 permanent missions in Geneva regarding interviews. We have further contacted 135 missions regarding an online survey, with questions on the integration of the R2P into the UPR. Only two missions, Botswana and New Zealand, responded to this survey, and the results were therefore not representative enough to be usable. We are fully aware of the overweight of interview persons from WEOG and have tried to balance this by including a diverse set of state statements, to reflect different opinions on the subject.

2.7. Limitations

The following section will examine the main methodological and content related limitations of the thesis. The first, and perhaps most significant limitation is that it is a difficult task to measure the specific impact of UPR recommendations and establish a clear causal connection between a recommendation or the broader UPR process and the given outcome in a state, although there are examples of this.[78] The analysis of the UPRs' impact on atrocity prevention is especially difficult because this is a very new agenda in the UPR and because the effects of prevention are always difficult to determine. The full analysis of the implementation and impact of each UPR recommendation assessed in the analysis would demand substantial resources and time not available in the research for this thesis. This does not mean that the implementation of recommendations will not be assessed at all in the analysis. The combination of preparatory UPR reports; National Reports, Stakeholder Reports, and UN System Reports for the UPR will be assessed to gain some insight into the implementations process (See descriptions of reports in Section "3.2. Human Rights Council Resolution 5/1: Institution-building of the UPR", p. 33). The Office of the High Commissioner for Human Rights (OHCHR) has developed a system of indicators for measuring the implementation and impact of human rights on the ground. The OHCHR

[78] *See e.g. UPR-info's report on the impact on the ground of the first UPR cycle and the URG's report on the lessons learned from the first two UPR cycles.
- UPR-info ("Beyond promises"), *supra* note 70.
- Limon and Gujadhur, *supra* note 9.

distinguish impact indicators, which refer to steps taken by the states, and output indicators which entail the analysis of whether the steps taken have resulted in improvements of human rights promotion and protection.[79] These indicators will be considered in case studies, where possible, but the scope of the thesis does not permit the thorough use of these in the analysis of all the examples assessed.[xvi]

The thesis research represents a very early analysis of the UNSG recommendations provided for in the 2017 R2P Report to integrate R2P into the UPR, which is both a limitation and strength. The fact that the analysis is an early assessment is a limitation in the sense that existing research on the specific relation between the UPR and atrocity prevention is very limited and the connection is also a relatively new idea in the mind-set of practitioners and state actors. Meanwhile, it can also be seen as an asset of the thesis that it is contributing to the initial research on a contemporary discussion.

In the 2017 R2P Report, the UNSG recommends that states should include atrocity prevention issues in the recommendations and questions posed by states in the UPR.[80] In this thesis, the focus will be on recommendations rather than the questions posed by states. This delimitation has been chosen, because recommendations are seen as the main currency of the UPR,[81] which is reflected in literature on the UPR by e.g. McMahon and Zhu. Furthermore, recommendations are the outcome of the UPR, which states can either note or accept.

Another aspect of the thesis, which both represents a strength and limitation is the general and universal scope of the analysis. The problem statement refers to the universal potential of using the UPR to support atrocity prevention, as it does not concretise a singular focus on one specific region, country or atrocity risk-level. This allows an open analysis of more or less detailed assessments of many and different cases and perspectives. This is prioritized over only providing in-depth analysis of a narrow set of cases, because the goal of the research is to provide general recommendations on how the potential for using the UPR to support the prevention of atrocity crimes can be increased. Additionally, because the thesis is an early assessment and there exists limited research on the subject, it has been prioritized to provide an assessment based on an inclusive analysis of the potential for using the UPR for both

[79] Limon and Gujadhur, *supra* note 9, p. 41.
[80] UNSG R2P Report 2017, *supra* note 5, §36.
[81] Limon and Gujadhur, *supra* note 9, p. 4.

structural, direct, explicit and implicit atrocity prevention. To ensure that the analysis has substantial depth a few country cases are assessed more thoroughly when relevant.[xvii]

Chapter III: Legal tools and Framework

3.1. The UN General Assembly Resolution 60/251: Establishing the Human Rights Council

The HRC was established with the adoption of the UNGA resolution 60/251 in 2006. The HRC is based in Geneva and is a subsidiary organ of the UNGA. The HRC replaced the Human Rights Commission and is mandated to *"be responsible for promoting universal respect for the protection of all human rights."*[82] A preventive mandate of the HRC is established in paragraph 5 (f), which states that the HRC shall "*contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies."*[83] The HRC shall address situations of human rights violations, and gross and systematic violations.[84] It is mentioned several times in the resolution that the HRC shall be guided by "*the principles of universality, impartiality and non-selectivity"*[85] and work with transparent, fair, and impartial methods.[86] The HRC has 47 geographically distributed member states elected by secret ballot; by a majority of the UNGA members for periods of three years.[87] The HRC gather for meetings and resolution negotiations three times a year for regular sessions of a month duration. Recommendations made in HRC resolutions are not binding. Resolution 60/251 establishes that the HRC can convene for special sessions when needed to fulfil its mandate.[88] It is further established that the HRC shall undertake UPRs based on reliable and objective information on the fulfilment by states of their human rights commitments and obligations.[89]

3.2. Human Rights Council Resolution 5/1: Institution-building of the UPR

The functioning and procedures of the UPR are mainly elaborated in HRC resolution 5/1 which was adopted in 2007.[90] The HRC resolution and its annex is an Institution-building Package that covers the agenda and procedures as well as the different Charter-based bodies[91]

[82] HRC Resolution 60/251, *supra* note 4, §2.
[83] HRC Resolution 60/251, *supra* note 4, §5 (f).
[84] HRC Resolution 60/251, *supra* note 4, §3.
[85] HRC Resolution 60/251, *supra* note 4, §4.
[86] HRC Resolution 60/251, *supra* note 4, §12.
[87] HRC Resolution 60/251, *supra* note 4, §7.
[88] HRC Resolution 60/251, *supra* note 4, §10.
[89] HRC Resolution 60/251, *supra* note 4, §4 (e).
[90] HRC Resolution 5/1, *supra* note 4.
[91] *Human rights monitoring mechanisms in the UN system can be divided into two categories: Charter-based bodies and treaty-based bodies. The Office of the High Commissioner of Human Rights (OHCHR) functions as the secretariat of these. Under international human rights law there also exist regional instruments, such as the African Charter on Human and Peoples' Rights and the European Court of Human Rights.

within the HRC's mandate; the UPR, the Special Procedures,[92] the HRC's Advisory Committee,[93] and the Complaint Procedure.[94]

The objective of the UPR is to improve the human rights situation on the ground.[95] The basis of the review is established as:

> "(*a) The Charter of the United Nations;*
> *(b) The Universal Declaration of Human Rights;*
> *(c) Human rights instruments to which a State is party;*
> *(d) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council".*[96]

Lastly, the inclusion of "applicable" IHL is added in the second paragraph.[97] The UPR is set-up to be a state-driven mechanism, where the review process is to be conducted with full inclusion of the SuR, while all other relevant stakeholders such as Non-governmental Organizations (NGOs) and NHRIs also are included in the preparatory and implementation phases of the process.[98]

It is established that the UPR will review all states in cycles of four years each.[99] The length of the UPR cycles was extended to four-and-a-half years in 2011, as a part of the HRC resolution 16/21, which was adopted as the outcome of the UNGA review of the HRC's first five years.[100] The review was planned in accordance with paragraph 16 of resolution 60/251

- OHCHR, "Human Rights Bodies", *OHCHR,* accessed 19.12.17, (available at http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx).

[92] *Special Procedures are defined in the Annex of resolution 5/1 §39-64: Special procedures are Special Rapporteurs, Independent Experts, or Working Groups appointed by the HRC with a mandate to report and advice on thematic or country specific issues. Special procedures report annually to the HRC.
[93] *The Advisory Committee is defined in the Annex of resolution 5/1 §65-84: The Advisory Committee functions as a think-tank for the HRC, and meets twice a year before HRC sessions.
[94] *The Complaint Procedure is defined in the Annex of resolution 5/1 §85-109: The Complaint Procedure addresses communications submitted by individuals, groups, or NGOs that have reliable knowledge or claim to be victims of human rights violations.
[95] HRC Resolution 5/1, *supra* note 4, Annex I, §4 (a).
[96] HRC Resolution 5/1, *supra* note 4, Annex I, §1 (a-d).
[97] HRC Resolution 5/1, *supra* note 4, Annex I, §2.
[98] HRC Resolution 5/1, *supra* note 4, Annex I, §3 (e) and (m).
[99] HRC Resolution 5/1, *supra* note 4, Annex I, §13.
[100] HRC Resolution 16/21, *Review of the work and functioning of the Human Rights Council,* A/HRC/RES/16/21 (12 April 2011), (available at http://www.undocs.org/A/HRC/RES/16/21), §5 (f)

from 2006, in which the UNGA decided that the HRC should review its work and functioning five years after its establishment.[101]

The preparatory documentation required before the review process include:
- **A National Report** on the national human rights situation, prepared by the SuR, preferable prepared "*through a broad consultation process at the national level".*[102] This report must not exceed a total of 20 pages.
- **A Compilation of UN documents** prepared by the OHCHR; containing information from the treaty bodies,[103] special procedures, including comments and observations by the SuR and other relevant UN documents. This report must not exceed a total of 10 pages. (Referenced in this thesis as UN System Report)
- **A Summary of information provided by relevant stakeholders** such as national civil society and human rights institutions.[104] The report is a summary made by the OHCHR of individual submissions by stakeholders. This report must not exceed a total of 10 pages. (Referenced in this thesis as Stakeholder Report)

These documents should if prepared properly ensure that the human rights situation in each state is reliably presented at the review.

After the end of the first cycle of the UPR, in addition to the adoption of HRC resolution 16/21, HRC decision 17/119 was adopted in July 2011. The resolution did not bring about significant changes to the mechanism but did underline that the second and subsequent cycles should focus on the implementation of recommendations accepted by SuRs during the first cycle. The resolution provides a few guidelines on this, amongst these that states should identify achievements, lessons-learned, challenges and constraint of the accepted recommendation.[105xviii]

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[101] HRC Resolution 60/251, *supra* note 4, §16.
[102] HRC Resolution 5/1, *supra* note 4, Annex I, §15 (a).
[103] *Treaty bodies are established under the core human rights treaties or their optional protocols to monitor the implementation of with these.
- OHCHR ("Human Rights Bodies"), *supra* note 91.
[104] HRC Resolution 5/1, *supra* note 4, Annex I, §15 (a-c).
[105] HRC Decision 17/119, *Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review*, A/HRC/DEC/17/119 (19 July 2011), (available at http://archive.ipu.org/splz-e/montevideo14/17_119.pdf), §2 and 2 (E).

3.2.1. The Stages of the UPR Process

The UPR process can be divided into four main phases that are described below:

1) A preparatory phase; where the three compulsory reports; the National Report, the UN System Report, and the Stakeholder Reports are made and submitted.[106]

2) Peer-to-peer review in the UPR Working Group; this phase is the main forum for the UPR, which is held in the Working Group, which consists of the 47 HRC member states. The peer-to-peer review is set-up as an interactive dialogue that lasts a three-and-a-half hour. The review starts with a presentation by the SuR of their national report, hereafter the working group's members and observer states of the HRC (i.e. all states that wish to participate) can provide comments, questions, and recommendations based on the three preparatory reports. The SuR will be allocated time to respond to these interventions during the dialogue. In an interview conducted for this thesis, a Geneva-based diplomat stated that the time limit of the interactive dialogue is a challenge for presenting good recommendations, as recommending states have approximately one minute and ten seconds.[107] Other relevant stakeholders, such as UN agencies, NGOs, and civil society organizations are allowed to observe, but not to intervene in the dialogue. The peer-to-peer review is facilitated by a Troika consisting of three states selected by drawing of lots among the HRC member states from different Regional Groups. The interactive dialogue is followed by a 48-hour period where the Working Group prepares a UPR Outcome Report in cooperation with the SuR and assisted by the OHCHR.[108]

3) Adoption of the review outcome; A reasonable time frame is allocated for the SuR to respond to the outcome report. The outcome report is adopted by the plenary of the HRC at the regular sessions. It is further established in HRC resolution 5/1, that the recommendations that enjoy the support of SuR shall be identified as accepted, other recommendation shall be noted. The Working Group, observer states, and other stakeholders are allowed to comment on the outcome report before the HRC adopts it.[109]

4) State implementation; after the adoption of the Outcome Report, the SuR permanent mission to the UN, the OHCHR, and NHRI/NGOs will transfer the Outcome Report (also called the Working Group Report) to the national level. The responsibility to implement recommendations accepted by the SuR lies at the domestic level. Between reviews, states are encouraged to submit a follow-up report on the implementation of accepted

[106] HRC Resolution 5/1, *supra* note 4, Annex I, §15 (a-c).
[107] Silke KMH and Marie SC, Interview with Geneva-based diplomat.
[108] HRC Resolution 5/1, *supra* note 4, Annex I, §18 (a-d) and 21-22.
[109] HRC 5/1, *supra* note 4, Annex I, §29-32.

recommendations. It is stated in HRC resolution 5/1 that the HRC will address cases of persistent non-cooperation with the UPR mechanism.[110]

3.3. The Responsibility to Protect

The UN doctrine R2P was adopted by the UNGA in consensus in 2005 and is a political commitment by states.[111] R2P's political origin builds on older ideas, put forward by Thomas Hobbes, Hugo Grotius, and John Locke, of sovereignty as responsibility. This means that sovereignty both entails rights and responsibilities.[112] While the R2P can be seen as the first cohesive political commitment to atrocity prevention it also builds on existing and legally binding principles of IL. The UN Charter firmly establishes the commitment to respect the sovereignty of states but also contains legal duties of sovereignty towards the protection of populations and human rights.[113] Moreover, the R2P applies to genocide, crimes against humanity and war crimes, which are all prohibited under IL and ius cogens norms,[114] meaning that no derogation is permitted.[115] R2P also applies to ethnic cleansing, which is not defined as an independent crime under IL, but the act of ethnic cleansing can constitute crimes against humanity and be assimilated to specific war crimes. States are therefore legally bound to protect their population against atrocity crimes. Furthermore, there also exists an extraterritorial legal obligation to prevent genocide. The International Court of Justice (ICJ) [116] found a legal obligation to prevent genocide established under article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, judging a case between Bosnia-Herzegovina and Serbia, concerning the application of the Convention.[117] The duty to prevent genocide is the most clearly legally defined obligation regarding atrocity prevention when it comes to crimes against humanity, ethnic cleansing, and war crimes the

[110] HRC 5/1, *supra* note 4, Annex I, §33 and 38.
[111] UNGA resolution 60/1, *supra* note 3, §138-139.
[112] Bellamy and Catherine Drummond, "The responsibility to protect in Southeast Asia: between non-interference and sovereignty as responsibility", *The Pacific Review*, Vol. 24, No. 2 (2011), p.181.
Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *The American Journal of International Law*, Vol. 101, No. 1 (January 2007), p. 111.
[113] *Charter of the United Nations*, San Francisco, 24 October 1945, 1 United Nations Treaty Series XVI, (available at: http://www.refworld.org/docid/3ae6b3930.html), articles 1(3), 2(1), 2(4), and 55.
[114] M. Cherif Bassiouni, *The Need for International Accountability,* in; M. Cherif Bassiouni (ed.), International Criminal Law - International Enforcement, Third Edition Volume III, 2008, p. 14.
[115] *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, United Nations Treaty Series, vol. 1155, (available at: http://www.refworld.org/docid/3ae6b3a10.html), article 53.
[116] The ICJ is the highest judicial organ of the UN. The court deals with disputes between states and not with criminal responsibility of individuals.
[117] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, International Court of Justice, 26 February 2007, (available at http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf), §428-438.

law is more ambiguous.[118] In relation to war crimes, common article 1 of the 1949 Geneva Conventions contains an obligation to not only respect but also to ensure respect of the Convention.[119] Knut Dörmann, Head of the Legal Division at the International Committee for the Red Cross (ICRC), and Jose Serralvo, Legal Advisor at the ICRC, have argued that common article 1 creates a legal obligation for third states, meaning states not taking part in armed conflict, to actively prevent IHL violations.[120] Moreover, Additional Protocol I to the Geneva Conventions establishes an obligation to act (jointly or individually in conformity with the UN Charter) in situations of serious violations of the Geneva Conventions and Additional Protocols.[121] Article 1 of the UN Charter refers to the principles and purposes of the UN, here included the prevention and removal of threats to the peace. Atrocity crimes present a threat to peace and security.[122] Furthermore, the UN Charter imposes an obligation to accept and carry out decisions by the SC.[123] This includes decisions on the prevention of atrocity crimes.[124] The SC has made 64 resolutions and presidential statements (out of 576 resolutions and presidential statements in total) with referral to R2P since 2011, these resolutions have been made either about a country situation of concern or a thematic issue.[125] The R2P continues to be placed at the centre of the UN's atrocity prevention efforts, with agencies and initiatives such as the UN Joint Office for the Prevention of Genocide and the R2P, the UNSG's R2P Reports, and the annual Interactive Informal Dialogue on the R2P.

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[118] Sheri P. Rosenberg, "Responsibility to Protect: A Framework for Prevention", *Global Responsibility to Protect 1* (2009), (available at http://responsibilitytoprotect.org/The%20Responsibility%20to%20Protect%20A%20Framework%20For%20Prevention%20(Rosenberg).pdf) p. 461.

[119] *The 1949 Geneva Conventions I-IV*, Geneva, 12 August 1949, *United Nations Treaty Series,* I: vol. 75, no. 31; II: vol. 75, no. 85; III: vol. 75, no. 135; and IV: vol. 75, no. 287, (available at https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf), Common article 1.

[120] Knut Dörmann & Jose Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations", *International Review of the Red Cross 96,* 2014, p. 707-736.

[121] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, *United Nations Treaty Series,* vol. 1125, no. 3, (available at https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf), article 89.

[122] UN Office on Genocide Prevention and the R2P "Security Council", *UN Office on Genocide Prevention and the R2P,* accessed 01.11.17, (available at http://www.un.org/en/genocideprevention/security-council.html).

[123] *Charter of the United Nations and Statute of the International Court of Justice*, *supra* note 28, article 25.

[124] UNSG R2P Report 2017, *supra* note 5, §16.

[125] GCR2P, References in United Nations Security Council Resolutions and Presidential Statements", *GCR2P,* accessed 01.11.17, (available at https://drive.google.com/file/d/0B2FNV3U3nvLkeUtONUdXTlpQMm8/view), and SC, "Presidential Statements", *SC*, accessed 20.12.17, (available at http://www.un.org/en/sc/documents/statements/), and SC, "Security Council Resolutions", *SC*, accessed 2012.17, (available at http://www.un.org/en/sc/documents/resolutions/).

However, the HRC has only used R2P language in 28 resolutions since 2008.[126] This number is rather low, considering that e.g. at the 35th HRC sessions 35 resolutions were adopted.[127] xix

The Pillar Structure of the R2P

The R2P consists of three pillars:

1) The state's responsibility to protect its own population from the four atrocity crimes or their incitement;

2) The commitment of the international community to assist states in meeting their obligation to protect;

3) The responsibility of member states to respond collectively and in a timely manner when a state manifestly fails to protect its population.[128]

Each of these pillars is linked to a set of tools, some of which can be applied under different pillars. The primary tool under pillar one is domestic capacity-building, here included national insurance of the prevention and protection against atrocity crimes. Under the second pillar of the R2P, third states have the responsibility to provide technical- and other assistance to states to ensure that they meet their obligation to protect their population against atrocity crimes. The third pillar entails both peaceful tools such as fact-finding missions, mediation, diplomatic measures, embargoes, and sanctions and coercive military measures as a last resort. Actions under pillar three have to be approved by the SC, who has the responsibility to protect and maintain international security and peace under the UN Charter article 24. The SC can mandate the use of tools provided for under articles 41 and 42 of the UN Charter when a threat to or breach of international peace and security has been established in accordance with article 39 of the UN Charter.

[126] GCR2P, "R2P References in United Nations Human Rights Council Resolution", *GCR2P*, accessed 01.11.17, (available at https://drive.google.com/file/d/0B2FNV3U3nvLkd0h1M1hOd0ZFem8/view) and GCR2P, "R2P

[127] UN, *Report of the Human Rights Council*, A/72/53 (2017), (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/246/51/PDF/G1724651.pdf?OpenElement.).

[128] UNGA and SC, *Implementing the Responsibility to Protect - Report of Secretary-General*, A/63/677 (January 2009), (available at http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf), §11 (a-c).

R2P - Critics and Defenders

When debating the R2P critics have emphasised the gap in implementation, the lack of guidelines on the use of force, R2P's non legally binding character, the SC's misuse of their veto which has resulted in a selective and politicised application of the R2P, and the high threshold for international action (manifestly failing to protect population). Defenders have highlighted that R2P is an ally of sovereignty that breaks with the discourse on the right to intervene, that states have agreed on R2P in consensus with a clear definition as opposed to humanitarian intervention, committed to a timely and decisive response, and emphasised the R2P's strong focus on prevention.[129]

3.4. Legal Definitions of the Four Atrocity Crimes

Genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide article 2, as acts such as killings, forceful prevention of births, serious bodily- or mental harm. For such acts to be determined as a genocidal crime under international criminal law they must have been committed with the intent to destroy in whole or in part a national, ethnical, racial, or religious group.[130]

Crimes against Humanity are defined in the Rome Statute, article 7, as acts such as murder; enslavement; torture; rape etc. Common for all acts contained in the definition are that they must be part of a systematic or widespread attack against a civilian population, with knowledge of the attack, for them to be determined as crimes against humanity under international criminal law. [131]

War Crimes are defined in the Rome Statute article 8 as grave breaches of the 1949 Geneva Conventions. The legal definition of war crimes includes a long list of prohibited acts against

[129] Thakur Ramesh, "Review article The Responsibility to Protect at 15", *International Affairs* (2016), p. 415-434.

[130] *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, December 9 1948, United Nations Treaty Series, vol. 78, no. 1021, (available at https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F091964230EADECC12563F700550817), article 2.

[131] *Rome Statute of the International Criminal Court*, Rome, July 17 1998, United Nations Treaty Series, vol. 2187, no. 38544, (available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf), article 7.

persons or properties protected under the Geneva Convention. War crimes are always linked to armed conflicts and are therefore regulated by IHL.[132]

Ethnic Cleansing is not officially defined and recognized as a distinct crime under IL. A UN Commission of Experts has described the practice of ethnic cleansing as "*rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.*"[133] The act of ethnic cleansing can constitute crimes against humanity and be assimilated to specific war crimes. Furthermore, the act of ethnic cleansing could also *"fall within the meaning of the Genocide Convention".*[134]*xx*

[132] *Rome Statute of the International Criminal Court, supra* note 131, article 131.
[133] UN Office on Genocide Prevention and the R2P ("Ethnic Cleansing"), *supra* note 1.
[134] *Ibid.*

Chapter IV: Analysis

4.1. Compatibility of the R2P and the Institutional and Legal Framework of the UPR

How can the R2P be integrated into the institutional framework of the UPR?

This section will focus on the above working question, by firstly presenting the UNSG 2017 R2P Report. Secondly, the compatibility between the R2P and the HRC's preventive mandate will be assessed. Following, the compatibility between the R2P and the Institution-building Package of the UPR will be analysed. Furthermore, the compatibility between the pillars of the R2P and the UPR will be assessed. Lastly, the possibility of reforming the HRC, hereunder the UPR, for effectively supporting atrocity prevention will be discussed.

4.1.1. The UN Secretary-General's 2017 Report on R2P

Since 2009, the UNGA has held interactive dialogues on the R2P to consider recommendations and best practices for the implementation of the principle. In preparation, the UNSG has published R2P Reports before the dialogues. In 2017 the report and dialogue focused on prevention, in line with the UNSG António Guterres' broader UN prevention agenda. In the 2017 R2P Report "Implementing the Responsibility to Protect: Accountability for Prevention", the UNSG described the UPR as *"especially well placed to support efforts to prevent atrocity crimes",* and called for better utilization of the mechanism to support atrocity prevention efforts through four steps:[135]

A) Inclusion of risk assessments and prevention measures for atrocity crimes in the preparatory materials of the UPR (National report, UN System Report, and Stakeholder Report);
B) Inclusion of atrocity prevention issues in the peer-to-peer dialogue of the UPR (here included recommendations and questions posed by states);
C) Adequate reflection of the discussion on risks and prevention measures for atrocity crimes in the outcome document, furthermore SuRs should be strongly encouraged to accept recommendations related to the prevention of atrocity crimes;

[135] UNSG R2P Report 2017, *supra* note 5, §35-36.

D) Where relevant, in line with pillar two of the R2P, states should provide assistance to help states under stress prevent atrocity crimes. Furthermore, UN agencies should support the implementation of recommendations.[136]

4.1.2. The Human Rights Councils Preventive Mandate

The first argument supporting the institutional compatibility between the UPR and the integration of R2P is the preventive mandate of the HRC. As accounted for in section "3.1. The UN General Assembly Resolution 60/251: Establishing the Human Rights Council", p. 33, the HRC shall address situations of human rights violations and gross and systematic violations, and in accordance with paragraph 5 (f) "*contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies".*[137] Gross and systematic human rights violations could be atrocity crimes or a risk factor for atrocity crimes, which the HRC is hence obligated to address and respond promptly to. However, the HRC should not only respond to human rights violations but also seek to prevent them in the first place through dialogue and cooperation. In this sense, the prevention mandate is very compatible with pillar two of the R2P. Critically, despite the clear mandate to prevent human rights violations, the preventive mandate of the HRC remains underdeveloped.[138] There exist no coherent strategy or processes to fulfil the HRC's prevention mandate, and the few initiatives taken forward have been on an ad hoc manner.[139] The operationalization of the preventive mandate should not only include the UPR but all relevant mechanisms at the HRC's disposal.

4.1.3. The Institution-building Package of the UPR

At the UNGA's 2017 Informal Interactive Dialogue on the R2P, Russia stated that the UPR has no mandate to deal with issues of the R2P. [140] As established in section "3.2. Human Rights Council Resolution 5/1: Institution-building of UPR", p. 33, the basis of the UPR includes IHL and voluntary pledges and commitments made by states. In contrary to Russia's interpretation, it is in this thesis argued that the UPR has the mandate to include the R2P

[136] UNSG R2P Report 2017, *supra* note 5, §36.
[137] HRC Resolution 60/251, *supra* note 4, §3 and 5 (f).
[138] Silke KMH and Marie SC, Interview Marc Limon, Executive Director for Universal Rights Group, Geneva via Skype, 26 October 2017.
[139] URG, "Glion Human Rights Dialogue 2017 - How to operationalise the Council's 'prevention' mandate: the effective implementation of paragraph 5F of GA RES. 60/261", 2017, (available at http://www.universal-rights.org/wp-content/uploads/2017/09/Glion_final_report.pdf), p. 3.
[140] Russia, "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-russian-federation.pdf).

because the R2P is a voluntary commitment made by states in 2005.[141] Furthermore, as argued in section "3.3. The Responsibility to Protect", p. 37, the R2P builds on existing IHL, and IHL is included as the basis of the UPR. In this thesis, it is therefore argued that there is nothing in the Institutional Package of the UPR standing in the way of an integration of the R2P into the UPR.

Furthermore, the wording in the Institutional-Building Package is especially interesting for the prospect of using the UPR to support atrocity prevention efforts. It is here highlighted, that the UPR shall be *"non-confrontational and non-politicized"* and *"United Nations Member-driven and action-oriented"* have *"universal coverage and equal treatment"*, and that it should *"not diminish the Council's capacity to respond to urgent human rights situations."*[142] These characteristics of the UPR could if properly implemented help diminish some of the challenges the atrocity prevention agenda have faced when the R2P doctrine has been applied in a 'SC-driven, selective and politicized' manner (this argument was elaborated in section "3.3. The Responsibility to Protect", p. 37).[xxi]

4.1.4. The R2P's Pillar One and Two

One of the main arguments for the UPR being well placed to support atrocity prevention efforts, is that the mechanism has the capability to document a wider range of human rights challenges and root causes for atrocities such as marginalization, poverty, economic inequality, abuse of power and weak rule of law (to the degree that these can be seen as a result of failure to uphold human rights).[143] Highlighted by numerous interviewees e.g. Geneva-based diplomats, Limon and a Representative of WEOG state Foreign Ministry.[144] The UPR could, therefore, be valuable for atrocity prevention as it can document a more holistic view of states' human rights records, both in the form of resiliencies and risks towards atrocity crimes.[145] The UPR could in this sense function as an even earlier 'early-warning mechanism' than existing early-warning mechanisms.[146] This means that the UPR can address many of the relevant aspects of the R2P's pillar one and the structural prevention of atrocities. One limitation in this regard is that preparation documents and

[141] UNSG 2017 R2P Report, *supra* note 5, §35.
[142] HRC Resolution 5/1, *supra* note 4, Annex I, §3 (c-d), (g), and (j).
[143] Ainley, *supra* note 15, p. 20-21.
[144] Silke KMH and Marie SC, Interview with Geneva-based diplomat and Silke KMH and Marie SC, Interview with Executive Director for URG Limon, *supra* note 138, and Silke KMH and Marie SC, Interview with Representative of WEOG state Foreign Ministry, 13 November 2017.
[145] Silke KMH and Marie SC, Interview with Geneva-based diplomat and Silke KMH and Marie SC, Interview with Representative of WEOG state Foreign Ministry, *supra* note 144.
[146] Ainley, *supra* note 15, p. 20-21.

recommendations will not necessarily be nuanced or good enough to support effective atrocity prevention. This is due to both formal limitations such as page limits, and organisational and governmental resources and priorities. Resources are generally a problem for foreign ministries.[147] One Geneva-based diplomat emphasized that their foreign ministry did not have capacity to understand the context, risks, and resilience of the all the SuRs and formulate good recommendations for all. [148] In terms of including risk assessments and resilience measures in the preparatory UPR documents, it must here also be considered that not all states and NGO stakeholders will have resources to ensure this. One proposal to combat this issue is to integrate atrocity prevention into existing sections of reports. Another challenge for the integration of the R2P is that this agenda is competing with many other human rights agendas, and these might be prioritised when reporting and making recommendations, especially if the SuR does not have impending risks of atrocity crimes.[149] Based on the above analysis, it must be stressed that the UPR can only support and must be complementary to other atrocity prevention efforts. Doing successful atrocity prevention requires a comprehensive set of processes and actors targeting many aspects of society.

The UPR is also compatible with the R2P's pillar two as states can exercise their pillar two responsibilities with recommendations contributing to resilient societies, offer assistance when appropriate, request assistance in national reports, and with their recommendations encourage other relevant states to live up to their pillar two responsibilities.

4.1.5. The R2P's Pillar Three

When analysing the compatibility and potential of using the UPR for direct prevention, it should be kept in mind that UPR recommendations are non-binding. The UPR mechanism cannot mandate specific measures and does not have the mandate to secure implementation of 'hard' direct prevention tools provided for under R2P's pillar three. Due to the cooperative and non-coercive character of the UPR, the UPR is in nature not compatible with the coercive elements of R2P's pillar three. However, states can potentially still use the UPR to call upon and encourage a given state to uphold obligations that have already been mandated by the SC or in bi-/multilateral agreements between states such as peace negotiations, peacekeeping missions, ICC referrals etc.

[147] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* nota 144.
[148] Silke KMH and Marie SC, Interview with Geneva-based diplomat.
[149] Silke KMH and Marie SC, Interview with Geneva-based diplomats; Silke KMH and Marie SC, Interview with Representative of the Foreign Ministry of Switzerland, Bern via Skype, 15 November 2017; and Silke KMH and Marie SC, Interview with Aoife Hegarty, programme manager at UPR-info, Geneva via Skype, 2 November 2017.

4.1.6. The Possibility of Reforming the Human Right Council to Support Atrocity Prevention

In the previous sections, it was established that the R2P's pillar one and two are compatible with the institutional and legal framework of the UPR and the HRC's preventive mandate. This means that there is nothing institutional standing in the way of the UNSG's proposal to integrate atrocity prevention into the UPR. However, it should be kept in mind, that this does not mean that there is state appetite for it,[150] as exemplified in the Russian statement. At this stage, there is no process to ensure the implementation of the UNSG's four steps. Thus the integration will happen in an ad hoc manner and will be highly dependent on state willingness. Arguing for mainstreamed and universal atrocity prevention it would be preferable if atrocity assessments were a compulsory part of preparatory reporting. This section will discuss whether there are any possibilities to reform the HRC, hereunder the UPR, to ensure the inclusion of atrocity prevention in the UPR.

As accounted for in section "3.2. The Human Rights Council Resolution 5/1: Institution-building of the UPR, p. 33", the HRC has been reviewed once before by the UNGA in 2011 with the outcome of the HRC resolution 16/21 and very few changes to the UPR mechanism.[151] The next review of the HRC by the UNGA is planned to begin in 2021, meaning after the third cycle of the UPR.[152] Limon argues that even though URG together with Switzerland and Norway are trying to kick-start the reform of the HRC, it is unlikely that the UPR will be covered, as the UPR is often seen in Geneva as the "best thing that has happened since sliced bread".[153] Both Limon and Hegarty see zero chance of reforming the Institutional-building Package.[154] Moreover, since the last review of the HRC in 2011, it has been difficult to reach consensus on smaller "piecemeal" reforms of the HRC discussed on an ad hoc basis.[155] It is, therefore, also unlikely that smaller ad hoc reforms could be made to the UPR, especially during the third cycle, as states under review in this cycle should be treated equally. That said, the integration of the R2P into the UPR would definitely not be a smaller reform.

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[150] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.
[151] HRC Resolution 60/251, *supra* note 4, §16.
[152] URG, "The end of the road for 'piecemeal' reform of the Human Rights Council?", *URG,* 25 October 2017, (available at http://www.universal-rights.org/nyc/blog-nyc/end-road-piecemeal-reform-human-rights-council/).
[153] Silke KMH and Marie SC, Executive Director for URG Limon, *supra* note 138.
[154] Silke KMH and Marie SC, Executive Director for URG Limon, *supra* note 138 and Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.
[155] URG (25 October 2017), *supra* note 139.

Based on the above discussion, it seems that the operationalization of the UNSG four steps is currently only possible in an ad hoc manner that largely relies on the willingness of states to do this on a voluntary basis. However, it is no secret that some states are reluctant to the idea of R2P, and for the integration to happen some states will have to function as champion states that are willing to lead by example with recommendations and reporting.[156] Civil society with the necessary resources can also function as advocates and include risks and resiliencies in their preparatory reporting, and focus on atrocity prevention issues at the HRC General Debates and at the UPR-info hosted Pre-session to the UPR (See explanation of these forums in sections "4.2.3. Human Right Council 2017 debate on item 6 (the UPR)", p. 52 and "4.2.4. Pre-sessions to the UPR", p. 54). [xxii]

4.1.7. Interim Conclusion

In this sub-analysis, it has been established that the UPR is highly compatible with R2P's pillar one and two. Due to the cooperative and non-coercive character of the UPR, the UPR is not compatible with the coercive elements of R2P's pillar three. However, states can still call on other states to uphold obligations that have already been mandated by the SC.

One of the benefits of utilizing the UPR for atrocity prevention is that the UPR can document a holistic view of states' human rights records, both in the form of resiliencies and risks towards atrocity crimes. The criticism of this argument is that, due to both formal limitations, organisational and governmental resources and priorities, preparatory documents and recommendations will not necessarily be nuanced to support effective atrocity prevention. Therefore, it must be stressed that the UPR can only support and be complementary to other atrocity prevention efforts.

It has been concluded that the HRC's preventive mandate is highly compatible with the R2P. However, despite a clear preventive mandate, the HRC lacks a coherent strategy for operationalizing this mandate. Furthermore, there is nothing in the Institution-Building Package of the UPR (HRC resolution 5/1) and the GA resolution 60/251 establishing the HRC, standing in the way of an integration of the R2P into the UPR. However, at this stage, there is no process to ensure operationalization of the UNSG's proposals, why the integration is highly dependent on state willingness. It has been discussed whether there are any

[156] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.

possibilities to reform the HRC, hereunder the UPR, to ensure the integration. However, such a reform is highly unlikely.

To explore the potential of integrating the R2P in an ad hoc manner, the next sub-analysis will analyse state acceptance of integrating the R2P into the UPR, and secondarily civil society engagement on the subject at the relevant international forums. [xxiii]

4.2. Current State Acceptance of R2P Integration into the UPR

How is state acceptance of integrating R2P into the UPR reflected in recent debates?

This section will focus on the above working question, by firstly giving an account of the Informal Interactive Dialogue on the R2P, held in New York the beginning of September 2017. Secondly, the result of the vote on the R2P as a formal agenda item at the UNGA, which took place in New York on the 15 September 2017, will be analysed. Thirdly, the statements made at the HRC's 2017 general debate on item 6 (the UPR), which took place in Geneva at the end of September 2017 will be analysed. Following, the value of the UPR-info hosted Pre-session to the UPR will be assessed. Lastly, there will be a discussion of the engagement on the R2P in the Geneva context.

4.2.1. Account of the Informal Interactive Dialogue on the R2P 2017

The interactive dialogue is an informal dialogue, which has been held annually since the first UNSG R2P Report was published in 2009. Due to the time constraints (the meeting lasts six hours) each state has three minutes or less to give a statement, which entails that, the dialogue in practice is not very 'interactive'. To address this challenge, and provide more time for dialogue, three preparatory meetings, two in New York and one in Geneva were organized by the UN Special Advisor to the UNSG on the R2P, for the first time in 2017.[157] The former UNSG Ban Ki-moon briefly touched upon the role of the UPR in atrocity prevention in his 2015 report on the R2P, stating *"There are opportunities to more systematically include atrocity crime risk factors and national efforts to address them in the universal periodic*

[157] UNSG R2P Report 2017, *supra* note 5, §8.

review process."[158] However, the better utilization of the UPR for the prevention of atrocity crimes is given considerably more attention in the 2017 R2P Report.

During the 2017 Informal Interactive Dialogue on the R2P, 66 states, representing around one-third of the UNGA, specifically acknowledged the UPR as a crucial mechanism for the prevention of human rights violations and as a vital institution for the operationalization of the R2P.[159] At previous Interactive Dialogues on the R2P states have referenced the work of the HRC and called for better cooperation between the HRC and the SC, although not focusing explicitly on the UPR.[160] On behalf of its 27 member states, the European Union (EU) stated that incorporating the HRC, here included the UPR, into the R2P framework is crucial for the effective prevention of atrocity crimes as the mechanism can contribute with identifying risks and deterring them.[161] During an interview, an EEAS Official confirmed that the EU supports the integration of the R2P into the UPR, but also shared that the R2P label is problematic to use in Geneva, which has led the EU to work more implicitly with atrocity prevention, mostly avoiding calling it R2P in their daily work.[162] At the 2017 Informal Interactive Dialogue on the R2P, it was primarily states from the WEOG and the Eastern European Group (EEG) who explicitly acknowledged the UPR as a useful mechanism for atrocity prevention. However, also states such as Mexico, Ghana, South Korea, Andorra and Rwanda voiced their support for the use of the mechanism for atrocity prevention.[163] On the contrary, Russia, Syria, Venezuela, Nicaragua, and Democratic People's Republic of Korea (DPRK) were highly critical of the UNSG's report, and Russia explicitly opposed the idea of

[158] UNGA and SC, *A vital and enduring commitment: implementing the responsibility to protect - Report of the Secretary-General,* A/69/981–S/2015/500 (13 July 2015), available at: http://responsibilitytoprotect.org/SG%20report%202015.pdfI), p. 10.
[159] GCR2P, "Summary of the informal interactive dialogue of the UNGA on the R2P, 6 September 2017", October 2017, (available at http://www.globalr2p.org/media/files/2017-summary-of-unga-r2p-interactive-dialogue.pdf), p. 5.
[160] GCR2P, "Summary of the Eighth Informal Interactive Dialogue of the UN General Assembly on the Responsibility to Protect, 6 September 2016", September 2016, (available at http://www.globalr2p.org/media/files/summary-of-the-r2p-dialogue-2016-1.pdf) and GCR2P, "Summary of the Seventh Informal Interactive Dialogue of the UN General Assembly on the Responsibility to Protect, 8 September 2015", September 2015, (available at http://www.globalr2p.org/media/files/summary-of-the-r2p-dialogue-2015.pdf).
[161] The EU, "Statement on behalf of the EU and its Member States at Informal Interactive Dialogue on the R2P", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-european-union.pdf).
[162] Silke KMH and Marie SC, Interview with EEAS Official, *supra* note 162.
[163] *Count from: UN web tv, "(1st & 2nd meeting) Informal interactive dialogue on the Responsibility to Protect - General Assembly, 71st session", New York, 6 September 2017, (available at (1st) http://webtv.un.org/watch/1st-meeting-informal-interactive-dialogue-on-the-responsibility-to-protect-general-assembly-71st-session/5566146523001/?term= & (2nd) http://webtv.un.org/watch/-2nd-meeting-informal-interactive-dialogue-on-the-responsibility-to-protect-general-assembly-71st-session/5565364474001/?term=).

integrating the R2P into the UPR. Russia stated that the UPR has no mandate to deal with issues of the R2P. Furthermore, Russia argued that there is no well-defined meaning of the R2P while calling its implementation a complete failure.[164] Pakistan supported the UNSG's prevention focus, but was critical towards the R2P's selectivity and argued that similar politicization of the UPR should be avoided.[165] States such as Iran, Cuba, and Ecuador were very concerned with the R2P being used as a pretext for intervention in domestic affairs and pointed to the politicization, selectivity and lack of consensus surrounding the R2P.[166] In line with this division, Egypt called for the next UNSG R2P Report to more clearly reflect a wider set of opinions.[167] It should be kept in mind that states that are against the integration of the R2P into the UPR often are states with bad domestic human rights records, which are not only opposed to the R2P, but to any kind of further international interference and engagement on human rights issues.[168] The dialogue shows that the R2P still is a polarized issue, and states making statements were either strongly against or strongly for the integration of the R2P into the UPR.[169] The states objecting the integration of the R2P into the UPR are generally critical of the R2P concept and have expressed this at earlier interactive dialogues on the R2P in 2015 and 2016.[170]

Nevertheless, studying the statements by the group of consistent objectors, there is pattern of endorsing peaceful prevention that focuses on mitigating root causes, while being simultaneously highly critical towards the R2P. The group of which this a pattern applies consists of Iran, Venezuela, Sudan, Pakistan, Nicaragua, Egypt, Ecuador, China, and Bolivia.[171] The grand statements endorsing the prevention agenda seem hollow when the

[164] Russia (6 September), *supra* note 140.
[165] Pakistan, "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-pakistan.pdf).
[166] 1. Ecuador, 2. Iran & 3. Cuba, "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (1. available at http://www.globalr2p.org/media/files/2017-iid-ecuador-english.pdf 2. http://www.globalr2p.org/media/files/2017-iid-iran.pdf 3. http://www.globalr2p.org/media/files/2017-iid-cuba.pdf).
[167] Egypt, "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-egypt.pdf).
[168] Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Savita Pawnday, New York via Skype, 10 November 2017.
[169] *Ibid*.
[170] GCR2P, ("Summary 2016"), *supra* note 160. and GCR2P, ("Summary 2015"), *supra* note 160.
[171] Venezuela, Sudan, Pakistan, Nicaragua, Egypt, Ecuador, China, and Bolivia, "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-venezuela-english.pdf http://www.globalr2p.org/media/files/2017-iid-sudan.pdf http://www.globalr2p.org/media/files/2017-iid-pakistan.pdf http://www.globalr2p.org/media/files/2017-iid-nicaragua-english.pdf

statements are considered in their entirety. Egypt stated that there is a need to refrain from incorporating initiatives into the R2P that are non-conceptual and developed outside intergovernmental processes, including the UN Framework of the Analysis for Atrocity Crimes, while also arguing that the R2P cannot be operationalized because there is no consensus on the concept.[172] Another example is Myanmar's statement in which it is argued that the state *"understands the noble principles of prevention of atrocity crimes."*[173] This quote reflects, that stating support to the principles of prevention is easy and not the same as actually practicing it. Studying the statements of the sceptical states shows that they endorse the prevention agenda in broad terms and object to the R2P concept, while they simultaneously argue that atrocity prevention can only be done based on concepts defined and agreed to by states; which the R2P is the only example of. Pawnday shared that the GCR2P have engaged with the consistent objectors without this leading to a constructive debate. However, this does not mean that the GCR2P will not engage with this group in future. It would be a mistake not to engage with this group of states, as there could still be a willingness to focus on root causes of atrocity crimes. Root causes could e.g. be poverty, and building resilience through development aid, which could be something of interest for these states. Furthermore, it should be kept in mind that the persistent objectors to the R2P represent a minority in the UNGA.[xxiv]

4.2.2. The Vote on the R2P as a Formal Agenda Item at the UN General Assembly

The R2P was added to the formal agenda of the UNGA on 15 September 2017, with 113 member states voting in favour, 21 against and 17 abstaining. Having a vote on the inclusion of the R2P onto the formal agenda somehow contradicts the fact the R2P was originally adopted in consensus by the UNGA.[174] The vote further showed that although the R2P has lost some of its support, a majority of states still support the concept. The inclusion of the R2P into the formal agenda will allow on-the-record debates between states and provide more time to discuss the subject. All the states who were critical of the idea of integrating the R2P into the UPR voted no to include the R2P onto the formal agenda of the seventy-second session of the UNGA. Again these states voiced their concerns with a similar focus to the

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http://www.globalr2p.org/media/files/2017-iid-egypt.pdf
http://www.globalr2p.org/media/files/2017-iid-ecuador-english.pdf
http://www.globalr2p.org/media/files/2017-iid-china.pdf
http://www.globalr2p.org/media/files/2017-iid-bolivia.pdf).

[172] Egypt (6 September 2017), *supra* note 167.

[173] Myanmar "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (available a http://www.globalr2p.org/media/files/2017-iid-myanmar.pdf)

[174] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144.

statements from the Informal Interactive Dialogue on the R2P in 2017. Furthermore, Algeria highlighted a broader concern of developing countries that the R2P can be used as a pretext to interfere in domestic affairs. This argument is challenged by experts such as Pawnday and Bellamy, and representatives of foreign ministries who all argue that one of the benefits of using the UPR for atrocity prevention is that all states have to undergo the review and recommendations related to atrocity prevention can be given by and to all states equally.[175] States who voted in favour such as Singapore regretted that consensus had not been reached and 'expressed hope' that states would not use this opportunity to widen the division between them. Ghana, who led the initiative to put the R2P onto the formal agenda of the UNGA with Australia, recognised that some of the concerns raised called for further deliberations. Australia also focused on the importance of building consensus on what the UN and its member states can do to prevent atrocity crimes. India called for an open and transparent debate. Estonia, on behalf of the EU, called the formalizing of the R2P on the UNGA agenda a chance to close the gap between rhetoric and action.[176] 17 states choose to abstain in the vote, thus not directly opposing the inclusion of the R2P onto the formal agenda of the UNGA.[177] None of the abstaining states made statements during the 2017 Informal Interactive Dialogue on the R2P assessed above. This, in combination with abstaining in the vote, could suggest that these states do not have much at stake in the debate, that they lack the capacity to address the issue, or that they are not directly against the R2P, but have reservations. The motives cannot be determined within the scope of this thesis, but particular attention should be paid to these states, as they are likely to be more open to dialogue and engagement on the R2P than the states that voted no.[178]

4.2.3. Human Rights Council 2017 Debate on Item 6 (The UPR)

On 22 and 25 September 2017, the HRC held its annual debate on the UPR, which is the compulsory item 6 on its agenda, as established in the HRC resolution 5/1.[179] During the

[175] Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Alex Bellamy, Brisbane via Skype, 2 November 2017; Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168; Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144, and Silke KMH and Marie SC, Interview Representative of Switzerland's Foreign Ministry, *supra* note 149.

[176] UN, Meetings Coverage and Press Releases, *General Assembly Adopts Work Programme, Agenda for Seventy-Second Session, Including Item on Responsibility to Protect*, 15 September 2017, GA/11946, (available at https://www.un.org/press/en/2017/ga11946.doc.htm).

[177] *The abstaining states were: Algeria, Angola, Antigua and Barbuda, Bhutan, Brunei Darussalam, Cameroon, Colombia, Gabon, Jordan, Kenya, Laos, Malawi, Mali, Serbia, Togo, Tanzania and Viet Nam.

[178] Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168.

[179] HRC Resolution 5/1, *supra* note 4, §V (C).

debate 16 states and 57 civil-society organizations gave statements. Tunisia (on behalf of the African Group), Egypt (on behalf of the Arab Group), Venezuela, China, Morocco, and Turkey used their statements to emphasise the importance of keeping the UPR a non-selective, non-confrontational, non-politicized and universal human rights mechanism.[180] Another central theme of the debate was brought forward in statements given by Estonia (on behalf of the EU), Paraguay, Montenegro, Haiti, Turkey, Guinea Bissau, and Commonwealth, who all highlighted the importance of strengthening the ability and willingness to implement accepted UPR recommendations.[181] Lastly, Estonia (on behalf of the EU), the US, Paraguay, and Armenia underscored that the importance of contributions by NGOs and civil society organizations to the UPR process could not be overstated and should be strengthened.[182] None of the statements given by states touched upon the potential of using the UPR for atrocity prevention rather states described the mechanism as a human rights promotion mechanism, as opposed to a mechanism that has the mandate to prevent human rights violations. The fact that the potential use of the UPR for atrocity prevention was absent in the HRC debate suggests that the issue is still controversial and sensitive, or that states are unaware of this potential. Still, as several interviewees have emphasised, it is the unique peer-to-peer nature of the UPR that makes the mechanism valuable for atrocity prevention, because it is not a naming-and-shaming mechanism.[183] Furthermore, interviewees argued that many states prefer receiving recommendations from other states and not from experts or any other non-state actors.[184] This means that the characteristics of the UPR, which states are highlighting in their statements, are the same characteristics that interview persons argue makes the UPR valuable for atrocity prevention.

Interestingly, many of the 57 statements given by the civil-society organizations presented at the debate directly addressed atrocity crimes, primarily focusing on accountability for past crimes, but also the prevention of the recurrence of crimes. No less than 14 statements were

[180] *See statements given by: Tunisia, Egypt, Venezuela, China, Morocco, Turkey.
- OHCHR, "Human Rights Council concludes general debate on human rights bodies and mechanisms and starts general debate on Universal Periodic Review", *OHCHR,* 22 September 2017, (available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22138&LangID=E).

[181] *See statements by: Estonia (on behalf of the EU), Paraguay, Montenegro, Haiti, Turkey, Guinea Bissau and Commonwealth.
- OHCHR (22 September 2017), *supra* note 180.

[182] *See statements by: Estonia (on behalf of the EU), the US, Paraguay and Armenia.
- OHCHR (22 September 2017), *supra* note 180.

[183] Silke KMH and Marie SC, Interview Representative of Switzerland's Foreign Ministry, *supra* note 149.

[184] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144 and Silke KMH and Marie SC, Interview Representative of Switzerland's Foreign Ministry, *supra* note 149.

given on the violations and crimes committed against the Tamil minority in Sri Lanka, eight statements addressed the serious human rights violations committed in Bahrain, and four addressed atrocities committed in Yemen. These statements called for the governments of these states to live up to commitments made in earlier accepted UPR recommendations and showed that civil society organizations endorse the use of the UPR for atrocity prevention and accountability for past atrocity crimes. The HRC debate on item 6 is one of the few HRC debates where civil society organizations are allowed to intervene with statements; they are not allowed to do this during the UPR interactive dialogues. Argentinian Government Official highlighted that civil society organizations should use this opportunity to advocate for integrating atrocity prevention into the UPR.[185] The HRC debate on item 6 was held shortly before the third UPR of Sri Lanka in November 2017. The statements by civil society regarding Sri Lanka suggest an awareness among civil society that this forum can be used as a forum for advocacy prior to the formal UPR in the working group.

4.2.4. Pre-sessions to the UPR

Another forum where civil society can engage in the debate and promote atrocity related issues is the UPR-info hosted Pre-sessions to the UPR. Since 2012, close to 800 civil society organisations and NHRIs have participated at the Pre-sessions, while 156 Permanent Missions to the UN in Geneva have participated to hear civil societies' interventions. The Pre-sessions provide civil society with a forum where they can advocate given agendas directly to state delegations and provide information from the ground. The Pre-sessions are held in relation to the states that are due to be reviewed in the UPR session a month prior to the formal review in the working group.[186] In a study evaluating the Pre-Sessions conducted before the third cycle of the UPR, UPR-info found that 38% of the civil society speakers said that 15 or more of the recommendations they made at the Pre-sessions were used for the formal review by states. 25% remarked that six-ten recommendations were incorporated, and another 25% had one-five recommendations incorporated by states at the formal review.[187] It can therefore be argued that the Pre-Sessions indeed is a forum where civil society can have an impact. However, Hegarty from UPR-info, who have managed the programme the last two years, has no recollection of atrocity preventive mechanisms ever being mentioned, including

[185] Interview, Argentinian Government Officials, Buenos Aires via Skype, 4 December 2017.
[186] UPR-info, "Pre-Sessions", *UPR-info,* accessed 27.11.17, (available at https://www.upr-info.org/en/upr-process/pre-sessions).
[187] UPR-info, "UPR Info Pre-sessions - Empowering human rights voices from the ground", 2016, (available at https://www.upr-info.org/sites/default/files/general-document/pdf/2016_pre-sessions_empowering_human_rights_voices_from_the_ground.pdf), p. 25.

at the Pre-session to Rwanda. Civil society organizations focus on agendas already well established in the UPR such as women's and children's rights.[188] This is probably due to the fact that women's and children's rights have a much stronger advocating civil society both nationally and in Geneva. NGOs specifically working with the R2P have very limited presence in Geneva. One of the leading NGOs on the R2P GCR2P, with headquarters in New York, only has one part-time employee in Geneva. The GCR2P's deputy executive director Pawnday shared that they are slowly trying to expand their presence in Geneva as it is an important piece in the puzzle for prevention, but that it is a learning process where GCR2P are still trying to understand the Geneva-based forums.[189] Considering the competition of agendas in the UPR process, the relative limited NGO engagement on the R2P is a major challenge for pushing the agenda forward. Hegarty argued that increased civil society focus on integrating the R2P into the human rights discourse, could help spark state appetite for including atrocity related issues in the UPR process.[190] xxv

4.2.5. The R2P in Geneva

As argued above some states are reluctant to debate and work for the integration of the R2P in Geneva, and the discussion was entirely absent in the HRC item 6 debate among states. This can in part be explained by the issue that the R2P is still seen by many as a subject to be dealt with under the UN's Peace and Security Pillar (based in New York), and not the UN's Human Rights Pillar (based in Geneva). A Representative of the Foreign Ministry of Switzerland argued that it is a challenge that many states see the R2P as a coercive tool after the Libya development in 2011. The Libya developments in 2011 heavily influenced the debate on the R2P and strengthened the widespread misunderstandings on the R2P. The Swiss Representative further argued that this challenge can only be dealt with by enhancing knowledge and understanding of the concept among states and other actors.[191] According to Hegarty, the R2P is only partly considered in Geneva in the context of special procedures in the form of country mandates and special sessions, and not in the UPR.[192] In contrast to this, a Representative of a WEOG state Foreign Ministry argued that it was his impression that the R2P discussions in Geneva had actually been more fruitful than discussions in New York, particularly because the focus in Geneva can only be on prevention efforts as opposed to

[188] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.
[189] Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168.
[190] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.
[191] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.
[192] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.

intervention and sanctions.[193] The Representative of the Foreign Ministry of Switzerland interviewed agreed that when we talk about the R2P in the UPR, we talk about pillar one and two.[194]

In November 2015 The Group of Friends of the R2P in Geneva was formally established, which has been highlighted in several interviews as creating a momentum for working with the R2P in Geneva.[195] The Group has 50 members; 49 states from all regions of the world[196] and the EU. An equivalent Group of Friends of the R2P exists at the UN in New York. The establishment of the Group can initially be interpreted as a positive step towards furthering states work to mainstream the R2P in Geneva, but interview persons working in Geneva suggest that the current functioning of the group is challenged. At the outset the Geneva-based group planned to mainstream the R2P in Geneva through all HRC resolutions and instruments including the UPR, but currently states see activities and membership of the group as a burden.[197] The Group was very active the first year, but many members of the group have become very passive, and are expecting the Group's co-chair states Rwanda and the Netherlands to take the lead.[198] The Group has been challenged since it initiated a move from conceptual to more substantial discussions on how to operationalize the R2P, and in practice, the group has been unable to agree on joint statements on specific cases.[199] The EEAS Official highlighted the example that the group was unable to agree on a joint statement on the situation in Sudan after which many members asked: "if we are not able to talk about that horrendous situation then what is this groups?".[200] The Group has not met in Geneva since the fall of 2016 according to an EEAS Official and a Representative of Switzerland's Foreign Ministry.[201] The EEAS Official further shared that the Group, in the

[193] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144.
[194] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.
[195] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144; Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162; Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149, and Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175.
[196] *The Group of Friends of R2P's members: Netherlands, Rwanda, Botswana, Cote d'Ivoire, Ghana, Liberia, Mali, Morocco, Mozambique, Nigeria, Senegal, Sierra Leone, South Sudan, Tanzania, Bangladesh, Japan, Qatar, Republic of Korea, Singapore, Argentina, Chile, Costa Rica, Guatemala, Mexico, Panama, Uruguay, Belgium, Bosnia-Herzegovina, Czech Republic, Denmark, European Union, Finland, France, Germany, Hungary, Italy, Liechtenstein, Luxembourg, Norway, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, Australia, New Zealand, Canada, United States.
[197] Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162.
[198] Silke KMH and Marie SC, Interview with Geneva-based diplomat.
[199] Silke KMH and Marie SC, Interview with Geneva-based diplomat.
[200] Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162.
[201] Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162 and Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.

beginning, consulted with different relevant agencies in Geneva; the OHCHR and directors of the ICRC to ask how the Group could support their work but received the negative response; "We don't want to have anything to do with you – you divide people". The EEAS Official acknowledged that access to conflict zones is pivotal for the OHCHR and ICRC, and the R2P is politicized to the degree that their involvement with the Group of Friends could jeopardize their status as impartial.[202] Many NGOs react in a similar way when the R2P is brought up; they too perceive it as a politicised and controversial concept, that does not belong in human rights debates.[203]

Limon went as far as to state that the R2P is dead in Geneva, but the remaining interviewees underlined that the integration of the R2P in Geneva and the UPR is a very new agenda which it will take a long time to implement.[204] Bellamy highlighted that there have been small improvements in the Geneva context, for instance suggesting that the appointment of Ivan Šimonović as the Special Advisor on the R2P to the UNSG has had a positive effect. Šimonović is a well-known and respected figure in the UN Human Rights system, as he served as Assistant Secretary-General for Human Rights between 2010 and 2016.[205] The Representative of Switzerland's Foreign Ministry interviewed also argued that the general focus on prevention, presented by UNSG Guterres, is high on the agenda in Geneva, which has created a window of opportunity for strengthening the atrocity prevention agenda too.[206] xxvi

4.2.6. Interim Conclusion

The analysis shows that there is a significant difference between state acceptance of integrating R2P into UPR. The account of the 2017 Interactive Dialogue on the R2P shows that there is a group of persistent objectors to the integration of the R2P into the UPR, these objector states also voted against the adoption of the R2P onto the formal agenda of the UNGA. Meanwhile, a large group of states expressed support for the integration of the R2P into the UPR during the Interactive Dialogue. These states argued that the UPR is well-placed

[202] Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162.
[203] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.
[204] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144; Silke KMH and Marie SC, Interview Executive Director for URG Limon, *supra* note 138; Silke KMH and Marie SC, Interview Geneva-based diplomat, and Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* notes 168.
[205] Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175.
[206] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.

to support atrocity prevention efforts. The majority of 113 states voting for the adoption of the R2P onto the formal agenda of the UNGA also shows that there is still broad support for the doctrine.

The HRC item 6 debate on the UPR contributes with the interesting finding that no states referred to atrocity prevention in their statements, which could be interpreted as a reflection of the sensitivity surrounding the R2P or a lack of awareness of the potential of using the UPR for atrocity prevention. Different groups of states used statements to focus on the non-politicized character of the UPR, calling for the better implementation of the recommendations and underlining the importance of civil society organization's contributions to the UPR. Despite the absence of reference to atrocity prevention in the statements it was highlighted in the interviews that it is the peer-to-peer nature of the UPR, which makes it valuable for atrocity prevention. Hence the characteristics of the UPR that states highlighted in statements is also what makes it useful for atrocity prevention. The many statements given by civil society organizations focusing on atrocity crimes show that these organizations acknowledge and push for the use of the UPR for atrocity prevention. Meanwhile, the finding that NGOs do not address atrocity prevention issues at the UPR-info's Pre-sessions counters this argument. It can be concluded that it is a challenge that there is a limited presence of NGOs working with the R2P in Geneva.

The last section of the analysis assessed the Group of Friends of the R2P. Interviews have shown that the group at the outset had momentum and good discussions on the conceptual aspects of the R2P. But as they tried to include substantial content and operationalize the R2P and make statements on specific country situations the group has been challenged.

In all the following sub-analyses, we have chosen to include examples of recommendations made by different types of states, also the ones that are critical towards integrating the R2P into the UPR, based on the assumption that these states also make recommendations that are implicitly contributing to atrocity prevention. In the following sub-analysis it will be explored how the different levels of state acceptance of integrating the R2P and atrocity prevention into the UPR are reflected in current state practice of making UPR recommendations referencing R2P language and the specific atrocity crimes.[xxvii]

4.3. Practice of Explicitly Addressing Atrocity Prevention in the UPR

How are explicit references to atrocity crimes and R2P language in UPR recommendations affecting the potential for supporting atrocity prevention through the UPR?

This section analyses the use of the explicit atrocity lens in the UPR. As explained in the section "2.1. Research Design and Outline of the Thesis", p. 10, the explicit atrocity lens in the UPR context means a specific focus on the four atrocity crimes: crimes against humanity, genocide, ethnic cleansing, war crimes or the encompassing term atrocities. The explicit atrocity lens could also be the use of R2P language in UPR recommendations. R2P language means the referencing of wording from paragraphs 138-139 of the 2005 WSOD. Compared to implicit atrocity prevention, the use of an explicit atrocity lens in UPR recommendations has the clear goal of preventing atrocity crimes. In this section, it will first be analysed whether R2P language has been used in the two first cycles of the UPR. Secondly, it will be analysed how the explicit atrocity lens with regards to the referencing of the atrocity crimes has been applied in the two first cycles of the UPR. Following will be a short discussion of some of the main patterns identified in the analysis of the explicit referencing of atrocity crimes. Lastly, explicit reference to atrocity crimes in recommendations given during the 28th UPR Sessions held in November 2017 will be analysed, and it will be assessed whether any developments can be identified after the UNSG's 2017 R2P Report was published in September.

4.3.1. R2P Language in the Two First Cycles of the UPR

From the first and second cycle of the UPR there only exist very few recommendations with the inclusion of the wording "responsibility to protect". Most of the recommendations with this wording essentially focus on the UN Declaration on the Protection of Human Rights Defenders.[207] These recommendations are relevant for building resilience towards atrocity crimes; however, the goal is not explicitly to prevent atrocity crimes. Norway is the recommending state most frequently using wording that could be interpreted as R2P language. As an example, in Hungary's first UPR, Norway recommended that Hungary *"Reconcile policies related to ethnic Hungarians abroad with neighbouring countries*

[207] *The UN Declaration on the Protection of Human Rights Defenders is a commonly used abbreviation for UNGA Resolution 53/144, *The United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,* A/RES/53/144 (8 March 1999), (available at http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf).

primary responsibility for minority protection".[208] In 2001 Hungary adopted the "Act on Hungarians Living in Neighbouring Countries", which was highly criticised by the neighbouring countries for interfering in their domestic affairs and violating the principle of sovereignty.[209] In this sense, Norway's recommendation focuses on the external commitment to respect the sovereignty of other states, which constitute one part of the principle of "sovereignty as responsibility" that the pillars of the R2P build on. Another example of Norway using wording that centers around aspects of the R2P's pillar one is a recommendation to El Salvador, where Norway focuses on the training of police officers to carry out their responsibility to protect the population efficiently and with integrity.[210] Of the recommendations with wording that can be interpreted as R2P language, this is the most clear-cut example, supported by the fact that Norway is an active R2P supporter. Another interesting example in this regard is the following by Nigeria, recommending Equatorial Guinea to "*seek international assistance in the area of systematic training of law enforcement officials on their responsibility to protect human rights"*.[211] This example resembles the focus of the R2P's pillar two i.e. international assistance and capacity building. However, the scope of the "responsibility to protect human rights" is too wide to call this an explicit integration of the R2P into a UPR recommendation, as the R2P is limited to the four specific crimes. A similar recommendation was made by Canada to the Philippines in the first cycle of the UPR *"Ensure that members of the security forces are trained on human rights and on their responsibility to protect human rights and human rights defenders"*.[212] If implemented properly, such a recommendation would indirectly support the implementation of the R2P's pillar one. However, this recommendation is again pointing to a more general responsibility to protect human rights.

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[208] HRC, *Report of the Working Group on the Universal Periodic Review* Hungary*, (11 November 2011), A/HRC/18/17, (available at https://www.upr-info.org/sites/default/files/document/hungary/session_11_-_may_2011/ahrc1817hungarye.pdf), §95.23.

[209] Nicholas Turner and Nanako Otsuki, "The Responsibility to Protect Minorities and the Problem of the Kin-State", *Policy Brief United Nation University,* no. 2, 2010, p. 2.

[210] HRC, *Report of the Working Group on the Universal Periodic Review* El Salvador* (17 December 2014), A/HRC/28/5, (available at https://www.upr-info.org/sites/default/files/document/el_salvador/session_20_-_october_2014/a_hrc_28_5_e.pdf), §105,40.

[211] HRC, *Report of the Working Group on the Universal Periodic Review* Equatorial Guinea* (4 January 2010), A/HRC/13/16, (available at https://www.upr-info.org/sites/default/files/document/equatorial_guinea/session_6_-_november_2009/ahrc1316equatorialguineae.pdf), §14.

[212] HRC, *Report of the Working Group on the Universal Periodic Review* Philippines* (23 May 2008), A/HRC/8/28, (available at https://www.upr-info.org/sites/default/files/document/philippines/session_1_-_april_2008/ahrc828philippinese.pdf), §58.2.

The limited practice of using R2P language can be interpreted as the result of the fact that the integration of the R2P into the UPR is a new agenda. In some cases, the increased use of R2P language could add value as it provides a more systematic and prioritised focus in recommendations. However, interviews showed that the R2P can be a difficult label to use in the Geneva context.[213] Nevertheless, many of the interviewees agreed that the preventive aspects of the R2P are not contested in the broader Geneva context.[214] Some interviewees stated that it is not always helpful to use the R2P label, why they were of the opinion that it is irrelevant whether the UPR is used for atrocity prevention with an explicit reference to the R2P (or with the use of R2P language) as long as situations, where there are risks of atrocities, are addressed.[215] Some even argued that using R2P language could be counterproductive.[216] Contrary, Pawnday from GCR2P in New York argued that R2P language is always important as it sets precedence. R2P is a political commitment, and promoting the language of the R2P denotes that obligation. Therefore, the Group of Friends of the R2P and supporters should use the language to set precedence. In this sense, Pawnday argued that R2P language not only strengthens atrocity prevention efforts but also emphasize the concrete commitment states made through the R2P to uphold protection.[217] Pawnday elaborated that it will be a long-term process before the use of relevant language is frequently used in practice, and the process will require states setting precedence. GCR2P are advocating this, by encouraging the R2P focal point states to reference the R2P in the UPR.[218]

As argued and elaborated in section "4.2.1. Account of the Informal Interactive Dialogue on the R2P 2017", p. 48, the issue of the R2P being perceived as selective and politicised have been observed in various statements by states at the 2017 Informal Interactive Dialogue on the R2P. For example, Pakistan stated that the integration of R2P into the UPR could lead to

[213] Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162; Silke KMH and Marie SC, Interview Geneva-based diplomat; Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149, and Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144.
[214] Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162; Silke KMH and Marie SC, Interview, Geneva-based diplomat; Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149, and Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144.
[215] Silke KMH and Marie SC, Interview EEAS Official, *supra* note 162; Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175, and Silke KMH and Marie SC, Interview Geneva-based diplomat.
[216] Silke KMH and Marie SC, Interview Geneva-based diplomats and Silke KMH and Marie SC, Interview Executive Director for URG Limon, *supra* note 138.
[217] Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168.
[218] *Ibid.*

the politicization of UPR, which should be avoided.[219] Countering this argument, Pawnday stated that all international processes, including the UPR, are already inherently political. Comparing these arguments, it can be argued that the use of the R2P language in the UPR is important to set precedence, but it should not be prioritized over making the recommendations related to atrocity prevention that are most likely to have an impact on the ground. Therefore, the use of R2P language must be decided on a case-to-case basis, here included considering the SuR's view on the R2P. However, regardless of the SuR's view on the R2P, in the UPRs of states with on-going or imminent risks of atrocities it could be argued, that it would be inappropriate not to use R2P language to underline the seriousness of atrocity crimes and the commitment to the R2P.

Despite the example of Norway, there does not exist any clear-cut examples of integrating the R2P explicitly into the UPR in the two first cycles. However, as will be presented in the following sections, there do exist some examples of integrating an explicit atrocity lens with a specific focus on the four atrocity crimes. It is important to analyse current practice of this to identify challenges, as well as good practices and frontrunner states with the ability to push the agenda forward and set precedence.[xxviii]

4.3.2. Practice of Explicitly Referencing Atrocity Crimes in the First Two Cycles of the UPR

In the first and second cycle of the UPR, there has been given 713 recommendations tagged under the UPR issue category IHL.[220] Considering that IHL is one of the key sources for the basis of review this is quite underrepresented.[221] In the two first cycles of the UPR, there has been given a total of 57.686 recommendations[222], out of these only 274 include the wording "atrocities", "crimes against humanity", "war crimes" and/or "genocide".[223] Explicit mention of atrocity crimes has therefore not been a general priority for states when making recommendations and practice of incorporating an explicit atrocity lens in recommendations is hence limited. However, some states have focused significantly more on atrocity crimes

[219] Pakistan (6 September 2017), *supra* note 165.
[220] UPR-info Statistics, *Global Statistics,* Issues.
[221] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.
[222] UPR-info, *Global Statistics*.
[223] *This number has been established using the UPR-info database of recommendation, by multiplying recommendations including the wording *atrocities, genocide, war crimes,* and/or *crimes against humanity.* Afterwards the recommendations that mentioned keywords simultaneously were retracted from the total to avoid duplication.

- UPR-info Database, Keyword(s): *atrocities, genocide, war crimes,* and *crimes against humanity*.

than other states. The next sections will identify these states, compare the regional engagement and analyse the focus of recommendations that explicitly mention atrocities, crimes against humanity, genocide and/or war crimes. The focus on regional engagement is assessed because atrocity prevention experts consider a regional balanced integration of R2P pivotal. Meaning, that questions directed at the Philippines should be the same for Switzerland and Australia.[224] There do not exist recommendations from the two first cycles of the UPR including the wording ethnic cleansing.[225] An explanation for this could be that ethnic cleansing is not as clearly legally defined as the three other atrocity crimes.

4.3.2.1. Atrocities

The term atrocities is neither defined under IL. Out of all the recommendation from the two first cycles there only exist eight recommendations including the wording "atrocities" (A: 4, N: 4).[226] Sierra Leone, Germany, DPRK, Chad, the United States (US), Tunisia, France, and Switzerland have given recommendations, hence a quite diverse mix of states. The recommendations have primarily been made to countries with on-going conflict or high risk of atrocity crimes: Syria (N), Somalia (A), Sri Lanka (N), South Sudan (A), and Cote d'Ivoire (A). Two noted recommendations were also given to India and Japan, and one accepted to Russia.[227] The recommendation to India mentions the vulnerable group; the Dalit. Generally, recommendations focusing on a specific group are in most cases noted, which of course is a problem, as vulnerable groups could be potential victims of atrocities.[228] A recommendation to Japan given by DPRK recommends that Japan put an end to distortion of past history and amends its educational curricula to reflect historical realities, including its past crimes and atrocities.[229] This recommendation can be interpreted as an expression of the tense political relations between DPRK and Japan, and be seen as an example of using the UPR to make a political statement. Using the UPR to make political statements is not something exceptional and there will be elaborated on more examples in this regard. In line with Pawnday's argument that the UPR in practice, like all other international processes, is inherently political

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[224] Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168 and Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175.
[225] UPR-info Database, Keyword: *ethnic cleansing.*
[226] UPR-info Database, Keyword: *atrocities.*
[227] *Ibid.*
[228] * The general trend of states noting recommendations referencing specific minority groups has been identified through the assessments of many different examples of such UPR recommendations.
[229] HRC, *Report of the Working Group on the Universal Periodic Review* Japan* (14 December 2012), A/HRC/22/14, (available at https://www.upr-info.org/sites/default/files/document/japan/session_14_-_october_2012/ahrc2214japane.pdf), §147.159.

is not necessarily an issue. However, when states receive recommendations from states they have strained relations to, recommendations are rarely constructive or accepted and implemented.[230] Recommendations between states with tense political relations will therefore seldom be contributing constructively to atrocity prevention efforts.

4.3.2.2 Crimes Against Humanity

There exist 90 recommendations from the first two cycles of the UPR including the wording "crimes against humanity", 50 of them have been accepted and 40 noted. Broadly described, these recommendations focus on accountability for past crimes, compliance with the Rome Statute, the Convention on Non-Applicability of Statutory Limitations on War Crimes and Crimes Against Humanity, and a few focus on human rights education and halting current atrocity crimes.[231] There is therefore a clear focus on the justice aspect of prevention, meaning mitigating risks such as impunity and weak rule of law. [xxix]

Regional Overview

The EEG and WEOG member states gave the majority of recommendations with the inclusion of the wording "crimes against humanity". In total the two regional groups gave 60 recommendations, which constitutes two-thirds of the overall number. The states from these two regional groups most active were the Netherlands, Armenia and Estonia.

The Asia-Pacific Group member states only gave two recommendations on the subject.[232] One of these were from the Republic of Korea to Kenya *"Fully cooperate with the International Criminal Court to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, committed during the 2007 general elections in Kenya"*.[233] This is an example of a specific recommendation relevant for the prevention of atrocity crimes as it is supporting justice for victims and resilience towards non-recurrence, by referring to a concrete step Kenya should take.

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[230] *The argument that SuRs receiving recommendations from states which they have strained relations tend to note these often nonconstructive recommendations builds on assessments of many examples of such UPR recommendations.
[231] UPR-info Database, Keyword: *crimes against humanity.*
[232] *Ibid.*
[233] HRC, *Report of the Working Group on the Universal Periodic Review* Kenya* (17 June 2010), A/HRC/15/8, (available at https://www.upr-info.org/sites/default/files/document/kenya/session_8_-_may_2010/ahrc158e.pdf), §101.79.

The African Group member states received the majority of recommendations (36 out of 90). The African Group itself has only given five recommendations on the subject, three of which were given by Ghana.[234] In collaboration with the government of Denmark and the GCR2P, Ghana launched the R2P Focal Points initiative in September 2010.[235] Kwesi Aning and Frank Okyere's have conducted research on atrocity prevention in Africa, and point to Ghana's National Peace Council as a particularly good model for resolving tensions and preventing violence. The strength of the National Peace Council is that it brings together different stakeholders of society both traditional leaders, faith-based groups, and youth- and women's groups.[236] Ghana's involvement in the Focal Point Initiative and good practice in terms of prevention makes Ghana an expected frontrunner in terms of integrating atrocity prevention explicitly into UPR recommendations.

The Latin American and Caribbean Group (GRULAC) member states have given 23 recommendations with the wording "crimes against humanity", 13 of these were given by Uruguay.[237] Uruguay is part of The Latin American Network for Genocide and Mass Atrocity Prevention, which is an initiative created in 2012 led by the governments of Argentina and Brazil.[238] Membership of this network does not mean that it is a given that Uruguay is working actively for supporting atrocity prevention efforts. Nevertheless, similar to Ghana, Uruguay has established mechanisms relevant for atrocity prevention - a national human rights mechanism addressing issues of accountability and impunity.[239] Bellamy argues that Uruguay together with Tanzania, Zambia and Botswana are countries that have many of the risks of atrocity crimes but have yet escaped their perpetration.[240] In line with this, a Representative of the Foreign Ministry of Switzerland argued, that countries from Latin America and from the Great Lakes Region in Africa have structures, policies and mechanisms in place for atrocity prevention that are much more advanced than in European countries.[241] Considering Uruguay's engagement and good practices, the country is also a

[234] UPR-info Database, Keyword: *crimes against humanity*.
[235] GCR2P, "Global Network of R2P Focal Points", *GCR2P*, accessed 15.11.17 (available at http://www.globalr2p.org/our_work/global_network_of_r2p_focal_points).
[236] Kwesi Aning and Frank Okyere, "Responsibility to Prevent in Africa: Leveraging Institutional Capacity to Mitigate Atrocity Risk", *Policy Analysis Briefs*, *The Stanley Foundation*, January 2015, p. 6.
[237] UPR-info Database, Keyword: *crimes against humanity*.
[238] Declaration of the Latin American Network for Genocide and Mass Atrocity Prevention, Fourth Focal Points Meeting, 29.05.15, Santiago, Chile (available at http://responsibilitytoprotect.org/Network-Declaration-EN.pdf).
[239] Bellamy (2016), *supra* note 11, p. 9.
[240] *Ibid*.
[241] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.

natural frontrunner for creating precedence in terms of integrating atrocity prevention explicitly into UPR recommendations.

4.3.2.3.Genocide

There exist 143 recommendations from the first and second cycle of the UPR including the wording "genocide" (A: 87, N: 56). 88 of these recommendations focus on the Genocide Convention, respectively; ratification, compliance and adherence (38 of which have been noted). Additionally, some focus more broadly on efforts to prevent genocide and ensure justice and reconciliation.[242] xxx

Regional Overview

The majority of the recommendations including the wording "genocide", were given by the WEOG and the EEG, respectively 30 and 71 recommendations. 49 of the WEOG and EEG recommendations were given to states from the African Group. In total the African Group member states received 72 recommendations with the inclusion of the wording "genocide". The Asia-Pacific Group member states received 30 recommendations with the inclusion of the wording "genocide", all of these focus on acceding or ratifying different legal instruments essential for the prevention of atrocity crimes such as the Genocide Convention and the Rome Statute.[243] A fairly large number of states in the Asia-Pacific Group have yet to ratify the Genocide Convention, explaining the focus on this in the recommendations made to member states of this group. When looking at whether the EEG and the WEOG have given recommendations within their own regional group including the wording "genocide", it is only the Netherlands, Estonia and Armenia that have given in total six of such recommendations.[244] In the other categories (war crimes and crimes against humanity) Czechia, Serbia, Lithuania and Germany have also given a few recommendations within their own regional group explicitly focusing on the atrocity crimes. Comparing with the above analysis of recommendations with the inclusion of the wording "crimes against humanity", where the African Group also received the majority of recommendations, there seems to be a pattern of focusing on the Global South when explicitly referencing atrocity crimes. In line with Pawnday and Bellamy's argument, the focus on the Global South is problematic and should be more regionally balanced for a successful integration of the R2P into the UPR.

[242] UPR-info Database, Keyword: *genocide.*
[243] *Ibid.*
[244] *Ibid.*

States especially active with the inclusion of the wording "genocide" consist of Armenia, Brazil, Uruguay, Ghana, Rwanda, Estonia, Austria, the United Kingdom (UK) and the Netherlands. There exist more recommendations with the inclusion of the wording "genocide" than "crimes against humanity", and "war crimes".[245] An explanation for this could be that the duty to prevent genocide is the most clearly legally defined obligation, while the law is more ambiguous when it comes to crimes against humanity, ethnic cleansing and war crimes.[246] In the category of genocide, there are also more countries active e.g. Brazil, Austria and the UK, states that are not especially active in the other categories war crimes and crimes against humanity.[247]

4.3.2.4. War Crimes

There exist 103 recommendations with the inclusion of the wording "war crimes", 33 of these focus on ratifying, acceding or aligning legislation with the Rome Statute. Others focus on accountability for perpetrators.[248]

Regional Overview

The majority of recommendations with the inclusion of the wording "war crimes" were given to states from the African Group (34). However, in this category the regional picture is not as skewed as in the above analyses, as the EEG member states have also received 33 recommendations with the wording "war crimes". Many of these recommendations were given to the countries of the former Yugoslavia Croatia and Bosnia and Herzegovina, and a few to Serbia and Montenegro. These recommendations focus on national prosecution of war crimes committed during the Yugoslav wars in the 1990s and bringing national legislation in line with international standards.[249] These are relevant for the prevention of atrocity crimes as they are supporting justice for victims and resilience towards non-recurrence. Ghana is again the most active state from the African Group. States from the Asia-Pacific Group have not given any recommendations on this matter. In GRULAC, EEG, and WEOG the most active states were Uruguay, Armenia, Estonia, Czechia, the Netherlands, and Switzerland. [250]

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[245] *Ibid.*
[246] Rosenberg, *supra* note 118, p. 461.
[247] UPR-info Database, Keyword: *genocide.*
[248] UPR-info Database, Keyword: *war crimes.*
[249] *Ibid.*
[250] UPR-info Database, Keyword: *war crimes.*

4.3.3. Patterns of UPR Recommendations Referencing Atrocity Crimes

The above analysis has shown that a lot of the recommendations explicitly referring to atrocity crimes regard ratification of international instruments. The UNSG highlights that are a large number of states have not ratified or acceded the primary legal instrument essential for atrocity prevention.[251] Problematically, with regards to recommendations on ratifying e.g. the Rome Statute there is a pattern of noting across all regional groups. There exist 925 recommendations mentioning the Rome Statute of which 647 have been noted.[252] The acceptance rate of recommendations on the Rome Statute is therefore only 30%, which is quite low considering that the recommendations with the lowest acceptance rate are those related to the politically sensitive issue of the death penalty, which has an acceptance rate around 22%.[253] To have a substantial conversation on e.g. the prevention of atrocities, states need to ratify the primary legal instruments for atrocity prevention, as the basis for each UPR is limited to the human rights and IHL instruments to which a SuR is party. Without ratification, it is hard to have a conversation moving beyond ratification to more substantial elements of prevention.[254xxxi]

There is generally a limited practice of making recommendations that reference the atrocity crimes, and simultaneously goes beyond ratification and focus on structural and more substantial elements of prevention. In the category of genocide, Armenia gave 49 recommendations, 39 of these focuses on acceding and ratifying the Genocide Convention (all of which are made to member states belonging to the African or the Asia-Pacific Group). The last ten recommendations with the wording "genocide" were given to Denmark, Estonia, France, Ireland, Latvia, Switzerland, Tajikistan, Rwanda and two recommendations to Turkey. Studying these recommendations it is very clear that the conversation has moved beyond ratification, focusing mostly on education programs for the prevention of atrocity crimes.[255] Education is vital for the structural prevention of atrocity crimes, as it strengthens civil society and resilience towards non-recurrence.[256] The recommendations to Turkey are distinct from the remaining recommendations and can be interpreted as an expression of a strained political relationship arising from the history of the genocide committed against

[251] UNSG R2P Report 2017, *supra* note 5, p. 6.
[252] UPR-info Database, Keyword: *Rome Statute*.
[253] *Ibid.*
[254] Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175.
[255] UPR-info Database, Keyword: *genocide.*
[256] Bellamy (2016), *supra* note 11, p. 15-16.

Armenian citizens of the Ottoman Empire during World War I, which Turkey has not acknowledged.

Other examples of recommendations referencing atrocity crimes going beyond ratification can be identified in recommendations given to Cote D'Ivoire, India, Somalia, Australia, Colombia, Niger, Guinea, Somalia, Slovenia, the Netherlands, Costa Rica, Burundi, Croatia, Rwanda, and Bosnia Herzegovina.[257] These recommendations focus on prosecution, strengthening mechanisms that ensure justice and combating impunity, reconciliation, and one on adopting a national strategy regarding transitional justice. These types of recommendations could be useful for the structural prevention of atrocity crimes, but some recommendations are worded quite vague. As an example, a recommendation from Armenia to Rwanda reads: *"Continue efforts for the prevention of genocide"*.[258] A Representative of the Foreign Ministry of Switzerland argued, that it is a general problem for those trying to advance the integration of atrocity prevention that recommendations not evolving around ratification or acceding treaties are often not very actionable, why much work needs to be done to make meaningful wording in recommendations.[259]

4.3.4. Developments of Explicitly Addressing Atrocity Prevention in the Third Cycle of the UPR

In this section the incorporation of the explicit atrocity lens in recommendations will be analysed in relation to the 28th Session of the UPR in November 2017. This session is particularly interesting as it was held after the publication of UNSG's 2017 R2P Report. Many interviewees have argued that it is very early to judge whether states will more explicitly integrate atrocity prevention, based on the recommendations of the UNSG in the 2017 R2P Report.[260] Nevertheless, some of the interview persons pointed to one specific recommendation that stands out as a good example of integrating atrocity prevention

[257] UPR-info Database, Keyword (s): *atrocities crimes against humanity, genocide and war crimes.*
[258] HRC, *Report of the Working Group on the Universal Periodic Review* Rwanda* (18 December 2015) A/HRC/3178, (available at https://www.upr-info.org/sites/default/files/document/rwanda/session_23_-_november_2015/a_hrc_31_8_e.pdf), §133.7.
[259] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.
[260] Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168; Silke KMH and Marie SC, Interviews Geneva-based diplomats; Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149, and Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144.

explicitly into the UPR.[261] This recommendation was given to Switzerland by the Netherlands and will be analysed below. Countries under review at the 28th Session included Argentina, Benin, Czechia, Gabon, Ghana, Guatemala, Japan, Republic of Korea, Pakistan, Peru, Sri Lanka, Switzerland, Ukraine, and Zambia.[262]

Benin, Gabon, Ghana, Japan, The Republic of Korea, and Zambia have received one recommendation explicitly on atrocity crimes. This was either:

"Ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity."[263]

Or

"Ratify the Convention on the Prevention and Punishment of the Crime of Genocide."[264]

In all these cases the recommendations were given by Armenia. Armenia has in fact made these recommendations to all countries under review except Ukraine, Peru, Czechia, Guatemala, and Pakistan. These two recommendations were neither given to Argentina nor Switzerland, but Armenia gave these two countries other recommendations focusing explicitly on atrocity prevention. The recommendations to Argentina and Switzerland read:

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[261] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144; Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149, and Silke KMH and Marie SC, Interview with Geneva-based diplomat.

[262] UPR-info, "Session 28. November 2017", *UPR-info,* accessed 27.11.17, (available at https://www.upr-info.org/en/session/Session-28---November-2017).

[263] HRC, *Draft Report of the Working Group on the Universal Periodic Review* Benin* (14 November 2017), A/HRC/WG.6/28/L.9_Benin, (available at https://www.upr-info.org/sites/default/files/document/benin/session_28_-_november_2017/a_hrc_wg.6_28_l.9.pdf), § 6.10. And HRC, *Draft Report of the Working Group on the Universal Periodic Review* Gabon* (21 November 2017), A/HRC/WG.6/28/L.3, (available at https://www.upr-info.org/sites/default/files/document/gabon/session_28_-_november_2017/a_hrc_wg.6_28_l.3.pdf), §118.13.
HRC, *Draft Report of the Working Group on the Universal Periodic Review* Ghana* (21 November 2017), A/HRC/WG.6/28/L.4, (available at https://www.upr-info.org/sites/default/files/document/ghana/session_28_-_november_2017/a_hrc_wg.6_28_l.4_.pdf), §147.35.
HRC, *Draft Report of the Working Group on the Universal Periodic Review* The Republic of Korea* (13 November 2017), A/HRC/WG.6/28/L.8, (available at https://www.upr-info.org/sites/default/files/document/korea_republic_of/session_28_-_november_2017/a_hrc_wg.6_28_l.8.pdf), §8.16.

[264] HRC, *Draft Report of the Working Group on the Universal Periodic Review* Japan* (23 November 2017), A/HRC/WG.6/28/L.12, (available at https://www.upr-info.org/sites/default/files/document/japan/session_28_-_november_2017/a_hrc_wg.6_28_l.12.pdf), §161.26. And HRC, *Draft Report of the Working Group on the Universal Periodic Review* Zambia* (22 November 2017), A/HRC/WG.6/28/L.11, (available at https://www.upr-info.org/sites/default/files/document/zambia/session_28_-_november_2017/a_hrc_wg.6_28_l.11.pdf), §131.18.

"Continue its active commitment on the international level for the prevention of genocide and crimes against humanity" (Armenia to Argentina).[265]

And

"Maintain the provisions of article 261bis of the Criminal Code, in particular the ones providing for liability in cases of denial, trivialization or seeking justification for genocide or other crimes against humanity" (Armenia to Switzerland).[266]

These recommendations show that the integration of the explicit atrocity lens does not have to be focused on risks but can also highlight resiliencies. The integration here focuses on how Argentina is a frontrunner state, with the underlying notion that other states should be inspired by Argentina. Meanwhile, the recommendation to Switzerland is about maintaining an existing law, which Armenia views as beneficial.[267] The recommendation to Switzerland has been accepted, while Argentina will provide a response in due time, no later than the 37th Session of the HRC in March 2018, which is the case with all recommendations Argentina have received. Nevertheless, it can with great certainty be argued that this recommendation will be accepted, given that it recommends continued action. In the 28th Session, Armenia is overall the most active state when it comes to incorporating atrocity prevention explicitly in recommendations. This is not surprising, considering that this was also the case in the first and second cycle of the UPR. In Armenia's statement at the 2017 Informal Interactive Dialogue on the R2P, Armenia gave the UNSG's prevention agenda absolute support, problematized the fact that many states have still not ratified core legal instruments for atrocity prevention, and underscored the importance of education. These two core issues have been reflected in previously given recommendations by Armenia.[268] Genocide recognition is

[265] HRC, *Draft Report of the Working Group on the Universal Periodic Review* Argentina* (22 November 17), A/HRC/WG.6/28/L.2, (available at https://www.upr-info.org/sites/default/files/document/argentina/session_28_-_november_2017/a_hrc_wg.6_28_l.2_0.pdf), §107.9.

[266] HRC, *Draft Report of the Working Group on the Universal Periodic Review* Switzerland* (22 November 2017), A/HRC/WG.6/28/L.7, (available at https://www.upr-info.org/sites/default/files/document/switzerland/session_28_-_november_2017/a_hrc_wg.6_28_l.7.pdf), §146.23.

[267] *In 2007 the Swiss court convicted Doğu Perinçek for publicly denying the Armenian genocide in accordance with article 261 bis (4) of the Swiss Criminal Code. In 2015 the European Court of Human Rights found that this conviction was a violation of article 10 (freedom of expression) of the European Convention on Human Rights, and ruled in favour of Perinçek.

- HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*Switzerland* (11 July 2017), A/HRC/WG.6/28/CHE/1, (available at https://www.upr-info.org/sites/default/files/document/switzerland/session_28_-_november_2017/a_hrc_wg.6_28_che_1_e.pdf), § 69-70.

[268] Armenia "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-armenia.pdf).

a central part of the Armenian foreign policy.[269] This can explain why Armenia is significantly more focused on genocide and atrocity prevention in the UPR process than other states without this as a central element of their foreign policy and human rights strategy. Other states that have given recommendations including wording on atrocities in both previous cycles and in the recently concluded 28th Session include the Netherlands, Estonia, Argentina, and Rwanda. Two recommendations to Switzerland from Rwanda and the Netherlands are particularly relevant for the operationalization of the UNSG's recommendations in the 2017 R2P Report:

"Include in its next UPR report information on measures it has taken to implement article 261 bis of its criminal code in particular on combating denial, trivialisation or attempts to justify genocide or other crimes against humanity" (Rwanda to Switzerland).[270]

"Further strengthen its engagement in the promotion of prevention of atrocities by undertaking efforts to prevent atrocities at the national level since history shows that no country is immune to atrocities" (The Netherlands to Switzerland).[271]

A Representative of the Foreign Ministry of Switzerland expressed that the accepted recommendation from the Netherlands opens up a good opportunity for follow-up in reporting and implementation.[272] Without such recommendations, it can be hard for those trying to advance the integration of atrocity prevention both in the Geneva context and in domestic political settings as this agenda is competing with many other human rights agendas.[273] Furthermore, the wording "history shows that no country is immune to atrocities" is highly relevant for combatting the focus on South countries, which has been identified when analysing explicit atrocity prevention in the two first cycles of the UPR. Interestingly, two sources interviewed for this thesis stated that Switzerland had requested this recommendation themselves.[274] Showing that both Switzerland and the Netherlands are actively trying to combat this issue, as structural atrocity prevention is relevant for all

[269] Ministry of Foreign Affairs of the Republic of Armenia, "Foreign Policy - Genocide Recognition", accessed 15.11.17, (available at http://www.mfa.am/en/recognition/).
[270] HRC, Switzerland, Draft Working Group Report 2017, *supra* note 266, §146.22.
[271] HRC, Switzerland, Draft Working Group Report 2017, *supra* note 266, §146.25.
[272] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.
[273] Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149.
[274] Silke KMH and Marie SC, Interview Geneva-based diplomat and Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144.

countries, not just countries with imminent risks. Although given at the 27th Session in the third cycle of the UPR, another explicit recommendation on atrocity prevention that must be highlighted is a recommendation by Rwanda to Finland:

"Consider including in its next universal periodic review report information on measures it has taken to analyse potential risk factors of atrocity crimes, including through utilization of the Framework of Analysis for Atrocity Crimes".[275]

This is probably one of the most relevant recommendations given for the operationalization of the UNSG 2017 R2P Report, as it is specifically referring to the UN Framework of Analysis for Atrocity Crimes. The recommendation has been accepted by Finland. In its response, Finland stated that the government is already following risk factors for atrocities.[276] Studying previous statements by the Finnish Government, it becomes clear that Finland has, for years, had a focus on its national structures rather than exclusively seeing R2P as a foreign policy tool, despite Finland not being a high-risk country for atrocity crimes. Finland has focused on the prevention of discrimination, enhancing fundamental rights, worked with civil society and had the R2P Focal Point work towards mainstreaming R2P in the daily work of the national authorities.[277] The Finnish government should be strongly encouraged to share best practices and utilize the UN Framework of Analysis for Atrocity Crimes at its next UPR, as this would set ground-breaking precedence. In the sense of shifting the focus away from the global south reaffirming that atrocity prevention is important in all countries. Even though the different recommendations to Switzerland and Finland are very positive for the explicit integration of atrocity prevention, the problem is again that the UPR is limited by its cycles. Meaning that Finland and Switzerland will not report on these issues until their next UPR in 2022. Finland and Switzerland will write midterm reports, but as Hegarty highlighted the problem with midterm reports are that they are not always read.[278] As mentioned, Argentina

[275] HRC, *Report of the Working Group on the Universal Periodic Review* Finland* (14 July 2017), A/HRC/36/8, (available at https://www.upr-info.org/sites/default/files/document/finland/session_27_-_may_2017/a_hrc_36_8_e.pdf), §100.75.
[276] HRC, *Report of the Working Group on the Universal Periodic Review - Finland - Addendum - Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (25 August 2017), (available at http://formin.finland.fi/public/download.aspx?ID=170493&GUID=%7BB14A0CE7-D760-4EC2-A68E-369230C5AF71%7D) §93.75.
[277] Finland, "Statement at the Informal Interactive Dialogue on the Report of the Secretary General on "The Responsibility to Protect: State Responsibility and Prevention", New York, 11 September 2013, (available at http://responsibilitytoprotect.org/Finland%2013.pdf).
[278] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.

and Estonia also gave relevant recommendations for explicit atrocity prevention, to respectively Guatemala and Sri Lanka. The recommendation to Sri Lanka focused on ending impunity for war crimes.[279] The recommendation to Guatemala focused on speeding up the progress of trials against the perpetrators of acts of genocide and crimes against humanity.[280] Both recommendations have been noted. That recommendations can simply be noted is a limitation of the UPR with regard to atrocity prevention. However, the consent and cooperation of the state is the general condition of doing international peaceful prevention and not a challenge specifically limited to the UPR. Furthermore, noted recommendations should not always be disregarded. Noting a recommendation is not always an expression of unwillingness, as it can also be an issue of resources to implement recommendations within the 4,5 years time-frame.[281] Guatemala is a firm supporter of the R2P, and with the recommendation on "speeding up trials" it could be a question of resources. [xxxii]

There are also some new, quite surprising states, which have given recommendations with explicit wording on atrocities. These include Iran, Syria, and Nicaragua - countries which are perceived as consistent objectors of the R2P.

"Continue to avail international assistance for investigating war crimes and human rights training for security forces." (Iran to Sri Lanka).[282]

"Put an end to violations and atrocities committed by governmental and loyalist forces in the context of the internal conflict in eastern Ukraine" (Syria to Ukraine).[283]

"Step up the efforts concerning the investigations of human rights violations and crimes against humanity during the military dictatorship from 1976 to 1983, and continue the prosecution of those responsible for these violations, strengthening the pillar on "Memory,

[279] HRC, *Draft Report of the Working Group on the Universal Periodic Review* Sri Lanka* (23 November 2017) A/HRC/WG.6/28/L.14, (available at https://www.upr-info.org/sites/default/files/document/sri_lanka/session_28_-_november_2017/a_hrc_wg.6_28_l.14.pdf) §117.36.
[280] HRC, *Draft Report of the Working Group on the Universal Periodic Review* Guatemala* (21 November 2017), A/HRC/WG.6/28/L.6, (available at https://www.upr-info.org/sites/default/files/document/guatemala/session_28_-_november_2017/a_hrc_wg.6_28_l.6.pdf) §113
[281] UPR-info ("Beyond Promises"), *supra* note 70, p. 33.
[282] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.69.
[283] HRC, *Draft Report of the Working Group on the Universal Periodic Review* Ukraine* 23 November 2017, A/HRC/WG.6/28/L.13, (available at https://www.upr-info.org/sites/default/files/document/ukraine/session_28_-_november_2017/a_hrc_wg.6_28_l.13.pdf), §116.58.

truth, justice and reparatory policies" of the Action Plan on Human Rights" (Nicaragua to Argentina).[284]

The recommendation to Sri Lanka was accepted. There will be provided a response in due time, no later than the 37th Session of the HRC in March 2018, to the recommendations given to Ukraine and Argentina. Despite Nicaragua giving a recommendation to the US in the first cycle of the UPR, which indeed reflects a tense political relationship[285], these states have not previously given recommendations with wording referencing atrocities.

The recommendation from Syria does predominantly reflect political tensions over the situation in Ukraine, as the four recommendations given by Syria seem to be well coordinated to support the ten recommendations made by Russia to Ukraine. Ten recommendations is a lot considering the general aim of many states to give two-three recommendations per review.[286] Ukraine addressed the comments of Syria and Russia together and *"underscored that illegal armed groups in Donbas continued to violate the ceasefire agreement, including the use of heavy artillery."*[287] This shows the strained relations between the countries, which is not a good precondition for neither accepting recommendations or constructively supporting atrocity prevention efforts. Furthermore, the recommendation made by Syria loses credibility considering the atrocities committed by the Syrian regime.

Nevertheless, the recommendation from Iran is relevant as it speaks right into the R2P's pillar two, by focusing on international assistance and training of security forces. The fact that Iran has made a recommendation with undeniable relevance for atrocity prevention means that the state is apparently not objecting incorporating atrocity prevention into the UPR. However, as argued in the analysis of State Acceptance of Integrating the R2P into the UPR", if labelled "R2P" this would probably be another story. At the 2017 Informal Interactive Dialogue on the R2P, Iran stated that the principles of the R2P could be valuable. However, Iran was very

[284] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.70.

[285]* *"Halt immediately the unjustified arms race and bring to justice those responsible for all war crimes and massacres against unarmed civilians, women, children as well as acts of torture carried-out in prisons such as Abu Ghraib, Bagram and Guantanamo"* (N)

- HRC, *Report of the Working Group on the Universal Periodic Review* United States* (4 January 2011), (available at https://www.upr-info.org/sites/default/files/document/united_states/session_9_-_november_2010/ahrc1611usae.pdf), §92.141.

[286] Silke KMH and Marie SC, Interview Geneva-based diplomat; Silke KMH and Marie SC, Interview Representative of the Foreign Ministry of Switzerland, *supra* note 149, and Silke KMH and Marie SC, Interview Argentinian Government Officials in the area of Human Rights, *supra* note 185.

[287] HRC, Ukraine Draft Working Group Report 2017, *supra* note 283, §86.

critical towards its implementation.[288] It could be argued that Iran is endorsing atrocity prevention in the recommendation above, even though the state is generally critical towards the R2P.

The recommendation from Nicaragua to Argentina also touches upon a relevant theme for atrocity prevention; justice for past crimes. This analysis shows that there are examples of consistent objectors of R2P using the UPR to support atrocity prevention efforts. However, this could be jeopardized if explicit R2P language is used in UPR recommendations, as these states will very likely distance themselves as they have done so far whenever debating R2P.

4.3.5. Interim Conclusion

In this sub-analysis, it has been argued that the use of R2P language in UPR recommendations is important to set precedence, but R2P language should not be prioritized over making the recommendations related to atrocity prevention that are most likely to be accepted and have an impact on the ground. Therefore, the use of R2P language must be decided on a case-to-case basis, considering issues such as the SuR's view on R2P and imminent risks of atrocities. The practice of using R2P language is almost non-existing in all cycles of the UPR, and it will be a long process, largely depending on frontrunner states, to increase practice. The added value of using R2P language is that it denotes a political commitment and gives recommendations a specific aim directly supporting atrocity prevention efforts.

In the two first cycles of the UPR, the practice of explicitly referencing atrocity crimes is quite limited. In total there exist 274 of such recommendations, none of which refers to ethnic cleansing. When comparing the different recommendations with the inclusion of wording on atrocity crimes, most focus on the justice aspect of prevention and ensuring non-recurrence, hence countries with histories of atrocities or impending risks of atrocities. Furthermore, there is a disproportionate focus on member states from the African Group. It is perhaps quite reasonable that the focus is on countries with high risk and not low-risk countries. However, the regional imbalance could be problematic for the integration of the R2P if not addressed. Another challenge is that a fairly large number of states have not ratified some of the primary legal instruments for atrocity prevention inhibiting substantial conversations.

[288] Iran (6 September 2017), *supra* note 165.

The Asia-Pacific Group is overall the least active when it comes to integrating an explicit-atrocity lens into UPR recommendations. Identified states which constitute significant frontrunners in this regard include: The Netherlands; Norway, Armenia; Estonia; Ghana; Uruguay; Rwanda; Switzerland; and Czechia. This is positively a quite diverse mix of states from different regional groups, meaning that practice is not delimited to one specific regional group. Recommendations by Armenia have especially been highlighted for combining the explicit atrocity lens with structural efforts.

The analysis of the third cycle has shown that it is to early to judge whether states will more explicitly integrate atrocity prevention, based on the recommendations of the UNSG in the 2017 R2P Report. Nevertheless, some examples of emerging developments have been highlighted, including identified practice by consistent objectors of the R2P and an attempt to shift the focus away from the Global South.

In this sub-analysis, we have argued that it would be inappropriate not to use R2P language to underline the seriousness of atrocity crimes in cases with on-going or imminent risks of atrocities. In the following sub-analysis, it will be analysed whether the UPR is used in this manner and whether the mechanism has potential to support the direct prevention of atrocity crimes.[xxxiii]

4.4. Practice of Direct Atrocity Prevention in the UPR

Working-question: *How is the potential for using the UPR to support the direct prevention of atrocity crimes reflected in current state practice?*

The following section will assess whether the UPR is useful for supporting the direct prevention of atrocity crimes, which as established in section "2.3.4. Direct Atrocity Prevention, p. 20", are efforts aimed at preventing imminent or halting ongoing perpetration of atrocity crimes. Limon argues that UPR is not set-up to address situations of on-going atrocities and that this has not been done because the UPR has no hard edge.[289] In a similar vein, a Representative of a WEOG state Foreign Ministry argues *"there is no pillar three in*

[289] Silke KMH and Marie SC, Interview Executive Director for URG Limon, *supra* note 138.

Geneva".[290] There is also consensus among interviewees that references to pillar three measures in recommendations could be problematic and controversial, and would possibly undermine the potential for integrating the first two pillars of R2P into the UPR. It is also argued that the worst human rights abusers have not and will not change their behaviour because of the UPR.[291] Unlike the practitioners and experts interviewed, Strauss argues that the UPR could potentially help halt imminent and ongoing atrocity crimes if risks and resilience assessments are included and considered in preparatory reports and recommendations.[292] However, Strauss highlights that the UPR has so far failed to halt atrocity crimes. He emphasises the UPRs of Sri Lanka in 2008, Kyrgyzstan and Kenya in 2010, as examples of why a more explicit atrocity lens needs to be integrated into the UPR, as he argues that states, for the most part, avoided addressing imminent or occurring crises unfolding in these states at the time of their UPRs.[293] Another challenge of using the UPR for direct atrocity prevention is timing; the UPR has a fixed calendar determining when each state will be reviewed and the perpetration of atrocity crimes does not occur on a schedule. This means that it will be random whether or not a given state experiencing a crisis is under review during the critical period. Recommendations made to states where atrocity crimes are imminent or ongoing, and recommendations directly referring to preventive tools associated with direct prevention will be assessed to test the validity of the arguments brought forward above and to analyse if the UPR has potential for contributing to direct prevention.

4.4.1. States with Ongoing Atrocity Crimes

4.4.1.1. Syria

The Syrian government has been among the worst perpetrators of atrocity crimes since the state spiralled into violent conflict in 2011, and the case is, therefore, a clear example of a state with ongoing atrocity crimes, where prevention efforts should focus on halting further escalation. When Syria underwent its second UPR in November 2016, a significant portion of the 239 recommendations the state received revolved around human rights issues related to or

[290] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144.
[291] Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175 and Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168.
[292] Strauss, *supra* note 15, p. 48.
[293] Strauss, *supra* note 15, p. 45-47.

created by the conflict.[294] This is reflected in the UPR issue categories, which recommendations to Syria were mostly tagged under. 20,5% of the recommendations was tagged under 'International Humanitarian Law' and 11,7% under 'Technical assistance and cooperation'.[295] Hence this case does not fit with Strauss argument that states are not addressing atrocity risks in the UPR. The Republic of Korea recommended that Syria *"Stop and investigate military operations targeting civilians and their facilities, especially in Aleppo"*.[296] Syria accepted this recommendation, which addressed atrocities committed at the time of the review, but as has been widely documented the recommendation was clearly not implemented.[297] During the same review Uruguay recommended Syria to "*Stop the widespread use of torture, enforced disappearance and arbitrary detention"*[298] and France recommended that Syria *"Accede to the Rome Statute of the International Criminal Court, so that the atrocities committed in the Syrian Arab Republic could be the subject of a rigorous and impartial exam by an independent court"*[299] Both of these recommendations were noted by Syria, and none of them implemented. Looking at these examples it is clear that the use of UPR recommendations for the direct prevention of atrocity crimes in the Syrian case have not halted the perpetration of these crimes. A Geneva-based diplomat directly stated in an interview that the UPRs of states like Syria and DPRK were a joke and an embarrassment because these states accept and note recommendations almost randomly and in both cases do not implement them.[300] Meanwhile, the examples given here show that recommending states are willing to address ongoing atrocities in the UPR. This implies that they use the mechanism to make political statements denouncing atrocity crimes. It can further be argued that it would be inappropriate for states to ignore the well-documented atrocity crimes in Syria during the UPR, even if the atrocities are not halted through this mechanism.[xxxiv]

[294] *A total of 2461 recommendations were made to 11 different states at the 26th session of the UPR, which makes the average number of recommendations per state 224. Hence the number of recommendations made for Syria is slightly more than average.
[295] UPR-info Statistics, *State under Review Statistics,* SuR: Syria, Table: *Issue.*
[296] HRC, *Report of the Working Group on the Universal Periodic Review* Syrian Arab Republic* (27 December 2016), A/HRC/34/5, (available at https://www.upr-info.org/sites/default/files/document/syrian_arab_republic/session_26_-_november_2016/a_hrc_34_5_en.pdf), §109.96.
[297] HRW, "Russia/Syria: War Crimes in Month of Bombing Aleppo", *HRW,* 1 December 2016, (available at https://www.hrw.org/news/2016/12/01/russia/syria-war-crimes-month-bombing-aleppo).
[298] HRC, Syria Working Group Report 2016, *supra* note 296, §109.159.
[299] HRC, Syria Working Group Report 2016, *supra* note 296, §110.1.
[300] Silke KMH and Marie SC, Interview Geneva-based diplomat.

4.4.1.2. Myanmar

The atrocities committed against the Rohingya in Myanmar, which the UN has labelled ethnic cleansing escalated in 2017.[301] During an interview, Pawnday argued that the situation in Myanmar is both a government and UN failure, that has worsened significantly in the last five-six years where Rohingya have lived in UN camps, but the current violence and discrimination against Rohingya can be traced back to the 1982 Citizenship Law.[302] The 1982 Citizenship Law excludes Rohingya and other religious and ethnic minorities from enjoying full citizenship rights. It can, therefore, be argued that the last UPR of Myanmar in November 2015, were made in a period of imminent threat, as atrocity crimes were not yet perpetrated at the scale they are today. Myanmar received the high number of 292 recommendations in total during their second UPR. Out these 27 recommendations directly mention the Rohingya minority; none of them were accepted. 19 of these recommendations simply recommended that Myanmar take measures to end the discrimination of Rohingya, while eight directly referred to the violence suffered by the minority group.[303] Belgium addressed the issue of violence against Rohingya, while also calling for accountability of perpetrators and those feeding hate speech. The US also added to the call for an immediate end to violence, focusing on the specific issue of sexual violence.[304] When perpetrated in a systematic or widespread manner, sexual violence can amount to crimes against humanity. These recommendations have not had any halting effect on the atrocities committed against Rohingya, and the government of Myanmar did not accept any of them.

As argued the discrimination against Rohingya can be traced back to the 1982 Citizenship Law. The 1982 law is directly mentioned in seven recommendations; two given during the first UPR of Myanmar in 2011 and five during the second in 2015.[305] None of these were accepted. Still, these recommendation e.g. one from Saudi Arabia that recommend Myanmar *"Amend the Nationality Law of 1982 to include all religious and racial minorities, including Rohingyas, and to guarantee their full and equal citizenship, and return the previous*

[301] Zeid Ra'ad Al Hussein, "Opening Statement at Human Rights Council's 36th Session", *OHCHR,* 11 October 2017, (available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E).
[302] Silke KMH and Marie SC, Interview Deputy Executive Director for GCR2P Pawnday, *supra* note 168.
[303] HRC, *Report of the Working Group on the Universal Periodic Review* Myanmar* (November 2015), A/HRC/31/13, (available at https://www.upr-info.org/sites/default/files/document/myanmar/session_23_-_november_2015/a_hrc_31_13_e.pdf), §145.8, 145.27, 145.30, 145.39-53, 145.55-56, and 145.60-66.
[304] UPR-info Database, SuR: *Myanmar*, Keyword: *Rohingya.*
[305] UPR-info Database, SuR: *Myanmar*, Keyword: *1982 citizenship.*

nationality documents to them"[306] serve as a good example of a recommendation that if the UPR had existed in the 1980s could have been given to Myanmar repeatedly. The Myanmar case shows how a discriminatory law (of course in combination with a complex set of other factors) can lead to atrocity crimes. In future cases similar discriminatory laws can be addressed in the UPR, which would be an example of structural prevention of atrocities, and in a best-case scenario the given discriminatory law would be amended as a result of external pressure created in the UPR process. Such a scenario would have to be supported by other international processes. The next UPR of Myanmar will be in 2020, and it seems too late to use the UPR mechanism in any meaningful way to halt the atrocities committed in Myanmar.

4.4.1.3. Kyrgyzstan

Strauss highlights Kyrgyzstan as an example of why a more explicit atrocity lens needs to be integrated into the UPR, as he argues that states, for the most part, avoided addressing the imminent crises unfolding in Kyrgyzstan at the time of their UPR in 2010.[307] Kyrgyzstan's first UPR was held just one month after a reported 86 people were killed and 1000 people received injuries during anti-government protests in Kyrgyzstan on 7 April 2010. The violent clashes forced the sitting President Bakiyev to flee the country.[308] During the peer-to-peer dialogue, five states (the UK and Northern Ireland, Lithuania, Austria, the Netherlands, and Norway) regretted the *'loss of life'* resulting from the instability in the country, hence voicing their concern over the events in Kyrgyzstan directly during the session.[309] Norway was the only state to actually include the wording '*loss of life'* in their recommendation.[310] Afghanistan recommended Kyrgyzstan to *"Establish a national preventive mechanism that will constitutionally guarantee the rights of all people, particularly the rights of minorities."*[311] The recommendation is SMART in the sense that it is specific and measurable, and if properly implemented this could contribute to mitigating atrocity risks in Kyrgyzstan. China and Tajikistan made very similar recommendations, which add weight to

[306] HRC, Myanmar Working Group Report 2015, *supra* note 303, §145.56.
[307] Strauss, *supra* note 15, p. 47.
[308] HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Kyrgyzstan* (5 December 2014), A/HRC/WG.6/21/KGZ/1, (available at https://www.upr-info.org/sites/default/files/document/kyrgyzstan/session_21_-_january_2015/a_hrc_wg.6_21_kgz_1_e.pdf) and §72 and Freedom House, "Freedom in the World report 2011 - Kyrgyzstan", *Freedom House,* accessed 20.12.17, (available at https://freedomhouse.org/report/freedom-world/2011/kyrgyzstan).
[309] HRC, *Report of the Working Group on the Universal Periodic Review* Kyrgyzstan* (16 June 2010), A/HRC/15/2, (available at https://www.upr-info.org/sites/default/files/document/kyrgyzstan/session_8_-_may_2010/ahrc152e.pdf) §21, 47, 49, 57, and 59.
[310] HRC Kyrgyzstan Working Group Report 2010, *supra* note 309, §76.72.
[311] HRC Kyrgyzstan Working Group Report 2010, *supra* note 309, §76.25.

the recommendation.[312] Kyrgyzstan accepted all three recommendations. Austria, Czechia, and Norway combined made five recommendations addressing the issue of minority protection from different perspectives both short- and long-term and more or less risk vs. resilience-oriented.[313] This brings the number of recommendations related to the protection of ethnic minorities to the modest total of 9 (all accepted) out of 175 recommendations in the first Kyrgyz UPR. Just one month after the UPR, ethnic rioting swept Southern Kyrgyz cities in early June, as Uzbek participation in politics increased ethnic tensions. Most accounts of the events indicate that the Uzbek minority in Kyrgyzstan suffered the brunt of the violence, and local security forces abetted the attacks on Uzbek communities.[314] This clearly indicates that the UPR held shortly before violence escalated, did not have a preventive effect.

The second UPR of Kyrgyzstan was held in January 2015. Assessing the preparatory reports and recommendations given during the review, it becomes clear that while the situation in Kyrgyzstan had been stabilised, serious risks towards atrocity crimes still prevailed. The National Report gives a very positive impression of the developments of human rights protection in Kyrgyzstan.[315] It is for examples highlighted that the advisory body the Human Rights Coordination Council was established in 2013.[316] The establishment of this Coordination Council shows that Afghani, Chinese and Tajik recommendations are implemented at least 'on paper'. The government also states in the National Report that they have addressed the 2010 ethnic-violence; providing redress and support for victims and their relatives.[317] The Stakeholder Report tells a very different story, underlining that Kyrgyzstan is a semi-democratic state that still has serious challenges with regards to the protection of ethnic minority rights. Human Rights Watch (HRW) highlighted that the government had not addressed abuses particularly those committed against the Uzbek minority.[318] Reflecting the lack of adequate protection of ethnic minorities, Armenia recommended that Kyrgyzstan *"Continue the initiatives for the promotion of tolerance and diversity with the aim of*

[312] HRC Kyrgyzstan Working Group Report 2010, *supra* note 309, §76.20 and 76.24.
[313] HRC Kyrgyzstan Working Group Report 2010, *supra* note 309, §76.119, 76.120, 76.121-76.122, and 77.13.
[314] Freedom House, *supra* note 308.
[315] HRC, Kyrgyzstan National Report 2014, *supra* note 308.
[316] HRC, Kyrgyzstan National Report 2014, *supra* note 308, §32.
[317] HRC, Kyrgyzstan National Report 2014, *supra* note 308, §73 and 79.
[318] HRC, *Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21* Kyrgyzstan* (24 October 2014), A/HRC/WG.6/21/KGZ/3, (available: https://www.upr-info.org/sites/default/files/document/kyrgyzstan/session_21_-_january_2015/a_hrc_wg.6_21_kgz_3_e.pdf), §37.

protecting the rights of national and ethnic minorities of the country."[319] Eleven other states from all UN regional groups gave similar recommendations on anti-discrimination and protection of ethnic minorities with wording calling for continued or general action (Action categories 2 and 4).[320] Kyrgyzstan accepted all these relatively nonspecific recommendations. Specific recommendations such a the following given by Czechia to *"Adopt comprehensive anti-discrimination legislation effectively fighting and preventing discrimination on all grounds, including ethnicity, religion, gender and sexual orientation"*[321] was noted, as were three other similar specific recommendations that were given by members of the WEOG and EEG.[322] Four states gave recommendations directly referring to the violence in 2010 calling for investigations and punishment of perpetrators of violence.[323] These recommendations were accepted, but the lack of efforts to investigate and punish perpetrators of the 2010 crimes might suggest that these will not be appropriately implemented. Norway made the only recommendation explicitly referring to the vulnerable Uzbek minority this recommendation was noted. The Kyrgyz case shows that recommending states to a limited extent are willing to address crises and risks. Meanwhile, low implementation of first cycle recommendation and the lack of willingness to accept specific recommendations in the second cycle, suggest a limited potential for the UPR to seriously impact direct prevention in cases with imminent risks of atrocity crimes.[xxxv]

4.4.2. Tools for Direct Prevention

The tools for direct prevention are listed in Section "2.3.4. Direct Atrocity Prevention, p. 20", most of these tools are mentioned in a few UPR recommendations. The relevance of these recommendations for direct prevention is assessed below. Direct atrocity prevention is very closely related to conflict prevention, and the tools available in both processes are almost indistinguishable. This implies that the recommendations referencing the tools in the analysis below could both be interpreted as efforts aimed at preventing escalation of a given crisis,

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[319] HRC, *Report of the Working Group on the Universal Periodic Review* Kyrgyzstan* (9 April 2015), A/HRC/29/4, (available at https://www.upr-info.org/sites/default/files/document/kyrgyzstan/session_21_-_january_2015/a_hrc_29_4_e.pdf), §117.131.

[320] *Recommendations made by: France, Brazil, Germany, Finland, Namibia, Malaysia, Morocco, Nicaragua, Sweden, Tajikistan, and Argentina.

- HRC, Kyrgyzstan Working Group Report 2015, *supra* note 319, §117.21, 117.40, 117.94, 117.106, 117.115, 117.132, 117.133, 117.134, 117.35, 117.36, and 117.37.

[321] HRC, Kyrgyzstan Working Group Report 2015, *supra* note 319, §118.18.

[322] *Recommendations made by: Canada, Germany, and Poland.

- HRC, Kyrgyzstan Working Group Report 2015, *supra* note 319, §118.20, 118.17, and 118.19.

[323] *Recommendations made by: The Czech Republic, the UK/Northern Ireland, Argentina, and Mexico.

- HRC, Kyrgyzstan Working Group Report 2015, *supra* note 319, §117.50, 117.97, 117.98, and 117.99.

conflict or atrocity crimes. Still, these examples will be analysed with a focus on their potential contribution to atrocity prevention.

4.4.2.1. Diplomatic Measures, Embargoes, and Sanctions

Because of the wide-ranging ways diplomatic measures can take shape, it is difficult to make a meaningful all-inclusive assessment of recommendations related to the use of diplomatic measures for atrocity prevention in the UPR. There only exists 13 recommendations (A: 12, N: 1) where the word "diplomatic" is explicitly used, these refer to the equal gender representation in diplomatic services and diplomatic assurance; a concept related to the protection of asylum seekers and refugees rights.[324] The latter could be relevant for the protection of this group against atrocities, but the remaining recommendations including the wording "diplomatic" are not related to direct atrocity prevention. Embargoes and sanction are both referred to in UPR recommendations. The word "embargo" appears in three recommendations, two where Sudan and the DPRK respectively recommend that the US lift economic- and commercial embargoes (N),[325] and one where Belarus recommend Cuba to "*continue consolidating work done in the international community concerning the rejection of unilateral coercive measures including the illegal embargo against Cuba"* (A).[326] A large majority of the 103 recommendations made in the two first cycles of the UPR (A: 78, N: 25) referring to "sanctions" are related to amendments of penal codes and hence refer to sanctions for domestic criminal offences that are not related to the direct prevention of atrocity crimes. A smaller amount was used similarly as the recommendations referring to "embargo", by states that criticize multi- and bilateral sanction regimes, these recommendations are given by states critical of the integration of R2P into the UPR such as Zimbabwe, Sudan, Pakistan, and Nicaragua. These recommendations can be seen as political statements, which are unlikely to be implemented. It can, in short, be concluded that sanctions and embargoes are not referred to in UPR recommendations in a way that is intended to, or in practice do, support direct prevention of atrocity crimes.[327] This assessment further confirms that the integration of measures such as embargoes and sanctions are not meaningful to address in a cooperative mechanism such as UPR, that can neither mandate, remove nor change embargo- and sanction regimes.

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[324] UPR-info Database, Keyword: *diplomatic.*
[325] UPR-info Database, Keyword: *embargo.*
[326] HRC, *Report of the Working Group on the Universal Periodic Review* Cuba* (8 July 2013), A/HRC/24/16, (available at https://www.upr-info.org/sites/default/files/document/cuba/session_16_-_april_2013/ahrc2416e.pdf), §170.210.
[327] UPR-info Database, Keyword: *sanction.*

4.4.2.2. Mediation, Fact-finding, and Peace Agreements

In the first two cycles, seven recommendations were made with the wording "mediation". Out of these, three given to Colombia (A), Burundi (N), and Mozambique (A) can be seen as supporting efforts for direct atrocity prevention, as they refer to domestic conflict mediation in states with recent or ongoing atrocity crimes.[328] Germany recommended that Mozambique *"Intensify the mediation process between conflict parties emphasizing the principles of inclusion of all relevant stakeholders to the conflict as well as parity"*.[329] Burundi received a similar recommendation;[330] however there have not been significant renewed official efforts of mediation in Mozambique or in Burundi.[331] Colombia also received a similar recommendation from Germany to *"Better protect human rights defenders, in particular in rural areas, and foster dialogue between the Government and human rights organizations, using if necessary the mediation of the local OHCHR office"*.[332] This recommendation has been implemented. The Colombian government has worked closely with the OHCHR, which has supported the Colombian NHRI in establishing a "*highly sophisticated information gathering and early warning system"*.[333] The warning information gathered through this system has been shared with national and international partners, why e.g. Limon highlighted the Colombian case as a successful prevention case supported by the OHCHR.[334] The German recommendation is an example of how cooperation between a SuR and OHCHR can be supported through the UPR mechanism.

States have in the two first cycles of the UPR given seven recommendations referring to "fact-finding", all of which can be interpreted as aiming at supporting direct atrocity prevention.[335] Libya received two recommendations (A), one from the US who recommended that Libya *"Cooperate fully with international human rights procedures and institutions,*

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[328] UPR-info Database, Keyword: *mediation.*
[329] HRC, *Report of the Working Group on the Universal Periodic Review* Mozambique* (12 April 2016), A/HRC/32/6, (available at https://www.upr-info.org/sites/default/files/document/mozambique/session_24_-_january_2016/a-hrc-32-6-e.pdf), §128.111.
[330] HRC, *Report of the Working Group on the Universal Periodic Review* Burundi* (8 January 2009), A/HRC/10/71, (available at https://www.upr-info.org/sites/default/files/document/burundi/session_3_-_december_2008/ahrc1071burundie.pdf) §24.
[331] HRW, "World report 2017 - Mozambique", *HRW,* accessed 20.12.17., (available at https://www.hrw.org/world-report/2017/country-chapters/mozambique) and GCR2P, "Populations at Risk: Burundi", *GCR2P,* last updated 15 November 2017, (available at http://www.globalr2p.org/regions/burundi).
[332] HRC, *Report of the Working Group on the Universal Periodic Review* * Colombia (9 January 2009), A/HRC/10/82, (available at https://www.upr-info.org/sites/default/files/document/colombia/session_3_-_december_2008/ahrc1082colombiae.pdf), §87.52.
[333] URG ("Glion"), *supra* note 139, p. 12.
[334] Silke KMH and Marie SC, Interview Executive Director for URG Limon, *supra* note 138.
[335] UPR-info Database, Keyword: *fact-finding*.

including with the Human Rights Council fact-finding mission, with the aim of holding accountable those responsible for violations and abuses of human rights".[336] Egypt received a recommendation (A)[337] from Belgium in 2014 to make public the conclusions and recommendations of national fact-finding reports, which Egypt has still not done.[338] Chad also received recommendations related to follow-up and implementation of fact-finding missions from Switzerland and Ireland (A:1, N:1). Zimbabwe and Syria both received recommendations to issue standing invitations to the UN's special procedures both recommendations were noted.[339]

The number of recommendations referring to a "peace agreement" is slightly higher than the two tools assessed above, with 23 recommendations.[340] Where the recommendations given on fact-finding and mediation were given to different states, more than half of the recommendations on peace agreements were given to South Sudan (11 in total) and Sudan (nine in total). Both states were broadly speaking recommended to implement peace agreements adopted in 2015 and/or 2005. During South Sudan's first UPR in 2011[341] the state received two recommendations from Somalia and Djibouti on the Sudanese Comprehensive Peace Agreement of 2005. The recommendations called for South Sudan to *"to preserve the climate of peace achieved by the Comprehensive Peace Agreement (...)"*[342] and *"Maintain the peaceful atmosphere that was created by the Comprehensive Peace Agreement (...)".*[343] However, the two recommendations were not specific regarding what measures South Sudan should take to maintain the peace. The two recommendations were noted. South Sudan received nine recommendations with the wording "peace agreement" during its second UPR in 2016, seven of these focused on the specific issue of transitional justice and called for the

[336] HRC, *Report of the Working Group on the Universal Periodic Review* Libya* (22 July 2015), A/HRC/30/16, (available at https://www.upr-info.org/sites/default/files/document/libya/session_22_-_may_2015/a_hrc_30_16_en.pdf), §137.68-137.69.
[337] HRC, *Report of the Working Group on the Universal Periodic Review* Egypt* (24 December 2014), A/HRC/28/16, (available at https://www.upr-info.org/sites/default/files/document/egypt/session_20_-_october_2014/a_hrc_28_16_e.pdf), §166.189.
[338] HRW, "Egypt: Compensate Victims of Mass Killings", *HRW,* 14 August 2016, (available at: https://www.hrw.org/news/2016/08/14/egypt-compensate-victims-mass-killings).
[339] UPR-info Database, Keyword: *fact-finding.*
[340] UPR-info Database, Keyword: *peace agreements.*
[341] *Because South Sudan was established as an independent state in July 2011, the first UPR of South Sudan is an integrated part of:
- HRC, *Report of the Working Group on the Universal Periodic Review* Sudan* (11 July 2011), A/HRC/18/16, (available at https://www.upr-info.org/sites/default/files/document/south_sudan/session_11_-_may_2011/ahrc1816sudane.pdf).

[342] HRC, Sudan Working Group Report 2011, *supra* note 241, §84.1.
[343] HRC, Sudan Working Group Report 2011, *supra* note 241, §84.7.

establishment of a hybrid court as decided in the South Sudanese peace agreement of 2015.[344] The UK recommended that South Sudan *"Work with the African Union to establish a hybrid court and the commission for truth, reconciliation and healing within the time frame set out in the peace agreement.*[345] All of the second cycle recommendations were accepted, but have not yet been implemented. The African Union (AU) and the South Sudanese government agreed to a draft statute for the court and a Memorandum of Understanding at the beginning of 2017, but progress has been stalled since then.[346] Even with the limited implementation, the second cycle recommendations are arguably better than the ones given during the first cycles, because they are measurable and specific, which enables follow-up and monitoring of their implementation.

The number of recommendations given on mediation, fact-finding and peace agreement is very low compared to the total amount of recommendations given in the UPRs. All three types of direct tools recommendations include examples that can be interpreted as attempts to support direct prevention of atrocity crimes. The majority of recommendations have been given to states from the African Group (75%), and the majority of the recommendations were made by members of the WEOG (59%).[347] The overall implementation of the accepted recommendations above has been low. The main exception to this general picture is the Colombian recommendation that can be seen as implemented. In spite of the shared low implementation rates, it can be argued that the quality of the recommendations given on the three tools differs. The recommendations related to fact-finding and peace agreements refer to concrete missions and agreements; this makes them specific, actionable and therefore easier to monitor the implementation of. The recommendations are clear statements made by states that call upon the SuRs to uphold specific agreements and bring attention to these whether or not they are implemented. Although, the different recommendations given to South Sudan in the two cycles showed how recommendations referencing specific agreements can be formulated in more or less specific ways. The mediation recommendations

[344] UPR-info Database, Keyword: *peace agreement.*
[345] HRC, *Report of the Working Group on the Universal Periodic Review* South Sudan* (28 December 2016), A/HRC/34/13, (available at https://www.upr-info.org/sites/default/files/document/south_sudan/session_26_-_november_2016/a_hrc_34_13_en.pdf), §126.63.
[346] HRW, "South Sudan: Stop Delays on Hybrid Court", *HRW,* last updated 15 December 2017, (available at: https://www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court).
[347] *The percentages on the amount of SuR from African Group and RS from WEOG are calculated based on the UPR-info datasets with the use of the keywords *mediation, fact-finding,* and *peace agreement.* The four recommendations that are not related to direct prevention in the *mediation* recommendations are excluded from the calculation.
- UPR-info Database, Keyword: *mediation, fact-finding,* and *peace agreement.*

are more vague because they refer to unspecified efforts of mediation, which makes the recommendations implementation more difficult to monitor. [xxxvi]

4.4.2.3. Security Council Resolutions

There exist 79 recommendations (A: 56, N: 23) including a reference to SC resolutions, 40 of these were to members states from the African Group. 37 recommendations reference the SC resolution 1325 on Women, Peace and Security adopted in 2000 and call upon states to implement and adhere to this resolution.[348] This is a reflection of the general high focus on women's rights in the UPR; 18,58% of all recommendations given in the first two cycles were tagged under the issue category 'Women's Rights'.[349] SC resolution 1325 revolves around the vulnerability of civilians hereunder especially women and girls in armed conflicts and calls for the inclusion of more women in decision-making processes related to the prevention, management and resolution of conflicts.[350] The resolution also includes the following paragraph that resembles R2P language even though it was adopted before the R2P doctrine "*Emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls"*.[351] The 37 recommendations on the SC resolution 1325 are thus clearly relevant for the direct prevention of atrocity crimes. Furthermore, this type of recommendations can support bridge building between the UN's Human Rights pillar and the Peace and Security pillar, and hence help raise awareness of the close link between human rights and atrocity crimes. This is also the case for the remaining recommendations referencing SC resolutions, which for the most part refer to specific country resolutions such as the recommendation given by the US to South Sudan in November 2016: *"Enable the full deployment, without obstruction, of the Regional Protection Force, as authorized by Security Council resolution 2304 (2016), to bring stability and help prevent further atrocities"*(A).[352] **[xxxvii]**

4.4.3. Interim Conclusion

The case studies of Syria, Myanmar, and Kyrgyzstan show that the UPR has not halted or prevented atrocity crimes. This reaffirms the statement by interviewees that the non-coercive nature of the UPR makes it unfit for the direct prevention of atrocities. Meanwhile, the Syrian

[348] UPR-info Database, Keyword: *Security Council resolution.*
[349] UPR-info Statistics, *Global Statistics*, Table: *Issue.*
[350] SC resolution 1325, *Women Peace and Security,* S/RES/1325 (31 October 2000), (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement), §1.
[351] SC resolution 1325, *supra* note 350, §11.
[352] HRC, South Sudan Working Group report 2016, *supra* note 345, §128.37.

case shows that states are willing to address cases of ongoing atrocities, and use the mechanism to make political statements that denounce atrocity crimes. In relation to this both diplomats, representatives of foreign ministries, and experts have argued that it is inappropriate not to mention ongoing atrocities in the UPR, even if they might not have an impact on the ground. In relation to the Myanmar case study, it has been argued that in future UPRs states can address discriminatory laws, similar to Myanmar's 1982 Citizenship law, at an earlier stage, which could support structural atrocity prevention.

There are few recommendations on embargoes, diplomatic measures, sanctions, and even fewer are relevant for the direct prevention of atrocity crimes. It is further argued that the UPR is not suited to address sanctions and embargoes given the cooperative nature of the mechanism. The direct prevention tools fact-finding, mediation, and peace-agreement have all been addressed in a few recommendations, but the implementation of these has been limited. For recommendations of this kind to be useful, they must refer to specific peace-agreements and fact-finding missions, in which case they could help hold states accountable for multi- and bilateral agreements, preferably with a focus on concrete elements of these. There is very limited practice of states recommending mediation efforts, although one given to Colombia has been successfully implemented. Recommendations on SC resolutions for the main part focus on the SC resolution on Women, Peace and Security, which is a relevant instrument to support atrocity prevention. Recommendations on SC resolutions can potentially help bridge the gap between the Human Rights and the Peace and Security pillar of the UN, but again practice is relatively limited.

In this sub-analysis, we have argued that the UPR does not have significant potential for contributing to the direct prevention of atrocity crimes. In the next sub-analysis, it will be analysed whether the UPR has potential for contributing to the structural prevention of atrocity crimes.

4.5. Structural Prevention and Resilience Building in the UPR

This sub-analysis will assess the contribution of the UPR to the structural prevention of atrocities. Firstly, there will be a short introduction to how the UPR is generally linked to structural atrocity prevention efforts. Secondly, five case studies from each UN regional group will be analysed more in detail; Argentina (GRULAC); Czechia (EEG); Sri Lanka

(Asia-Pacific Group); Switzerland (WEOG); and Zambia (African Group). All these states had their latest review at the 28th session of the UPR held in November 2017.

In UPR-info's database of recommendations, UPR recommendations have been divided into 56 overarching UPR issue categories e.g. impunity, justice, civil society, and racial discrimination.[353] Studying recommendations under such relevant categories for structural prevention it becomes clear that the UPR mechanism is currently implicitly addressing many of the various risks and resiliencies relevant for structural atrocity prevention. Implicitly, meaning that atrocity prevention is not stated directly as the aim of recommendations. Exemplified, a recommendation focusing on promoting freedom of speech could support efforts to create a more vibrant civil society, and in this manner a civil society more resilient towards atrocity crimes. However, such a recommendation will not necessarily be given with the intention of mitigating atrocity crimes. There exist 57,686 recommendations in UPR-info's database (from the first and second cycle of the UPR),[354] with the structural prevention approach targeting many of the same themes as the overarching UPR categories, it could be argued that many of these recommendations are implicitly supporting structural prevention of atrocities. However, this means that structural prevention of atrocities can be seen as everything and nothing when analysing UPR material. Furthermore, it would be next to impossible to determine the contribution of all these implicit recommendations for the actual prevention of atrocity crimes. Therefore, this sub-analysis will analyse the UPRs of the five cases. The analysis of these case studies will analyse how risks and resilience indicators are addressed in recommendations and reporting for the UPR. The purpose of this is to analyse current practice and assess more in detail how the UPR can be used to support structural atrocity prevention. To ensure a systemised and targeted analysis of structural atrocity prevention in the UPR, the cases studies are divided into the five key areas of resilience; constructive management of diversity, legitimate and capable authority, security of livelihood, vibrant civil society, and guarantees of non-recurrence (See definitions in section "2.3.3. Structural Atrocity Prevention", p. 18)[xxxviii]

[353] The UPR-info, "UPR-info's Database - Issue categorisation", 2016, (available at https://www.upr-info.org/database/files/Database_Issues_explanation.pdf), p. 5-6.
[354] UPR-info Statistics, *Global Statistics.*

4.5.1. Argentina

Argentina received 188 recommendations[355] during its third UPR cycle of which a large majority can be seen as having potential for implicitly contributing to the structural prevention of atrocity crimes. Argentina will provide responses in due time to recommendations, no later than the 37th session of the HRC in March 2018.[356] Most of the recommendations are related to the key resilience area constructive management of diversity, while many others also focus on the areas legitimate and capable authority. Furthermore, there are a couple of recommendations relevant for guarantees of non-recurrence and a vibrant civil society. Meaning that all key areas of structural prevention, except the security of livelihood are essentially targeted.

Guarantees of Non-recurrence

Truth, Memory, and Justice

Argentina has a section following up on recommendations regarding efforts to bring perpetrators of crimes against humanity to justice, here included avoiding delays in human rights trials, and continuing developing state policies regarding memory, truth, and justice.[357] These recommendations were given by Switzerland, Cyprus, Peru, and Armenia in the second cycle of the UPR.[358] In an interview conducted with Argentinian officials they emphasized that because of Argentina's history with atrocities, R2P and atrocity prevention is a core priority domestically and internationally also in the UPR.[359] Indeed, Argentina has reported on prevention with a focus on justice in all cycles of the UPR. The three pillars memory, truth, and justice form Argentina's work on atrocity prevention. The justice aspect serves to make the point that even though many years have passed, everybody will be held accountable for the crimes committed during the dictatorship from 1976-1983. This is highly relevant for the resilience area of guaranteeing non-recurrence. When asked whether

[355] *The average number of recommendations per state was 213 in the 28th UPR session. Hence the number of recommendations received by Argentina is below average.
[356] HRC, *Report of the Working Group on the Universal Periodic Review*Argentina* (12 December 2012) A/HRC/22/4 , (available at https://www.upr-info.org/sites/default/files/document/argentina/session_14_-_october_2012/ahrc224argentinae.pdf).
[357] HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Argentina* (24 August 2017), A/HRC/WG.6/28/ARG/1, (available at https://www.upr-info.org/sites/default/files/document/argentina/session_28_-_november_2017/a_hrc_wg.6_28_arg_1_e.pdf), §164-171.
[358] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §99.68 and 99.71-99.73.
[359] Silke KMH and Marie SC, Interview Argentinian Government Officials in the Field of Human Rights, *supra* note 185.

Argentina will explicitly include other domestic risks for atrocities, the Argentinian officials responded that it will be a question of resources and space in the report.[360]

Already at Argentina's first UPR, various NGOs reported that there had been significant progress in *"prosecuting military and police personnel responsible for "disappearances", killings and torture during the military dictatorship (1976-1983)".*[361] Prosecutions started before the establishment of the UPR, and the mechanism has therefore not influenced the commencement of this. Nevertheless, there is significant progress between Argentina's second review in 2012 and the third review in 2017. In 2012, 482 persons had been broad to trial of which 287 had been convicted.[362] In 2017, 2780 persons had been tried, resulting in 750 convictions and 77 acquittals. A number of 794 accused persons have not been tried yet.[363] The potential contribution of the UPR with regards to this case and non-recurrence is the extensive UPR reporting that documents the continued progress; meaning if progress was to hail it would be easily spotted.

Constructive Management of Diversity

Structural Discrimination

In the Stakeholder Report for Argentina's third UPR, the National Ombudsman's Office drew attention to structural discrimination of indigenous people, migrants, Lesbian, Gay, Bisexual and Trans (LGBT) persons, and people with African descent.[364] Many states also drew attention to structural discrimination in their recommendations e.g. Ecuador recommended Argentina to *"Intensify efforts to consolidate a broad national multisectoral strategy to combat structural discrimination."*[365] Other states making recommendations on this issue include Venezuela, Iran, Morocco, Slovakia, Sierra Leone, Egypt, Honduras, Iraq, Namibia, Algeria, Albania, Panama, South Africa, Madagascar, Israel, and Palestine. These states

[360] Silke KMH and Marie SC, Interview Argentinian Government Officials in the Field of Human Rights, *supra* note 185.
[361] HRC, *SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15(C) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1* Argentina* (6 March 2008), A/HRC/WG.6/1/ARG/3, (available at https://www.upr-info.org/sites/default/files/document/argentina/session_1_-_april_2008/ahrcwg61arg3e.pdf), §22.
[362] HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Argentina* (12 December 2012), A/HRC/22/4, (available at https://www.upr-info.org/sites/default/files/document/argentina/session_14_-_october_2012/ahrcwg.614arg1e.pdf), §66.
[363] HRC, Argentina National Report 2017, *supra* note 357, §165-166.
[364] HRC, *Summary of stakeholders' submissions on Argentina* Report of the Office of the United Nations High Commissioner for Human Rights* (8 August 2017), A/HRC/WG.6/28/ARG/3, (available at https://www.upr-info.org/sites/default/files/document/argentina/session_28_-_november_2017/a_hrc_wg.6_arg_3_e.pdf), §4-5, and 7.
[365] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.25.

focused on initiatives relevant for the constructive management of diversity, e.g. awareness-raising and effectively implementing national plans to combat discrimination.[366] Even though it is not known whether Argentina will accept these recommendations, Argentina has in previous cycles had a bad track record of only accepting recommendations under the UPR issue category ´Racial Discrimination´ if these do not require specific action i.e. action categories 1-2. Exemplified, recommendations from previous cycles on classifying racial discrimination as a criminal offence rather than a civil offence have been noted and not implemented,[367] while vaguely worded recommendations such as *"Continue to make progress on measures against migrants' discrimination"*[368] have been accepted. Comparing with both the number of recommendations and preparatory reporting from previous cycles, notably the UN System Report, there is much more focus on racial discrimination in Argentina's third UPR. The visit in 2016 by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to Argentina, could in part explain the increased attention on the issue. The Special Rapporteur presented his report at the 35th session of the HRC in June 2017, meaning a few months before Argentina's UPR in November. In the report, the Special Rapporteur did not explicitly comment on risk factors for atrocities, but implicitly identified victim groups, risk factors and highlighted some resiliencies. In the recommendations to Argentina in November, it seems that the states listed above that gave recommendations in the area of constructive management of diversity have clearly been influenced by this report addressing some of the same risks and the same three vulnerable groups (migrants, people with African descent, and indigenous peoples).[369] In interviews conducted for this thesis, it has been highlighted that many states prefer UPR recommendations made by other states to recommendations given by experts, such as the Special Rapporteur.[370] The potential of the UPR in this regard is that it can complement the HRC's special procedures and possibly pressure and trigger action by the SuR. The UN Special Rapporteur argues in the 2016 report that the history of discrimination and

[366] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.20-107.35, and 107.179.
[367] HRC, Argentina Working Group Report, 2012, *supra* note 356, §99.27, *(Recommendations made by South Africa, Trinidad, and Tobago) and HRC, *Report of the Office of the United Nations High Commissioner for Human Rights*Argentina* (28 August 2017), A/HRC/WG.6/28/ARG/2, (available at https://www.upr-info.org/sites/default/files/document/argentina/session_28_-_november_2017/a_hrc_wg.6_28_arg_2_e.pdf) §14.
[368] HRC, Argentina Working Group Report, 2012, *supra* note 356, § 99.117, *(Recommendation made by Venezuela).
[369] HRC, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Argentina*, A/HRC/35/41/Add.1 (18 April 2017), (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/093/24/PDF/G1709324.pdf?OpenElement).
[370] Silke KMH and Marie SC, Interview Representative of WEOG state Foreign Ministry, *supra* note 144 and Silke KMH and Marie SC, Interview with Representative of Switzerland's Foreign Ministry, *supra* note 149.

xenophobia can be traced back in Argentina's history.[371] Changing this mind-set will, therefore, be a long process, why recommending states should be encouraged to keep on making recommendations in this regard.[xxxix]

Horizontal Inequality

In the Stakeholder Report for Argentina's third UPR, civil society organisations have reported on severe gaps concerning equal access to justice, education, land, water, health services, political and social life, and other basic services.[372] Especially in regards to indigenous peoples, who according to the organisation Cultural Survival are denied access to basic services, lacks title to their lands, and are mostly excluded from social and political life.[373] Such horizontal inequalities between different groups in society are among the key risks for atrocities. Four states are directly targeting horizontal inequality in their recommendations to Argentina; these include Nicaragua, Bangladesh, Uruguay, and the Maldives. As an example Nicaragua recommended *"Continue to advance in the recognition of the differences and the respect for the rights of vulnerable groups, bearing in mind the duty to ensure equality among all people, with special attention to the poorest provinces and the systemic inequalities that may exist between the rural and urban areas".*[374] Bolivia addressed the standard of living of indigenous peoples directly.[375] These recommendations are highly relevant, as the civil society organisation Cultural Survival noted, that recommendations on indigenous peoples from Argentina's second cycle UPR had not been implemented. In the National Report for the third cycle, Argentina highlights its membership of the Global Network of the Responsibility to Protect Focal Points, the Latin American Network for Genocide and Mass Atrocity Prevention, and participation in the Global Action Against Mass Atrocity Crimes, a network which tries to deepen cooperation between various stakeholders working for genocide prevention and the R2P.[376] If explicitly identifying horizontal inequalities and racial discrimination as a risk factor for atrocities in recommendations, it could therefore potentially be difficult for Argentina to ignore, because of their history with atrocities and commitment to the atrocity prevention agenda.

[371] HRC ("Report of the Special Rapporteur"), *supra* note 369, §6.
[372] HRC, Argentina Stakeholder Report 2017, *supra* note 364, §12-13, 36, 55, 60-61, 67, 74, 76, 83-84.
[373] HRC, Argentina Stakeholder Report 2017, *supra* note 364, §84.
[374] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.87.
[375] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.86, 107.93, and 107.97.
[376] HRC, Argentina National Report 2017, *supra* note 357, §190.

Vibrant Civil Society

Processes of Civil Society Inclusion

With regards to civil society, Argentina received three very relevant recommendations from Ireland, Greece, and Austria. These focus on developing a comprehensive human rights plan with clear measurable goals in close cooperation with civil society and undertaking inclusive processes with civil society to implement UPR recommendations.[377] In the second cycle of the UPR, Argentina received two similar recommendations from Norway and Mexico, both accepted. In the second cycle, Norway likewise recommended Argentina to undertake inclusive processes with regards to implementation of UPR recommendations,[378] and Mexico recommended, in the first cycle of the UPR, that Argentina should *"Envisage the inclusion of the UPR outcome in the National Human Rights Plan"*.[379] The interviewed Argentinian officials told that they are currently working on a human rights strategy, which will be based on the UPR recommendations Argentina have received. That the human rights strategy will take outset in UPR recommendations shows the potential of UPR when states are cooperating. With regards to recommendations on inclusive processes with civil society, Argentina's government plans to have two-three meetings with civil society organisations in 2018 on implementation.[380] However, civil society organisations reported that they had not been consulted for the preparation of the National Report.[381] Another risk addressed by four states in their recommendations is that the national Ombudsman's Office has been without leadership for the last eight years.[382] A strong independent NHRI is a vital resilience factor for atrocities.

Legitimate and Capable Authority

Unequal Access to Justice

Legitimate and capable authority regards, among other issues, legal equality and equal access to justice. As established with the Stakeholder Report on Argentina, there is unequal access to justice across the Argentinian society, as groups such as indigenous people are in large

[377] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.17-107.18, and §107.79.
[378] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §99.23.
[379] HRC, *Report of the Working Group on the Universal Periodic Review* Argentina* (13 May 2008), A/HRC/8/34, (available at https://www.upr-info.org/sites/default/files/document/argentina/session_1_-_april_2008/ahrc834argentinae.pdf), §20.
[380] Silke KMH and Marie SC, Interview Argentinian Government Officials in the Field of Human Rights, *supra* note 185.
[381] HRC, Argentina Stakeholder Report 2017, *supra* note 364, §15.
[382] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.10-107.14.

denied this right.[383] India addressed this issue head on, although the recommendation is not very specific; "*Take measures to eliminate discrimination against indigenous people and ensure their easy access to justice and the right to property*".[384]

Abuse of Power

Several civil society organisations reported on police abuse of power, here included widespread use of profiling and persecution practices against indigenous peoples, people with African descent, LGBT persons, and Latin-American migrants.[385] Furthermore, various NGOs reported on arbitrary detentions, harassment, threats, and in some extreme cases executions or enforced disappearances to cover up police brutality.[386] Especially problematic is the widespread targeting of specific groups, which places the police in the category of potential perpetrators of atrocity crimes. Slovakia and Israel addressed this issue by recommending relevant initiatives for strengthening legitimate and capable authority, such as investigations and prosecution of all cases of abuse by police authority[387], and training in order to reduce cases of institutional violence and discrimination based on sexual orientation, gender identity and expression.[388]

4.5.1.1. Interim Conclusion

The UPRs of Argentina have supported resilience in the area of guarantees of non-recurrence. This area of resilience has been addressed substantially both in preparatory reports and in recommendations. Argentina's history with atrocity crimes has made impunity an important domestic political agenda, which the UPR can support with continuous reporting on the issue. A rather developed domestic strategy to fight impunity was identified as a resilience indicator in Argentina. The Stakeholder reports particularly exposed risks such as structural discrimination and unequal access to justice, which is seen as a potential contribution of the UPR process. However, this potential is challenged as the analysis further showed that Argentina has been reluctant to accept SMART recommendations regarding discrimination and equal access to justice. The analysis also showed that horizontal inequalities are

[383] HRC, Argentina Stakeholder Report 2017, *supra* note 364, §12.
[384] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.171.
[385] HRC, Argentina Stakeholder Report 2017, *supra* note 364, §25.
[386] HRC, Argentina Stakeholder Report 2017, *supra* note 364, §23
[387] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.38. (*Recommendation made by Slovakia).
[388] HRC, Argentina Draft Working Group Report 2017, *supra* note 265, §107.40, (*Recommendation made by Israel).

highlighted as an issue both in reporting and recommendations. It was argued that the UPR has potential for supporting structural prevention of atrocity crimes, if inequality and racial discrimination are framed in UPR recommendations as risks towards atrocities, because it would be difficult for Argentina to ignore or note such recommendations, based of their political commitment to the atrocity prevention agenda.[xl]

4.5.2. Czechia

Czechia received 188 recommendations[389] during its third UPR cycle of which a large majority can be seen as having potential for implicitly contributing to the structural prevention of atrocity crimes. Czechia will respond in due time to recommendations, no later than the 37th session of the HRC in March 2018.[390] Most of the recommendations are related to the key resilience area constructive management of diversity, while states have also given recommendations relevant for the key resilience area of legitimate and capable authority and a few related to guarantees of non-recurrence. None of the recommendations given to Czechia during the third UPR cycle directly addressed the security of livelihoods or vibrant civil society. Even though there is no direct reference to these, especially civil society actors will be important for the implementation of many of the recommendations. The main examples of recommendations where civil society actors will be important are six recommendations to make an awareness-raising campaign on anti-discrimination laws.[391]

Guarantees of Non-recurrence

Commemoration of Past Atrocities

Czechia received one recommendation directly linked to the commemoration of past atrocities; "*Resolve the question of the commemoration of the memory of the Roma who died during the second world war in the Nazi camp in the village of Lety"* from Russia.[392] The former Nazi camp is also mentioned in the Czechia Stakeholder Report of 2017. In the Stakeholder Report, various commissions and committees of the Council of Europe[393]

[389] *The average number of recommendations per state was 213 in the 28th UPR session. Hence the number of recommendations received by Czechia is below average.
[390] HRC, *Draft report of the Working Group on the Universal Periodic Review* Czechia* (21 November 2017), A/HRC/WG.6/28/L.1, (available at https://www.upr-info.org/sites/default/files/document/czechia/session_28_-_november_2017/a_hrc_wg.6_28_l.1.pdf).
[391] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.53-115.55, 115.45, 115.47, and 115.122.
[392] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, § 115.177.
[393] *Specifically: The Council of Europe Commissioner for Human Rights, Advisory Committee on the Framework Convention for the Protection of National Minorities, European Commission against Racism and Intolerance.

recommended the removal of pig farms built on the former concentration camp of Lety, and recommended that Czechia take measures to honour the many Roma who died there.[394] The honourable commemoration of past atrocities is considered an essential element of assuring non-recurrence of atrocity crimes. As will be shown below, one of not the most vulnerable groups in Czechia is the Roma, who are victims of discrimination, hate- and racist crimes, which further underlines the importance of acknowledging and commemorating past atrocities committed against members of this group. The issue of the former concentration camp is not addressed in the 2017 Czechia National Report or the UN system report, which emphasizes the importance of the information in the Stakeholder Report to supplement the two other preparatory reports.

Enforced Sterilization of Roma Women

Another disturbing issue addressed in all of the third cycle preparatory reports is the practice of enforced sterilization, which as many as 90.000 Roma women have been victims of in the former Czechoslovakia territory since the 1980s. The practice was abolished in 1993, but there have been accounts of the practice as recent as 2007.[395] Enforced sterilization can amount to a crime against humanity if it is committed in a widespread or systematic manner under article 7 (g) of the Rome Statute. With the high number of victims, it can be argued that the practice was widespread and hence the perpetration constitutes crimes against humanity. The perpetration of enforced sterilizations is addressed in seven recommendations given to Czechia; the US, Argentina, France, and Mexico made recommendations referring to Roma women that called either for the revision of the position on providing compensation for victims of enforced sterilization, establishing a complaints and prevention mechanism for forced sterilization or the persecution and punishment of perpetrators of the crime.[396] Greece, Timor-Leste, and Venezuela also recommended that Czechia reviews the three-year statute of limitation for cases of enforced sterilization, abolish the practice of sterilization without the consent of persons with disabilities, and give compensations to victims of enforced sterilization. The issue of sterilization was addressed in three recommendations in Czechia's first UPR cycle in 2008, although without the wording of "enforced" or "non-consensual",

[394] HRC, *Summary of Stakeholders' submissions on Czechia** (23 August 2017), A/HRC/WG.6/28/CZE/3, (available at https://www.upr-info.org/sites/default/files/document/czechia/session_28_-_november_2017/a_hrc_wg.6_cze_3_e.pdf), §28.
[395] Amnesty International, "We have succeeded by speaking out", *Amnesty International,* 21. March 2013, (available at https://www.amnesty.org/en/latest/campaigns/2013/03/we-have-succeeded-by-speaking-out/).
[396] HRC, Czechia Working Group Report 2017, *supra* note 390, §. 115.101-115.103, and 115.108.

which is important as it underlines the magnitude of the crime.[397] In recommendations from the second UPR cycle in 2012, the wording "coercive or non-consensual" is used in two out of three recommendations related to the issue.[398] Czechia has accepted all of these recommendations. It is noteworthy that even though the wording is made stronger, none of the recommendations refer to enforced sterilization as a crime against humanity, or are in other ways formulated in a manner that could be seen as explicitly linking the issue to atrocity prevention. An entire section in the 2017 National Report is dedicated to the issue of enforced sterilization, where it is referenced that a draft law on the establishment of a mechanism for compensations for victims of enforced sterilization has been drafted, but rejected by the government and parliament with the claim that current court procedures were sufficient.[399] This limited implementation of the first and second cycle recommendations is criticised as inadequate both in the Stakeholder Report and the UN System Report of 2017.[400] This is an example of how states, the UN system, and civil society stakeholders can use the UPR process to bring continuous attention to a practice, that in a specific context or mode could be considered an atrocity crime. The recommendations are for the most part measurable as they call specifically for the establishment of a complaint mechanism and the prosecution of perpetrators. Even if recommendations on the issue have not been fully implemented, the political pressure built by actors in the UPR process can have influenced that the Czech government has addressed the issue in their National Reports. The example also shows that atrocity crimes can happen in states from all regions of the world, and should be given attention universally.

[397] HRC, *Report of the Working Group on the Universal Periodic Review* Czechia* (28 April 2008), A/HRC/WG.6/1/CZE/4, (available at https://www.upr-info.org/sites/default/files/document/czech_republic/session_01_-_april_2008/czech_republic_adopted_wg_report_edited.pdf), §44.5 and 44.7.
[398] HRC, *Report of the Working Group on the Universal Periodic Review* Czechia* (23 October 2012), A//HRC/WG.6/14/L.1, (available at https://www.upr-info.org/sites/default/files/document/czech_republic/session_14_-_october_2012/a_hrc_wg.6_14_l.1.pdf), §94.80-82 and 94.94.
[399] HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Czechia* (9 August 2017), A/HRC/WG.6/28/CZE/1, (available at https://www.upr-info.org/sites/default/files/document/czechia/session_28_-_november_2017/a_hrc_wg.6_28_cze_1_e.pdf), §52-54.
[400] HRC, Czechia Stakeholder Report 2017, *supra* note 394, §25 and HRC, *Compilation on Czechia - Report of the Office of the United Nations High Commissioner for Human Rights* (4 September 2017), A/HRC/WG.6/28/CZE/2 (available at https://www.upr-info.org/sites/default/files/document/czechia/session_28_-_november_2017/a_hrc_wg.6_28_cze_2_e.pdf) §20.

Constructive Management of Diversity

With the vast majority of Czechia's third cycle recommendations being related to the constructive management of diversity, as well as the challenges highlighted within this area of resilience in the three preparatory reports, it can with reasonable certainty be argued that it is within this area that Czechia's main risks of atrocity crimes lie.[xli]

Strong and independent NHRI

A strong and independent NHRI is essential for the constructive management of diversity, and was the focus of 13 recommendations to Czechia, although the approach to the issue and specificity of them differed. Denmark, India, Timor-Leste and the Philippines recommended that Czechia "*establish an A-status national human rights institution based on the Paris Principle"*.[401] States such as Portugal and Bangladesh gave softer recommendations asking Czechia to "*consider"* the establishment of an A-status NHRI.[402] Czechia has accepted all recommendation tagged under the issue category National Human Rights Institution in the two first UPR cycles,[403] which makes it unlikely that Czechia will not accept at least some of the 13 recommendations of the third cycle, and thereby commit itself to continue working on the issue. The next question will be whether this will lead to improvement as it is stated in the National Report that the NHRI already live up to the Paris Principle, a claim rejected both in the Stakeholder and UN System Report.[404] This points to a limitation of the UPR, in the sense that if the SuR believes its human rights record is acceptable in a specific area, recommendations will not necessarily trigger action. To mitigate this limitation states can continue making recommendations on the given issue, calling to the attention of the SuR that its record is not acceptable.

Discrimination of the Roma People

More than half of the recommendations given to Czechia in the third cycle relate to anti-discrimination, the state received recommendations addressing challenges of discrimination against minorities, asylum-seekers, migrants, non-EU citizens, and women, as well as issues

[401] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.24-115.27.
[402] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.23-35.
*An A-Status NHRI refers to a set of the principles regarding NHRIs adopted by the UNGA in resolution 48/134 in 1993. These principles are commonly known as the Paris Principles. An A-Status is given to NHRI that are fully in line with the Paris Principles.
[403] UPR-info Database, SuR: *Czechia*, Issue: *National Human Rights Institution*.
[404] HRC, Czechia UN System Report 2017, *supra* note 400, §14 and HRC, Czechia Stakeholder Report 2017, *supra* note 394, §11.

such as racism, xenophobia, hate crimes/speech, and Islamophobia.[405] An important potential contribution of the UPR to the prevention of atrocity prevention is the identification of vulnerable groups in a state, and a wide range of vulnerable groups are addressed in Czechia's UPR. Assessing the recommendations and the preparatory reports for Czechia's third UPR, the Roma minority seems an especially vulnerable group. 39 (out of 188) recommendations refer to the group and the Czech Roma Integration Strategy, adopted by the government in 2015, is the subject of 14 recommendations alone.[406] The recommendations related to the protection of Roma peoples' human rights cover many different aspects of the discrimination against the group. Recommendations focus on continuing and fully implementing the integration of Roma children into the educational system[407], improving the equal access of Roma to housing, employment and health services[408], and lastly recommendations that address racially motivated violence and hate crimes against the Roma.[409] This reflects, what many of the interview persons for this thesis have highlighted as a benefit of using the UPR for structural prevention; that the mechanism gives a holistic record of human rights violations related to atrocity prevention.[410] The UPR can as seen in this example be used to give recommendations to bolster or ensure the protection of a vulnerable group addressing crosscutting areas of human rights. Czechia has, which is, unfortunately, an exception to the general trend, accepted all recommendations that refer to a specific vulnerable minority (the Roma) in the two first UPR cycles. Czechia has further adopted the Roma Integration Strategy 2015-2020, a national strategy that aims at bridging the gaps between the Roma and the rest of society, which shows a domestic willingness to work with the issue.[411] The proper implementation of the recommendations can support the long-term protection of Roma in Czechia against possible atrocity crimes, which they have previously been victims of.

[405] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.40-115.49, 115.50-115.63, 115.66-115.68, 115.70-115.201, and 115.93.
[406] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.163-115.176, and 115.178-115.179.
[407] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.110-115.126.
[408] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.166-115-167, 115.69, and 115.73-115-75.
[409] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.68 and 115.79.
[410] Silke KMH and Marie SC, Interview with Geneva-based diplomat and Silke KMH and Marie SC, Interview with Representative of WEOG state Foreign Ministry, *supra* note 144.
[411] HRC, Czechia National Report 2017, *supra* note 399, §23.

Legitimate and Capable Authority

Judiciary and Legislative Aspects of Non-discrimination

In the third cycle of the UPR, Czechia received a few recommendations related to the area of legitimate and capable authority. These recommendations focused on the competence of professionals within the Czech judiciary and police to tackle discrimination crimes. Turkey recommended Czechia to "*Step up efforts of the competent Ministries to effectively train professionals, such as judges, prosecutors and police officers for a prompt and independent investigation and effective prosecution of racist and hate crimes."*[412] Canada similarly recommended that crimes and the alleged discriminatory motives behind them be effectively and promptly investigated, while Iceland recommended that legal aid and improved protection of victims of discrimination be ensured.[413] These recommendations are closely related to the recommendations on the constructive management, but add the focus on the legal assurance of non-discrimination more directly, and touch upon the issue of impunity and training of professionals. In Czechia's 2017 National Report it is underlined that racist propaganda and racist attacks are considered a crime under Czech law, and it is further stated that *"these most serious crimes are punished as crimes against humanity, such as genocide; attack against humanity; apartheid and discrimination of a group of people"*.[414] This paragraph is an important example of how atrocity prevention can be integrated into a National Report in the UPR, as it clearly acknowledges the link between racist crimes and atrocity crimes, while also acknowledging the domestic potential risk of such crimes.

4.5.2.1. Interim Conclusion

The analysis of the Czechia case showed that the UPR has contributed to support resilience in the area guarantees of non-recurrence by bringing attention to past atrocities. Recommendations to the state have called for commemoration of past atrocities and provided political pressure through increasingly stronger worded recommendations on the issue of enforced sterilizations, which have made Czechia address the issue in their National Report. The analysis also shed light on the potential of the UPR to identify groups especially vulnerable towards discrimination, who are potential victim groups of atrocity crimes. Czechia's UPR recommendations have addressed discrimination against identified vulnerable groups across different human rights issues. Meaning, that legal perspectives and insurance of equal access to services have also been targeted in recommendations on non-discrimination.

[412] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.63.
[413] HRC, Czechia Draft Working Group Report 2017, *supra* note 390, §115.65 and 115.94.
[414] HRC, Czechia National Report 2017, *supra* note 399, §34.

The analysis of recommendations on establishing an A-status NHRI, pointed to the limitation of the UPR, that if the SuR perceives and argues that its human rights record is acceptable in a specific area, recommendations will not necessarily trigger action. Lastly, the analysis provided an example of how risks towards atrocity crimes can be integrated into the National Report, as the link between hate crimes and the risk of atrocity crimes is acknowledged in the Czechia National Report.[xlii]

4.5.3. Sri Lanka

The UPR preparatory reports and the 229 recommendations[415] (A: 177, N: 52) given to Sri Lanka during the third cycle of the UPR illustrate the multifaceted risks facing the state.[416] The analysis will focus on the recommendations that have been accepted, when noted recommendations are assessed in the analysis this will be explicitly mentioned. All five key areas of resilience towards atrocities are addressed in the UPR material. The Sri Lankan civil war that started in 1983 was concluded in 2009, which makes the risk of recurrence especially important, and the assessment of the state's UPR will have a particular focus on this area. The sub-analysis will focus on the potential of using the UPR to support structural atrocity prevention in a high-risk country like Sri Lanka. The current government was elected in 2015, and civil and political rights have been improved under the current administration.[417] Another positive development has been the 19th amendment to the Sri Lankan constitution which as accounted for in the Stakeholder Report 2017 has ensured "*the removal of the President's immunity for official acts; reducing the President's power in relation to Parliament; re-introducing term limits for the office of the President; taking away the sole power of the President to make appointments to key independent institutions; and improving transparency in the law making process".*[418] Even with these improvements, issues such as impunity for crimes committed during the armed conflict and other serious human rights violations remain.

[415] *The average number of recommendations per state was 213 in the 28th UPR session. Hence the number of recommendations received by Sri Lanka is slightly above average.
[416] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279.
[417] Freedom House, "Freedom in the World 2017 - Sri Lanka", *Freedom House,* accessed 20.12.17, (available at: https://freedomhouse.org/report/freedom-world/2017/sri-lanka).
[418] HRC, *Summary of stakeholders' submissions on Sri Lanka* Report of the Office of the United Nations High Commissioner for Human Rights* (8 August 2017), A/HRC/WG.6/28/LKA/3, (available at https://www.upr-info.org/sites/default/files/document/sri_lanka/session_28_-_november_2017/a_hrc_wg.6_lka_3_e.pdf), §3.

Constructive Management of Diversity and Vibrant Civil Society

The key areas of resilience; constructive management of diversity and vibrant civil society will both be analysed in this section. The two areas are combined as there were only a few recommendations related to civil society, and those given are closely related to the constructive management of diversity.

Protection of Civil Society Actors

It is highlighted in the Sri Lankan National Report that for the first time civil society organizations were consulted in the preparation of the National Report.[419] However, looking at earlier national reports it is also stated in these that civil society representatives have been included in the preparation of the National Report of the first and second cycle.[420] This shows that under certain governments the amount of reliable information in the National Report can be limited. Civil society organizations in Sri Lanka were addressed in recommendations from Palestine, Norway, Finland, and Ireland. These states recommended that all necessary measures should be taken to ensure protection of civil society actors and human rights defenders.[421] These recommendations are highly relevant for atrocity prevention and reflect a serious concern voiced in the UN System Report of *"intimidation and harassment, including physical attacks, death threats, administrative detention and politically motivated charges, by State officials against journalists, lawyers, clergymen, members of non-governmental organizations (NGOs), human rights defenders and opposition politicians"*.[422]

Human Rights Education

The important resilience building issue of human rights education is addressed in recommendations made by India and Burundi.[423] States have given Sri Lanka

[419] HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Sri Lanka* (24 August 2017), A/HRC/WG.6/28/LKA/1, (available at: https://www.upr-info.org/sites/default/files/document/sri_lanka/session_28_-_november_2017/a_hrc_wg.6_28_lka_1_e.pdf), §4-10.

[420] HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Sri Lanka* (10 August 2012), A/HRC/WG.6/14/LKA/1, (available at https://www.upr-info.org/sites/default/files/document/sri_lanka/session_14_-_october_2012/ahrcwg.614lka1e.pdf), §9-10 and HRC, *NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 15 (A) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1 * Sri Lanka* (2 May 2008), A/HRC/WG.6/2/LKA/1, (available it: https://www.upr-info.org/sites/default/files/document/sri_lanka/session_2_-_may_2008/ahrcwg62lka1e.pdf), §2.

[421] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.104-116.107.

[422] HRC, *Compilation on Sri Lanka Report of the Office of the United Nations High Commissioner for Human Rights* (28 August 2017), A/HRC/WG.6/28/LKA/2, (available at https://www.upr-info.org/sites/default/files/document/sri_lanka/session_28_-_november_2017/a_hrc_wg.6_28_lka_2_e.pdf), §23.

[423] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.29-116.30.

recommendations on human rights education since the first UPR cycle and it seems to be one of the most efficient contributions of UPR in the Sri Lankan case. The implementation has resulted in the introduction of human rights education in all pre-schools as well as human rights training for law enforcement officers, members of the armed forces and prison officers, and lastly IHL training for military personnel conducted by the ICRC.[424] This shows that the recommendations on human rights education have triggered action, although the quality of these initiatives cannot be determined in this thesis.

National Human Rights Actions Plan

12 states recommended that the Sri Lankan government implement the National Human Rights Action Plan and in relation to this allocate the necessary resources to the Human Rights Commission.[425] Afghanistan did as the only state recommend that Sri Lanka *"Ensure the full alignment of the Human Rights Commission of Sri Lanka in accordance with the Paris Principles."*[426] In many other cases such a recommendation is very commonly made for states that do not have such an accredited institution yet. The reason why this is not the case with Sri Lanka, could be that states have assumed that recommendations to support existing strategies, such as the National Human Rights Plan, will be more efficient.

Non-discrimination and Identification of Vulnerable Groups

Measures and efforts to strengthen non-discrimination and the protection of non-specified vulnerable groups were given by seven states.[427] These recommendations could potentially provide pressure on Sri Lanka to strengthen the existing frameworks for non-discrimination, but they are less actionable as they do not identify specific vulnerable groups. The vulnerable group of religious minorities are more directly identified in a number of recommendations; Namibia e.g. recommended Sri Lanka *"Take concrete measures aimed at preventing and punishing the perpetrators of hate speech and incitement of violent attacks against ethnic and religious minority"*.[428] Such recommendations may be more useful as they target a vulnerable group, which is also the case in five recommendations addressing the rights and protection of migrants, internally displaced persons (IDPs), asylum-seekers and refugees.[429] Interestingly,

[424] HRC, Sri Lanka National Report 2017, *supra* note 419, §29-31.
[425] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.15-116.16, 116-116-24, and 116.26-116.27.
[426] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.17.
[427] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.31-116.37.
[428] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.42.
[429] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.173-116.177.

the specifically vulnerable group of the Tamils are only referred to in one recommendation Peru made to *"Continue the protection programs and policies of the Tamil population so that they can fully enjoy their rights, particularly economic, social and cultural rights".*[430] The use of the wording "continue" makes the recommendation inappropriately vague, especially considering that it is stated throughout the Stakeholder Report that Tamils are harassed and under surveillance by security forces and that Sri Lanka lacks an *"appropriate mechanism for the investigation and prosecution of war crimes, crimes against humanity and genocide committed against the Tamil people by the Sri Lankan State".*[431] Furthermore, it is "*noted that destroying Tamil cultural identities, the Sri Lankan state was trying to wipe out Ethnic Tamil national identity".*[432] The language used in the last quote highly resembles the description of ethnic cleansing. Lastly it is highlighted that the Tamil-speaking minorities do not have fair and equal access to state services.[433] These important issues both represent challenges to the constructive management of diversity, and as will be elaborated below, also a clear risk of recurrence of atrocity crimes.

Legitimate and Capable Authority

Democracy and the Anti-torture Agenda

The issue of legitimate and capable authority is also addressed in different ways in the recommendations given to Sri Lanka during its third UPR cycle. Nepal gave the rather broad recommendation to *"Continue the ongoing process of consolidating democracy and the rule of law in the country",*[434] which is arguably not concrete enough to be actionable. A more specific and actionable recommendation was given by Indonesia, who recommended that Sri Lanka *"strengthen regulatory and institutional framework to ensure implementation of the Zero Tolerance Policy on Torture, as well as enhancing capacity building on the prevention of torture",*[435] Slovakia, Iran and Madagascar gave similar recommendations.[436] These recommendations are important as it is highlighted in the UN System Report that torture is a serious and widespread issue in Sri Lanka.[437] Widespread torture could constitute a crime against humanity.[438] Torture and Other Cruel, Inhuman or Degrading Treatment is number

[430] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.171.
[431] HRC, Sri Lanka Stakeholder Report 2017, *supra* note 418, §31
[432] HRC, Sri Lanka Stakeholder Report 2017, *supra* note 418, §82.
[433] *Ibid.*
[434] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.59.
[435] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.55.
[436] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.56-116.58.
[437] HRC, Sri Lanka UN System Report 2017, *supra* note 422, §16-21.
[438] Rome Statute, *supra* note 131, §7(f).

four on the list of top issues raised in the UPR process.[439] As previously argued, the integration of R2P is competing with many human rights agendas, here included strongly established agendas such as the prevention of torture and women's rights. It should be remembered, that such agendas are also highly relevant for the prevention of atrocity crimes, why the competition is not necessarily a problem for implicit structural prevention. However, the competition could be a more pressing challenge for the integration of explicit atrocity prevention into the UPR. Moreover, if states are exclusively focusing on a few human rights agendas, this could inhibit the holistic view on the SuRs' human rights records, which has been highlighted as one of the main arguments for using the UPR to support atrocity prevention. The top three issues raised in the UPR (International instruments, women's rights, and rights of the child) are significantly more raised than other issues.[440] Nevertheless, in the case of Sri Lanka, states have targeted many different agendas with their recommendations, allowing a holistic view of the human rights situation. [xliii]

De-militarization of Lands

Civil control with security forces is an important resilience factor, and risks in this regard are especially relevant in post-conflict states in the process of consolidating democracy, such as Sri Lanka. The issue is more or less directly addressed in four recommendations. The most direct one was given by Switzerland "*Strengthen the democratic control of the defence sector, in particular suspend the involvement of members of the armed forces in economic activities, in order to ensure guarantee of property of citizens, as well as their livelihoods".*[441] The other recommendations focus on the issue of land grabbing, land laws, and the restitution of lands confiscated by the military.[442] Well managed land laws is a resilience factor for the security of livelihoods, but with the involvement of the military, this is closely related to the key area of legitimate and capable authority. The issue of land return is accounted for in the National Report, where it is stated as a priority of the Sri Lankan government, who since 2009 has released 24,336.25 acres of private land, with 6051.36 acres left to be returned.[443]

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[439] UPR-info Statistics, *Global Statistics,* Table: *Issue.*

[440] *The category international instruments constitutes 22,04% of all recommendations, women's rights constitute 18,58%, rights of the child constitute 17,53%.

- UPR-info Statistics, *Global Statistics*, Table: *Issue*.

[441] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.130

[442] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.131-116.134.

[443] HRC, Sri Lanka National Report 2017, *supra* note 419, §42.

Security of Livelihoods

The Sustainable Development Goals

The resilience area of security of livelihood is addressed in recommendations focusing on the Sustainable Development Goals (SDGs), the protection of the environment, and calls for the integration of climate change considerations in the National Human Rights Action plan.[444] Recommendations focusing on the environment and climate change are relevant for structural prevention, as natural disasters can be a trigger for atrocity crimes, especially if combined with the other risks of atrocities prevalent in the Sri Lankan society.

The recommendations on the SDGs have been given by the United Arab Emirates, Pakistan and Algeria. However, reflecting a general trend when referencing the SDGs, the recommendations are not specific and hence not very actionable.[445] As an example, the recommendation from Algeria reads *Continue efforts to ensure the implementation of the Sustainable Development Goals for the entire population"*.[446] Referring to emerging developments in the third cycle of the UPR, one Geneva-based diplomat argued in an interview, that there had not been increased focus on the R2P in the third cycle of the UPR, rather there had been increased focus on the SDGs.[447] From an atrocity prevention perspective, this could still be positive, as implementation of the SDGs would contribute to more resilient societies. Especially goal 16 which focuses on the ambition to promote peaceful and inclusive societies, as it integrates efforts such as building resilience, strengthening the rule of law and ensuring accountable institutions in the development agenda.[448] Referencing the SDGs in recommendations could therefore be a creative way for states to indirectly incorporate the R2P and atrocity prevention. However, both in regards to recommendations on the R2P and the SDGs, states should avoid turning the UPR into a forum of grand statements. In the sense of referencing broad agendas without recommending actionable steps for the SuR. A positive example of an actionable recommendation that can be highlighted was given by Mexico to Mozambique in the second cycle of the UPR *"Develop a strategy and national indicators in order to comply with the Sustainable Development Goals"*.[449] The identification of national indicators with regards to the SDGs would also be relevant for supporting atrocity prevention in Mozambique.

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[444] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.44-116-50.
[445] UPR-info Database, Keyword: *sustainable development goals.*
[446] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.50.
[447] Silke KMH & Marie SC, interview with Geneva-based diplomat.
[448] Alexandra Buskie, "Atrocity prevention and the SDGs – a shared ambition", *UNA-UK*, 1st March 2016, (available at http://www.sustainablegoals.org.uk/atrocity-prevention-sdgs-shared-ambition/).
[449] HRC, Mozambique Working Group Report 2016, *supra* note 329, §128.158.

Guarantees of Non-recurrence

Human Rights Council Resolution 30/1

The recent conclusion of the civil war in Sri Lanka does as stated above increase the risk of recurrence of atrocity crimes. It can therefore generally be seen as positive that the resilience area of guarantees of non-recurrence is addressed both in recommendations given to Sri Lanka, the National Report, the Stakeholder Report, and the UN System Report. In 2015 the HRC adopted resolution 30/1 on the situation Sri Lanka, the resolution address a long list of elements related to the post-conflict situation in Sri Lanka.[450] Among the issues addressed are; the recommendation to establish a transitional justice mechanism, truth and reconciliation, accountability for atrocity crimes and compensations for victims. The US and Australia linked the different procedures of the HRC and recommended that Sri Lanka fully implement HRC resolution 30/1, which Sri Lanka accepted.[451] Five states made recommendations such as the following from Norway to *"Develop a clear timeline and benchmarks for the full implementation of its commitments in Human Rights Council resolution 30/1",*[452] these time-bound and more SMART recommendations were all noted by Sri Lanka, showing the lack of willingness to make such a specific commitment. In the National Report, Sri Lanka states that the government already in 2015 established a Secretariat for Coordinating Reconciliation Mechanisms to ensure that the commitments under HRC resolution 30/1 are fulfilled.[453] However, in the Stakeholder Report wording such as "painstakingly slow" are used to describe the process of establishing the Truth Commission and Office for Reparations, while the implementation of a Victim and Witness Protection Act enacted in March 2015 is described as having fatal flaws hampering its overall effectiveness.[454] This is just two examples showing how the National Report is highlighting specific measures taken, but without describing the output impact of the decisions. This underlines the importance of Stakeholder Reports for the credibility of the UPR process. Six states focused on one specific element of resolution 30/1 recommending that Sri Lanka establish a transitional justice mechanism.[455] Seven other recommendations were also related to issues of accountability and reconciliation. France, Sierra Leone, Palestine, the US, and

[450] HRC Resolution 30/1, *Promoting reconciliation, accountability and human rights in Sri Lanka,* A/HRC/RES/30/1 (14 October 2015), (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/236/38/PDF/G1523638.pdf?OpenElement),
[451] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.90-116-91.
[452] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §117.40-117.44.
[453] HRC, Sri Lanka National Report 2017, *supra* note 419, §38.
[454] HRC, Sri Lanka Stakeholder Report 2017, *supra* note 418, §30.
[455] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.76-116.81.

Argentina all recommended that Sri Lanka continues and completes the investigation of human rights violations and abuses committed against the civilian population during the civil war.[456] The US specifically recommended that members of the security forces and government officials are held accountable.[457]

Enforced Disappearances

Sri Lanka signed the International Convention for the Protection of All Persons from Enforced Disappearance in December 2015, and has according to the National Report taken measures to introduce comprehensive legislation that incorporates the provisions of the Conventions into domestic law.[458] In the two first cycles of the UPR, Sri Lanka received 15 recommendations to either ratify the Convention or cooperate with the Working Group on Enforced and Involuntary Disappearances; all of these were noted.[459] The signing of the convention and the establishment of the Office for Persons Missing can be seen as a step in the right direction, but as the Working Group on Enforced or Involuntary Disappearances highlight in the UN System Report the challenge facing the Government is to *"transform its promises into a concrete, comprehensive, legitimate and participatory framework aimed at securing the rights to truth, justice, reparation and memory, and guarantees of non-repetition for the families of the disappeared and Sri Lankan society as a whole"*.[460] Furthermore, it is stated in the Stakeholder Report that Sri Lanka has the second highest number of enforced disappearances in the world.[461] This serious issue is indeed a challenge to the consolidation of stability, reconciliation and accountability in Sri Lanka as a post-conflict state. Two especially relevant recommendations were given on this issue; Spain recommended that Sri Lanka focus on the implementation of the Convention for the Protection of All Persons from Enforced Disappearances into domestic legislation,[462] and the Republic of Korea recommended Sri Lanka "*Provide the Office on Missing Persons with sufficient resources and equip the office with highly qualified members to perform its mission independently and effectively"*.[463] Five other states also gave recommendations related to enforced disappearances.[464]

[456] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.70-116.74.
[457] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.73.
[458] HRC, Sri Lanka National Report 2017, *supra* note 419, §18.
[459] UPR-info Database, SuR: *Sri Lanka*, Keyword: *enforced disappearances*.
[460] HRC, Sri Lanka UN System Report 2017, *supra* note 422, §34.
[461] HRC, Sri Lanka Stakeholder Report 2017, *supra* note 418, §28.
[462] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.61.
[463] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.64.
[464] HRC, Sri Lanka Draft Working Group Report 2017, *supra* note 279, §116.62-116.63 and 116.65-116.67.

4.5.3.1. Interim Conclusion

The analysis of the Sri Lankan UPR shows that all key areas of resilience have been addressed in reporting and recommendation. This reaffirms the potential of the UPR to contribute with a holistic assessment of the human rights situation, relevant for the key areas of structural prevention. The UPR recommendations to Sri Lanka have focused on a number of key risks in Sri Lanka; namely widespread torture, the high number of enforced disappearances, and the need to demilitarize lands. The attention brought to these issues by recommending states can implicitly support structural prevention of atrocity crimes. Furthermore, the willingness to implement human rights education was identified as a resilience indicator in Sri Lanka, which is supported by continued attention to the issue in the UPR material. The analysis showed that states are mostly providing recommendations on discrimination to Sri Lanka that do not target specific vulnerable groups. The limited focus on specific groups seemed disproportionate compared to the information provided for in the Stakeholder Report and UN Report. Lastly, the analysis of the case illuminated the general challenge in the UPR that states can account for positive steps taken in their National Report, and it demands significant analytical capacity and resources to determine if they are effective, although the Stakeholder Report and the UN System Report can minimize this challenge to some degree.[xliv]

4.5.4. Switzerland

Switzerland has received 251 recommendations at it third UPR (A: 121, N: 67, P: 63).[465] Switzerland is highly resilient towards atrocity crimes. Still, a large majority of the recommendations Switzerland received and accepted during their third UPR are relevant for the constructive management of diversity. This shows that even with a generally good human rights record, Switzerland too have challenges to address to further bolster their high resilience. Switzerland further received recommendations within the area of legitimate and capable and authority and a few related to the area security of livelihoods. Although, the latter mainly focus on how Switzerland can support this resilience in other states. Switzerland did not receive recommendations related to the key areas vibrant civil society, but some elements of the Swiss National Report related to this area will be analysed below. The resilience area of guarantees of non-recurrence will not be analysed, as Switzerland does not have recent history with atrocities.

[465] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266.

During an interview, Hegarty from the NGO UPR-info pointed to the question of whether it is relevant for states at peace with very low risks of atrocities, such as Switzerland, to include assessments of risk and resilience towards atrocity crimes in their national reports. It was her impression that there is very limited appetite for doing this among states, which was confirmed in other interviews with diplomats from low risk countries.[466] The National Reports are limited to 20 pages, which means that if a highly resilient state dedicate a large portion of their report to domestic risk and resilience assessments, as well as to what the state has done to support atrocity prevention in other states, this could substitute focus on more pressing domestic human rights issues. On the contrary, a successful integration of atrocity prevention must be regionally balanced, to avoid jeopardizing the universality that characterizes the UPR.[467] There is no getting around that atrocity prevention is more pressing in some states than others. However, all states have certain risks, discrimination being a good example, while other risks of atrocities will only be relevant for some states. Hegarty highlighted Armenia and Switzerland as states that might be willing to lead by example and voluntarily integrate atrocity prevention perspectives in their UPR reporting.[468]

Constructive Management of Diversity

National Human Rights Institutions in Accordance with the Paris Principles

Switzerland does not have an independent NHRI in accordance the Paris Principles. Sudan, Australia, the Republic of Korea, and Malaysia called for continue efforts to the establishment of such a NHRI in their recommendations.[469] Assessing recommendations from the two first cycles of the UPR it is evident that Switzerland has changed opinion on the subject. All recommendations to establish a NHRI in accordance with the Paris Principles were noted in the first cycle, while Switzerland accepted all recommendations in the second UPR.[470] The continuous focus on this issue in recommendations could have influenced Switzerland's change of opinion on the subject. The implementation of this has been relatively slow. Nevertheless, it is stated in the Swiss National Report from 2017 that a consultative process on the drafting of a bill for the establishment of such an institution was commenced in June

[466] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149 and Silke KMH and Marie SC, Interviews Geneva-based diplomats.
[467] *This argument was elaborated throughout the section "4.3. Practice of Explicitly Addressing Atrocity Prevention in the UPR", p. 59.
[468] Silke KMH and Marie SC, Interview Programme manager at UPR-info Hegarty, *supra* note 149.
[469] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.11-146.14.
[470] UPR-info Database, SuR: *Switzerland*, Keyword: *Paris Principles*.

2017.[471] The continuous focus in the third cycle of UPR could add political pressure to kick-start the process further.

Xenophobia

In the UN System Report, the Committee on the Elimination of Racial Discrimination voiced concern with racism promoted by members of right-wing populist parties and sections of the media, which focus extensively on populist initiatives such as mass immigration and the expulsion of foreign criminals.[472] Furthermore, NGOs contributing to the Stakeholder Report criticised the lack of provisions on hate crimes in the Swiss Criminal Code and underlined the issue of ethnic profiling in Switzerland.[473] In line with this, both Albania and Uzbekistan recommended that Switzerland conduct broad and systematic awareness-raising campaigns to combat stigmatization and negative attitudes against vulnerable groups as well as react to racist statements or actions.[474] 26 states also focused on issues of racism, xenophobia and discrimination.[475] Most of the recommendations on these issues fall within the UPR Action category 2, as they call for "continued" action, which can be seen as the recommending states' acknowledgment that initiatives and activities already exist in Switzerland. In the National Report it is for instance highlighted that anti-discrimination has been a prime component of all programmes since 2014.[476] Discrimination against groups divides societies in groups of "us" and "them", and can in the worst cases be used as a tool for the justification of atrocities, through propaganda and scapegoating. Given the centrality of anti-discrimination for structural prevention, the recommendations given to Switzerland on the subject are highly relevant even though Switzerland is a low risk country. It could be argued that such recommendations are generally relevant across Europe. Considering, that many European countries are currently experiencing right wing propaganda with hardened rhetoric and cases of hate speech towards refugees, asylum-seekers, and migrants. Positively for combating the issue of hate speech, this issue has received focus in the UPR process, with 194

[471] HRC, Switzerland National report 2017, *supra* note 267, §7.
[472] HRC, *Compilation on Switzerland Report of the Office of the United Nations High Commissioner for Human Rights* (4 September 2017), A/HRC/WG.6/28/CHE/2, (available at https://www.upr-info.org/sites/default/files/document/switzerland/session_28_-_november_2017/a_hrc_wg.6_28_che_2_e.pdf), §12.
[473] HRC, *Summary of Stakeholders' submissions on Switzerland* Report of the Office of the United Nations High Commissioner for Human Rights* (30 August 2017), A/HRC/WG.6/28/CHE/3, (available at https://www.upr-info.org/sites/default/files/document/switzerland/session_28_-_november_2017/a_hrc_wg.6_che_3_e.pdf), §14 and 16.
[474] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.28 and 146.42.
[475] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.24, 146.126-146.144, and 146.114-146-117.
[476] HRC, Switzerland National Report 2017, *supra* note 267, §43-45.

recommendations on the subject, of which 184 were given to WEOG and the EEG.[477] Furthermore, the WEOG have received 48% of all recommendations on 'Racial Discrimination' (from the first and second cycle of the UPR). The top receiving states in this category are Austria, Sweden, and Denmark, which are states usually associated with very high levels of resilience.[478] This reflects that all countries can have risks of atrocities, which should be addressed both because these are human rights issues and a risk of atrocities.

Legitimate and Capable Authority

The resilience area of legitimate and capable authority is also addressed in a few recommendations to Switzerland. Three of these explicitly deal with atrocity crimes and were given by Armenia, Netherland and Rwanda[479] (See the analysis of these in section "4.3.4. Developments of Explicitly Addressing Atrocity Prevention in the Third Cycle of the UPR", p. 69).

Asylum Seekers and Migrants as a Vulnerable Group

Namibia, Belarus, Ecuador, France, and the Central African Republic (CAR) all gave recommendations to strengthen the protection of victims of violence and investigate cases of cruel treatment by law enforcement officers.[480] Ecuador specifically called for the establishment of an independent complaint mechanism, CAR directly pointed to asylum seekers and migrants as vulnerable groups in this regard.[481] This group is also identified as especially vulnerable in a recommendation from Afghanistan to *"Ensure full application of the 1951 Convention relating to the Status of Refugees."*[482] These recommendations can if implemented strengthen the rule of law and equal protection of vulnerable groups. In line with the above analysis on xenophobia, identifying asylum seekers and migrant as a vulnerable potential victim group, could be a relevant issue for many WEOG and EEG countries.[xlv]

[477] UPR-info Database, Regional Group - SuR: *WEOG* and *EEG,* Keyword: *hate speech.*
[478] UPR-info Statistics, *Issue Statistics*, Issue: *Racial Discrimination,* Table: *Regional group which received recommendations on this issue.*
[479] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.22-146.23.
[480] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.55-146.59.
[481] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.119.
[482] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.118.

Security of Livelihoods

Development Assistance and the Prevention of Atrocity Crimes

In the UNSG's 2017 R2P Report it is stated that the UPR mechanism can promote international assistance. Meaning, that where relevant and appropriate states should provide the necessary assistance to help countries under stress prevent atrocity crimes and protect their populations.[483] This recommendation calling for states to live up to their R2P pillar two responsibility could for instance be implemented through the UPR mechanism, by applying pressure on the appropriate states to provide development aid to vulnerable states in order to strengthen these states' resilience towards atrocity crimes. In an interview conducted for this thesis, Bellamy argued that the link between atrocity prevention and development is a popular idea and an area in which consensus is possible.[484] Studying statements at the 2017 Informal Interactive Dialogue on the R2P, Bellamy's argument is supported by statements such as Brazil's, where the state argued that development and R2P is inextricably linked. Moreover, Brazil emphasised, that prevention should be interpreted in broad terms and involve promoting sustainable peace, food security, eradication of poverty, and reduction of inequality.[485] Sudan likewise noted that in order to address root causes and prevent atrocity crimes, assistance should be provided to developing countries.[486] Switzerland is among the states that could provide such assistance to developing countries.

During Switzerland's third UPR, five states implicitly addressed the link between development and atrocity prevention in their recommendations.[487] Haiti recommended that Switzerland *"Increase its contribution of official development assistance to reach the 0.7% of GNP threshold, with particular emphasis on capacity building and resilience (..)"*.[488] Syria, Bangladesh, and Nigeria gave similar recommendations.[489] It is stated in the National Report that Switzerland in the long-term works towards spending 0,7% of Gross National Product (GNP) on development aid, so far the state spends 0,5% annually.[490] Yemen gave the broader recommendation *"Continue to provide humanitarian and development assistance to poor*

[483] UNSG 2017 R2P Report, *supra* note 5, §35-36.
[484] Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175.
[485] Brazil, "Statement at the Informal Interactive Dialogue of the UNGA on the R2P", New York, 6 September 2017, (available at http://www.globalr2p.org/media/files/2017-iid-brazil.pdf).
[486] Sudan (6 September 2017), *supra* note 171.
[487] HRC, Switzerland Draft Working Group report 2017, *supra* note 266, §146.49-146.53.
[488] HRC, Switzerland Draft Working Group report 2017, *supra* note 266, §146.151
[489] HRC, Switzerland Draft Working Group report 2017, *supra* note 266, §146.49-146.150 and 146.153.
[490] HRC, Switzerland National Report 2017, *supra* note 267, §76-77.

countries to help these countries to bear the humanitarian burden and to promote human rights",[491] which can be interpreted as an indirect call and encouragement for Switzerland to uphold its pillar two responsibility.

In a joint civil society submission to Switzerland's third UPR, civil society organisations highlighted that states have duties that extend beyond their borders. Meaning, that Switzerland *"has a legal obligation to ensure that the bilateral free trade agreements it concludes do not encourage human rights violations in the partner states."*[492] Therefore, Switzerland must carefully examine human rights consequences before concluding agreements.[493] Integrating a human rights aspect and possibly an atrocity lens into development projects can be highly important as these can have unintended negative consequences. Exemplified this could be *"internationally sponsored economic strategies that prioritize growth but increase horizontal inequalities"*.[494] However, in practice the integration of an atrocity lens in development projects is seldom.[495] In an interview, Bellamy argued that scholars and practitioners have not yet been specific enough in formulating what linking atrocity prevention and development means in practice.[496] Although both state and stakeholder recommendations in the Swiss case are not directly linked to atrocity prevention, they serve as an example of how the UPR can be used to support structural prevention through international assistance and development, and how to avoid unintended consequences of such projects.

Vibrant Civil Society

Inclusion of Civil Society

As stated previously in this thesis the limited role of civil society organizations in the UPR process challenges the potential of using the mechanism to support atrocity prevention. Limon from the URG highlighted that it is a massive problem that civil society organizations

[491] HRC, Switzerland Draft Working Group Report 2017, *supra* note 266, §146.52.
[492] Joint Submission 2, "UNIVERSAL PERIODIC REVIEW OF SWITZERLAND, 3RD CYCLE: CONTRIBUTION OF THE PLATFORM OF SWISS HUMAN RIGHTS NGOS", (available at https://www.upr-info.org/sites/default/files/document/switzerland/session_28_-_november_2017/js2_upr28_che_e_main.pdf) p. 2.
[493] *Ibid.*
[494] Bellamy (2016), *supra* note 11, p.21.
[495] USAID & Danish Ministry of Foreign Affairs "The Role of Atrocity Prevention and Responsibility to Protect in Development Cooperation - workshop report", 22-23 March 2016, (available at http://www.responsibilitytoprotect.org/Kampala%20Report.pdf), p. 2.
[496] Silke KMH and Marie SC, Interview Professor and Director of the Asia Pacific Centre for the R2P Bellamy, *supra* note 175.

are not allowed to present their reports or make comments during the peer-to-peer dialogues in the UPR. According to Limon, the UPR can in some instances be reduced to a beauty contest between states, where national reports are used to present what the SuR wishes to show of.[497] With this in mind it should be highlighted that Switzerland has included a paragraph under the headline "*Views of civil society (Swiss NGO Coalition for the universal periodic review)"* at the end of their National Report. In this paragraph it is stated that *"In general, the NGO Coalition, although it recognizes the difficulty of the exercise, is somewhat disappointed by the report submitted by Switzerland. It would have liked it to be more critical and thereby, in its view, more credible"*.[498] Even though the NGO Coalition is somewhat disappointed, the direct inclusion of the view of civil society organizations in the National Report is very unusual and should be noticed as a positive example of how the role of civil society in the UPR process can be strengthened. The inclusion of civil society in the broad consultation process held in preparation of the National Report is also highlighted in the beginning of the report, and it is stated that this process led to greater discussions of human rights and related issues among different departments, authorities, and civil society.[499] Even though this serves as a positive example, it should be kept in mind that it is unlikely that many states will be willing to include such a section in National Reports, as cooperation between civil society and state officials in the preparatory phase of the UPR vary greatly from state to state.[500]

4.5.4.1. Interim Conclusion

The analysis of Switzerland illustrates how the UPR can support long-term structural prevention of atrocity crimes also in low risk states such as Switzerland. The resilience areas of constructive management of diversity and legitimate and capable authority are the primary focus of both the preparatory reports and the recommendations made for the Swiss UPR. Discrimination can be identified as the main risk in Switzerland, and the UPR contributes with the identification to the vulnerable groups asylum seekers and migrants. The analysis of the Swiss UPRs also addressed the discussion of whether it is meaningful for low risks states to focus on risks and resilience towards atrocities, we argued that this focus should not substitute a focus on pressing human right issues. Meanwhile, Switzerland has been identified as a potential frontrunner state for incorporating atrocity prevention related issues in

[497] Silke KMH and Marie SC, Interview Executive Director for URG Limon, *supra* note 138.
[498] HRC, Switzerland National Report 2017, *supra* note 267, §81.
[499] HRC, Switzerland National Report 2017, *supra* note 267, §4.
[500] Silke KMH and Marie SC, Interview Geneva-based diplomat.

reporting. The point of view of NGOs is integrated into the National Report, we have argued that this serves as a positive example of how the role of civil society in the UPR can be strengthened. Lastly, recommendations to increase development aid and a stakeholder submission arguing that Switzerland should consider the human rights impact of development project, served as examples of how the link between development and atrocity prevention can be strengthened through the UPR. [xlvi]

4.5.5. Zambia

Zambia received 201 recommendations during its third UPR; problematically 111 of these were noted.[501] In research conducted by UPR-info, it was found that noted recommendations do not necessarily mean that action will not be triggered, as 19% of noted recommendations from the first cycle of the UPR triggered action by midterm. Nevertheless accepted recommendations are more likely to trigger action, as 55% of accepted recommendations triggered action by midterm.[502] Many of both the accepted and noted recommendations to Zambia are relevant for the key resilience areas constructive management of diversity and legitimate capable authority. There are also some recommendations relevant for the key resilience areas security of livelihoods and vibrant civil society.

Zambia is a country that has many of the risks associated with atrocity crimes here included ethnolinguistic divisions, limited democracy, and horizontal inequality. However, Zambia has never experienced atrocities, contrary to many of its neighbour countries. Making Zambia an especially interesting case to understand mitigating factors for atrocity crimes.[503] As Zambia has not experienced atrocities, this section will not deal with the resilience area of guaranteeing non-recurrence.

Constructive Management of Diversity and Legitimate and Capable Authority

This section will deal with two key areas of resilience; constructive management of diversity and legitimate and capable authority, as the management of ethnic diversity is very closely linked to how the Zambian government has exercised its authority.

Electoral Violence and Ethnic Division

[501] HRC, *Draft report of the Working Group on the Universal Periodic Review* Zambia* (22 November 2017), A/HRC/WG.6/28/L.11, (available at https://www.upr-info.org/sites/default/files/document/zambia/session_28_-_november_2017/a_hrc_wg.6_28_l.11.pdf).
[502] UPR-info ("Beyond Promises"), *supra* note 70, p. 5.
[503] Stephen McLoughlin, "Reconceptualizing Mass Atrocity Prevention: Understanding Risk and Resilience in Zambia", *International Journal of Politics, Culture, and Society*, vol. 27, no. 4 (2014), p. 433.

With 73 tribal groups, Zambia has ethnolinguistic divisions that at times have had a destabilizing effect on the political situation. McLoughlin argues that one of the key factors inhibiting this to escalate has been the inclusive ideology of Zambia's founding leader and former president Kenneth Kaunda. Kaunda's based his nation-building on the motto "One Zambia, One Nation", which was effective to limit ethnic division.[504] In connection with the 2016 general election in Zambia, ethnic divisions again posed a risk of escalation. In the Stakeholder Report, the Zambia Human Right Commission (ZHRC) reported on an unprecedented level of violence by political cadres.[505] Amnesty International pointed to a disturbing trend of politicians inciting hatred, causing discrimination of the Tonga ethnic group, hereunder forcible transfer of Tonga people to rural areas.[506] If widespread and systematic, the forcible transfer can amount to a crime against humanity, making the Tonga population a potential victim group that should be watched.[507] In relation to the election, states such as the US gave specific and relevant recommendations on engaging in *"constructive dialogue and reconciliation with the main opposition party to diffuse lingering tensions from the August 2016 general election"*.[508] Furthermore, South Africa gave a specific recommendation on implementing the recommendations made by the Commission of Enquiry on Voting patterns and Electoral Violence, established by President Lungu himself in October 2016.[509] Mexico also recommended to protect ethnic and religious minorities in the country.[510] Violent elections can be a trigger of atrocities, in the case of Zambia, the country once again mitigated atrocities. However, problematically for maintaining resilience in the area of constructive management of diversity, all recommendations on the subject were noted by Zambia.

[504] McLoughlin ("Zambia"), *supra* note 503, p. 430-431, 434.
[505] HRC, *Summary of Stakeholders' submissions on Zambia* Report of the Office of the United Nations High Commissioner for Human Rights* (18 August 2017), A/HRC/WG.6/28/ZMB/3, (available at https://www.upr-info.org/sites/default/files/document/zambia/session_28_-_november_2017/a_hrc_wg.6_zmb_3_e.pdf), §11.
[506] Amnesty International, "SUBMISSION FOR THE UN UNIVERSAL PERIODIC REVIEW 28TH SESSION OF THE UPR WORKING GROUP", November 2017, (available at https://www.upr-info.org/sites/default/files/document/zambia/session_28_-_november_2017/ai_upr28_zmb_e_main.pdf), p. 4.
[507] Rome Statute, *supra* note 131, §7(d).
[508] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §131.80.
[509] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §131.41.
[510] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §131.53.

Restrictions on the Freedom of Expression and Association and the Right to Peaceful Assembly

In Zambia, freedom of expression remains criminalized by laws from the colonial era, which were designed to crush dissent.[511] ZHRC reported on attacks on journalists, and severe restrictions on the freedom of association and right to peaceful assembly.[512] At Zambia's third UPR states including the US, Guatemala, Ireland, Canada, the UK, Paraguay, France, Sweden and the Republic of Korea addressed these issues. All the recommendations are very specific and regard voluntary pledges Zambia made at its second UPR to enact the Freedom of Information Bill into law and legislative changes on the Public Order Act.[513] The Zambian government argues that the Public Order Act is supposed to ensure peaceful assembly.[514] Contrary, the ZHRC expressed concern that the Public Order Act had been implemented selectively. Highlighting cases of brutality by the police against the opposition and individuals critical towards the government.[515] All the recommendations in this regard were noted. This is problematic, considering that these were voluntary pledges previously made by Zambia, somehow showing a decline in constructive engagement with the UPR mechanism. Studying previous cycles, it is not something new that Zambia notes many recommendations. However, it is the first time Zambia has noted more recommendations than it has accepted.[516] Zambia did not write a follow-up report, and reading the Stakeholder Report it becomes very clear that there are serious limits to the implementation of previous recommendations. During its third UPR, Zambia problematically also noted a recommendation to continue engagement and fruitful cooperation with UN human rights mechanisms.[517] In this thesis, it has been argued that it is beneficial when states are linking UPR recommendations to other human rights mechanisms, as human rights mechanisms are interdependent and can be mutually reinforcing.[518] At its third UPR, Zambia received a recommendation from the Republic of Korea to present a standing invitation to UN Special Rapporteurs, here included the Special

[511] HRC, Zambia Stakeholder Report 2017, *supra* note 505, §40.
[512] HRC, Zambia Stakeholder Report 2017, *supra* note 505, §11-13.
[513] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §131.39 and §131.67-131.74.
[514] HRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Zambia* (26 October 2017), A/HRC/WG.6/28/ZMB/1, (available at https://www.upr-info.org/sites/default/files/document/zambia/session_14_-_october_2012/ahrcwg.614zmb1e.pdf), §130 and §133.
[515] HRC, Zambia Stakeholder Report 2017, *supra* note 505, §12.
[516] UPR-info Database, SuR: *Zambia.*
[517] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §131.37-131.38, (*Recommendations made by Azerbaijan and Côte d'Ivoire).
[518] Silke KMH and Marie SC, Executive Director for URG Limon, Interview, *supra* note X,

Rapporteur on the Freedom of Expression.[519] This recommendation was noted. These examples illustrate, that without voluntary engagement and cooperation by the SuR there are serious limits to the potential of the UPR to contribute to the structural prevention of atrocity crimes. Nevertheless, one opening for constructive engagement with the UPR mechanism is that Zambia has requested international assistance for implementing UPR recommendation in its National Report.[520] In line with the recommendations in the UNSG's 2017 R2P Report and pillar two of the R2P, states should provide assistance to help prevent atrocities. Noting recommendations can be a question of resources, and assistance for implementation of UPR recommendations could mitigate that Zambia further distance itself from the UPR process. xlvii

Vibrant Civil Society

Physical Attacks on Activists and Interference in the Independence of NGOs

McLoughlin argues that one of the key resilience factors toward atrocity crimes in Zambia, has been a strong civil society which has been instrumental in securing key democratic reforms, by campaigning against rollbacks towards authoritarian rule.[521] However, the environment for civil society organisations in Zambia is not without risks. In the Stakeholder Report for Zambia's third UPR, it was reported *"civil society activists have been subjected to verbal and physical attacks by the security forces and members of the Government."*[522] Amnesty International further reported that a Non-Governmental Organisations' Act from 2009 continues to interfere with *"the ability of non-governmental organizations to operate independently and freely."*[523] Only one recommendation focuses specifically on the civil society. This recommendation was given by the US "*Engage civil society, activists, NGOs and the media in dialogue to seek common ground on the draft Access to Information bill and governance issues, such as corruption."*[524] This recommendation was positively accepted, and could potentially support an active civil society and combat risks of atrocities such as corruption. Generally speaking, states can have three approaches when making UPR recommendations, and formulate; 1) Recommendations that are likely to be accepted and create change; 2) Recommendations that are supporting civil society in their work to achieve change; or 3) Recommendations that put political pressure on a state.[525] When making

[519] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §131.39.
[520] HRC, Zambia National Report 2017, *supra* note 514, §134-136.
[521] McLoughlin ("Zambia"), *supra* note 503, p.434.
[522] HRC, Zambia Stakeholder Report 2017, *supra* note 505, §44.
[523] HRC, Zambia Stakeholder Report 2017, *supra* note 505, §45.
[524] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §129.49.
[525] Silke KMH and Marie SC, Interview Geneva-based diplomat.

recommendation states should consider carefully what approach works best in the given context. In the case of Zambia, where most recommendations have been noted, it is hard for states to know which recommendations are likely to be accepted and create change. As Zambia has only shown a limited level of cooperation, it could be argued that the most meaningful approaches for states making recommendations to Zambia are to apply political pressure or make recommendations supporting civil society. The civil society is one of the key resilience factors in Zambia, which supports the argument that states should focus on maintaining this resilience.

Security of Livelihoods

Poverty and Economic Inequality

Economic inequality and poverty in Zambia is a risk factor for atrocity crimes, especially as these have an ethnic and horizontal dimension.[526] In 2015 the economic growth fell to 2,9%, meaning the lowest rate since 1998. The economy was hit hard by, among other things, a low harvest after the weather phenomenon El-Niño induced drought and political uncertainty up to the 2016 general election.[527] Economic, political and natural crisis can be a trigger for atrocity crimes, and Zambia has managed to mitigate this during a time partially characterised by all these triggers, showing the resilience of Zambia. The focus of recommendations should be on maintaining resilience towards future crises or triggers. This could be by focusing on sustainable development. Generally, poverty and development are not issues frequently addressed in the UPR, and only constitute respectively 1,94% and 1,87% of all first and second cycle UPR recommendations.[528] The pillar structure of UN separates the three agendas of development, human rights, and peace and security, which can explain why development is not seen as a typical UPR and human rights issue. Confirming the general tendency, development and poverty reduction were not directly addressed in Zambia's third UPR, even though about 60% of Zambia's population live in poverty.[529] In previous cycles, Zambia has not received a single recommendation on poverty and only one in the area of development. [530] In the third cycle of the UPR, many states did welcome the launch of Zambia's 7th National Development Plan for 2017-2020, which establishes commitments in the areas of human rights and the rule of law, which is highly relevant for mitigating

[526] McLoughlin ("Zambia"), *supra* note 503, p. 433.
[527] The World Bank, "The World Bank in Zambia - Overview", *The World Bank,* last updated: 12 October 2017, (available at http://www.worldbank.org/en/country/zambia/overview).
[528] UPR-info Statistics, *Global Statistics,* Table: *Issues*.
[529] HRC, Zambia Stakeholder Report 2017, *supra* note 505, §55.
[530] UPR-info Database, SuR: *Zambia*, UPR issue categories: *development* and *poverty*.

unintended consequences of development, such as increasing horizontal inequality.[531] However, only Cuba gave an actual recommendation in this regard recommending that the Seventh National Development Plan is implemented.[532] As Zambia has received an annual average of 999 million US dollars in Official Development Assistance between 2010-2015,[533] the integration of an atrocity lens into development projects could also be a relevant issue states could address in their recommendations. Development and poverty recommendations have one of the highest acceptance rates close to 97%. In addition, according to states own assessments, recommendations addressing extreme poverty have one of the highest implementation rates as well.[534] The high acceptance and implementation rates suggest a potential of the UPR to contribute to atrocity prevention in the sphere of development and poverty eradication, which has not been utilised to its full potential.

4.5.5.1. Interim Conclusion

The sub-analysis of Zambia has illustrated one of the main challenges for the potential of using the UPR to support atrocity prevention; that if states are unwilling or unable to cooperate, they can merely note recommendations. The analysis shows that many risks, e.g. electoral violence and serious limitations to civil and political rights are identified in the Stakeholder Report and recommendations. Unfortunately, an overwhelming majority of the relevant recommendations have been noted by Zambia. The analysis also shows that voluntary pledges made by Zambia at its second UPR have not been implemented properly and all recommendations related to these made in the third cycle have been noted. This can be interpreted as a decline in Zambia's willingness to cooperate with the UPR. Nevertheless, two windows of opportunities are highlighted in the analysis; Zambia has requested assistance to implement recommendations in the National Report, which if provided could possibly build more capacity in Zambia to engage with the UPR mechanism. Secondly, the issue of development could be addressed in future UPRs and potentially support resilience building in Zambia.[xlviii]

[531] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §44 50, 67-68, 75, 85, and 102, (*Recommendations made by Zimbabwe, Azerbaijan, Finland, France, Indonesia, Mauritius, and Sierra Leone).
[532] HRC, Zambia Draft Working Group Report 2017, *supra* note 501, §129.16.
[533] OECD, "Development Aid at a Glance - Statistics by Region - Africa", 2017, (available at http://www.oecd.org/dac/stats/documentupload/Africa-Development-Aid-at-a-Glance.pdf) p. 8.
[534] Limon and Gujadhur, *supra* note 9, p. 37.

Chapter V: Discussion of Case Studies and Research Results

This discussion will be divided into six themes of lessons learned from the five case studies analysed in the previous sub-analysis on "Structural Prevention and Resilience Building in the UPR". The purpose is to unify the central arguments put forward during the analysis, and discuss how the potential of the UPR for structural prevention of atrocities can be increased. The discussion thus primarily focuses on the lessons learned from the analysis on structural prevention, but will also draw on conclusions from the previous sub-analyses.

5.1. The Importance of Stakeholder and UN Reporting

All case studies have shown the importance of Stakeholder Reports and UN System Reports for the credibility of the UPR. National Reports are generally not as critical and tend to showcase all the different measures states have taken, but without necessarily presenting the impact on the ground of these measures. This was specifically highlighted in the case study on Sri Lanka, where the National Report accounted for initiatives regarding the implementation of the HRC resolution 30/1 from 2015 on promoting reconciliation, accountability and human rights in Sri Lanka. Compared, the Stakeholder Report called relevant processes in this regard painstakingly slow. It would increase the potential and credibility of the UPR if stakeholders and the UN System represented by the OHCHR were allowed to present their reporting and make statements during the UPR process. However, as there is no reform of the UPR in sight for the near future, it is unlikely that this will happen. A positive example for strengthening the role of civil society was highlighted in the case study on Switzerland, where the views of civil society were included in the national report. However, the cooperation between civil society and state officials in the preparatory and implementation phase of the UPR varies greatly from state to state. The role of civil society could be strengthened if states make it a priority to participate in the UPR-info hosted Pre-sessions to the UPR, where civil society organizations are presenting their reports. Furthermore, states should with their recommendations seek to support civil society in their work to achieve change, especially if the civil society is a strong resilience factor in the given SuR, as was argued in the case study of Zambia.

5.2. Competition between Human Rights Agendas

The integration of the R2P into the UPR is competing with strongly established human rights agendas, which interview persons have highlighted as challenging for explicitly including atrocity prevention in recommendations and national reporting. However, for the UPR's

potential to implicitly support structural prevention of atrocities the issue is not as pressing, as many different human rights agendas already addressed in the UPR are highly relevant for the structural prevention of atrocities. Interviews have suggested that it is too early to judge any new developments in the third cycle of the UPR. However, one Geneva-based diplomat suggested that there had not been increased focus on the R2P in the third cycle of the UPR, rather there had been an increased focus on the SDGs. Successful implementation of the SDGs would contribute to more resilient societies. Referencing the SDGs in recommendations could, therefore, be a creative way for states to support structural prevention of atrocities. However, states must avoid turning the UPR into a forum of grand statements, where broad agendas such as the R2P and the SDGs are referenced in recommendation without being SMART.

5.3. Identification of Vulnerable Groups and Potential Perpetrators of Atrocity Crimes

The case studies have shown that it is possible to use the UPR to identify potential victim groups and perpetrators of atrocity crimes. Exemplified: In Czechia, Roma people are especially vulnerable and have been victims of what could constitute crimes against humanity; In Zambia politicians incite hatred towards the Tonga people; In Argentina indigenous peoples are denied basic services, people of African descent and migrants are discriminated, and there are problems of police abuse towards in particular LGBT people; In Sri Lanka Tamils are still harassed by security forces and atrocity crimes committed against the group during the civil war are not adequately investigated; and in Switzerland right-wing propaganda increases xenophobia directed against asylum-seekers, migrants and refugees. In the analysis it has been discussed whether atrocity prevention is relevant for low-risk countries such as Switzerland. The identification of potential victims groups serves to show, that all countries essentially have some risks of atrocities, which should be addressed both because these are human rights issues and a risk of atrocities. In line with this, it has been argued that anti-discrimination is especially relevant for building resilience in all cases. The analysis of the case studies, have shown that the UPR is used to support protection of vulnerable groups by addressing cross-cutting areas of human rights e.g. issues related to equal access to services and legal assurance of non-discrimination. It has further been argued that recommendations about vulnerable groups are actionable if these refer to a specific group. However, this also increases the chance that the recommendations will be noted.[xlix]

5.4. Holistic View of SuRs' Human Rights Records

The case studies have shown that all key areas of resilience were implicitly addressed in the UPRs of Zambia, and Sri Lanka. This is positive as it gives validity to one of the central arguments for using the UPR for atrocity prevention, being that the UPR with its extensive reporting and recommendations can provide a holistic view on the SuRs' human rights records. As argued above, the other case studies also showed that the UPR is used to address cross-cutting human rights issues. This supports the argument that the UPR can give a holistic view of states' human rights situation. While the fixed calendar of the UPR, has been highlighted as a limitation for the direct prevention of atrocities, the continuous reporting over periods of time is a benefit for the structural prevention of atrocities, as the mechanism can maintain attention to long-term risks and resiliencies in a systematic way. Exemplified, if progress was to hail it would be easily spotted when comparing documents from different UPR cycles, as argued in the case study on Argentina. Another opportunity for using the UPR for structural prevention is that states, stakeholders, and the UN can continuously use the UPR to bring attention to unacceptable human rights practices. In some cases and with some political sensitive issues, a good example being the death penalty, continued pressure does not really seem to have any effect and recommendations are continuously noted.[535] However, the case study on Switzerland showed that the continued pressure in recommendations to establish a NHRI in accordance with the Paris Principles could have influenced that Switzerland changed opinion on the subject from its first UPR to its second, where Switzerland accepted all recommendations in this regard.

5.5. Cooperation vs. Non-cooperation

The analysis has shown that there is significant difference between the level of cooperation and engagement by states with the UPR mechanism. One example showing constructive engagement, is Argentina's plan to have their national human rights plan take outset in UPR recommendations. On the contrary, Zambia did not write a follow-up report to its second cycle review, is noting the majority of recommendations, and there are serious limits to the implementation of recommendations. Noting and not implementing recommendations can be a question of resources, and international assistance for implementation of UPR recommendations could mitigate that countries, which lacks resources, further distance themselves from the UPR process. In the UNSG's 2017 R2P Report it is stated, that where

[535] UPR-info Statistics, *Issue Statistics,* Issue: *Death penalty,* Table: *Responses to recommendations made on this issue.*

relevant and appropriate states should provide the necessary assistance to help countries under stress prevent atrocity crimes and protect their populations. Switzerland received recommendations calling for continues humanitarian and development assistance. Although the recommendations were not directly linked to atrocity prevention, they served as an example of how the UPR can be used as an implicit call and encouragement for states to uphold their pillar two responsibility. The high acceptance and implementation rates in the areas of poverty and development suggest that the UPR has potential to contribute to structural atrocity prevention in these areas, however this has not been utilised to its full potential yet.

5.6. SMART Recommendations

The analysis has shown that with regards to atrocity prevention, there are both examples of SMART recommendations and more broad recommendations that are arguably not concrete enough to actionable. As argued in the case study on Zambia, states generally have three approaches to making recommendations, and can formulate these with different aims 1) Recommendations that are likely to be accepted and create change; 2) Recommendations that are supporting civil society in their work to achieve change; 3) Recommendations that put political pressure on a state. States must consider carefully which approach works best in a given context. Furthermore, making good recommendations with regards to atrocity prevention is not only about identifying risks but also about maintaining resiliencies, which could also increase the chance of acceptance. Approach number one will in many cases be the best option; however putting political pressure on states can be highly relevant if states are not cooperating. UPR recommendations are unlikely to change the behaviour of the worst human rights abusers, but in terms of atrocity prevention it is important not to neglect and downplay the seriousness of atrocity crimes by avoiding making recommendations on the subject. Furthermore, we have argued that it could be beneficial to link UPR recommendations to other human rights mechanisms, as these can be mutually reinforcing. Still, as the case studies on Zambia and Sri Lanka showed, the impact of this is highly dependent on whether states are cooperating. Lastly, as argued in the case study on Argentina, explicitly identifying risks such as horizontal inequality and discrimination as a risk factor for atrocities in recommendations, makes it politically difficult for "R2P champions" to note recommendations, why they would have to address issues they might otherwise have noted. On the contrary, the explicit mention of R2P in recommendations to states critical towards the R2P, would very likely have the opposite effect.[1]

Chapter VI: Conclusion and Recommendations for the Way Ahead

The following section will conclude on the validity of the thesis' problem statement "*The integration of the Responsibility to Protection into the UN's Universal Periodic Review has significant potential for contributing to the prevention of atrocity crimes"*. Recommendations for different stakeholders, with a primary focus on states, on how they can best increase the potential of using the UPR to contribute to the prevention of atrocity crimes will be given throughout the conclusion.

To analyse whether the integration of the R2P into the UPR has significant potential for contributing to the prevention of atrocity crimes, it was first necessary to determine whether the R2P is institutionally compatible with the UPR mechanism. It has been argued that there is nothing in the Institution-Building Package of the UPR (HRC resolution 5/1) and the GA resolution 60/251 establishing the HRC, standing in the way of integrating the R2P into the UPR. However, the R2P and the UPR are very different in nature, as the UPR can target all kinds of human rights issues, while the R2P is limited to the four specific atrocity crimes: war crimes, ethnic cleansing, genocide, and crimes against humanity. Another difference is that the third pillar of the R2P has a coercive element, which is not compatible with the cooperative nature of the UPR. It must, therefore, be stressed that the integration of the R2P into the UPR only regards pillar one and two of the R2P.

Recommendation 1

States and other relevant stakeholders should raise awareness of the well-established link between human rights and atrocity crimes in Geneva and the UPR context.

That the UPR does not have a coercive element is its strength and its weakness for its potential to contribute to atrocity prevention. Meaning, the reason why most states respect and actively engage with the UPR is its peer-to-peer and universal nature that inhibits naming-and-shaming. On the other hand, states not cooperating can just note and not implement recommendations even those related to the serious issue of atrocity crimes. The UPR may have potential to pressure states, but the UPR is not going to change the behaviour of the worst human rights abusers. The UPR therefore only has significant potential to contribute to atrocity prevention in cases where states to some degree are cooperative and interested in receiving assistance and work domestically to decrease atrocity risks and build

resilience. The analysis showed that some states are willing to denounce on-going atrocity crimes in UPR recommendations, which has been highlighted as important to ensure that the perpetration of these crimes is not neglected. Moreover, the UPR should not be an excuse not to utilise hard measures in places with on-going atrocities. The potential of the UPR for direct atrocity prevention is highly limited, as the analysis of direct prevention shows that the UPR is not well placed to halt on-going atrocity crimes or prevent imminent ones. Another issue limiting the potential of using the UPR to support direct atrocity prevention is that the UPR has a fixed calendar determining when each state will be reviewed and the perpetration of atrocity crimes does not occur on a schedule.

Recommendation 2

In cases where states commit atrocity crimes and are unwilling to have meaningful cooperation through the UPR, states should make UPR recommendations that bring attention to and denounce on-going atrocity crimes.

The UPR has significant potential to support structural prevention efforts, mitigating that situations in the first place become imminent. The reason for this is that the UPR has the capability to document a holistic review of states human rights records, both identifying resiliencies and risks towards atrocity crimes (to the degree that these can be seen as a result of failure to uphold human rights). This argument has been tested analysing the UPRs of Argentina, Switzerland, Czechia, Sri Lanka, and Zambia. Analysing these case studies, confirmed that relevant key resiliencies and risks for structural prevention are already addressed in the UPR. Interviews suggested that states are not doing this intentionally, arguing that issues are not addressed because they are relevant for atrocity prevention; they are addressed merely because they are relevant human rights challenges. However, it can be concluded that already firmly established human rights agendas implicitly support the structural prevention of atrocity crimes. The case studies focusing on the structural prevention of atrocity crimes further showed that there are great differences between which, and to what extent, the key areas of resilience and risk indicators are relevant in each case. To increase the potential of UPR for contributing to structural prevention of atrocity crimes, it would be beneficial that states use e.g. the UN Framework of Analysis for Atrocity Crimes or Bellamy's key areas used in this thesis, to assess which key areas are relevant in their domestic or a given SuR's context and use this to set priorities for recommendations and national reporting.[li]

Recommendation 3

States should assess key areas of resilience and risks towards atrocities and prioritize the integration of the relevant areas into national preparatory UPR reports and in UPR recommendations.

Recommendation 4

The UN Joint Office for the Prevention of Genocide and the R2P should provide states with clear research-based guidelines on which specific risk and resilience areas will be most useful to integrate into the UPR and how this can be done in practice.

The potential of using the UPR for structural prevention does not necessarily mean that states will have to mention atrocity crimes or the R2P in their recommendations explicitly. Nevertheless, explicit mention can have added value as it more transparently clarifies the aim and potentially allows more targeted and long-term strategies for atrocity prevention. The use of an explicit atrocity lens can also create some challenges, not necessarily beneficial for the potential of using the UPR to support atrocity prevention. It has been argued that the use of R2P language in recommendations can be important to underline the seriousness of risks of atrocities in specific situations and denounce the commitment to protect. However, R2P language can also be counterproductive as states critical towards the R2P might note a recommendation they otherwise would have accepted. The use of R2P language must, therefore, be decided on a case-to-case basis. That said, the practice of using R2P language is almost non-existing in all cycles of the UPR. The practice of explicitly mentioning atrocity crimes exist but also remains limited. Potentially increased practice will be a longer process. Positively, practice of recommendations is not delimited to specific regional groups either with explicit recommendations or recommendations related to structural and direct atrocity prevention.

Recommendation 6

States should make UPR recommendations with explicit R2P language and reference to atrocity crimes on a case-by-case basis, taking into consideration whether it will decrease or increase the chance of positive change.

In this thesis examples of both implicit and explicit practice have been assessed, and we have identified both SMART and less constructive recommendations for atrocity prevention. The assessment has shown, that it could be useful for states to develop and learn from examples of SMART recommendations when trying the integrate atrocity prevention into the UPR. This could help ensure that the UPR is not turned into another forum of grand statements on the R2P. It can further be concluded that the use of SMART recommendations enables a potential for meaningful engagement with the UPR mechanism and implementation. However, even the 'SMARTEST' recommendations do not ensure acceptance and state cooperation. As there does not exist any process to ensure operationalization of the UNSG's recommendations, the integration largely depends on frontrunner states setting precedence with national reports and recommendations. Representatives of foreign ministries and diplomats interviewed for this thesis suggest that the main challenges for this are limited resources and competition between human rights agendas. As established the competition is not necessarily an issue for implicitly supporting structural prevention of atrocity crimes, but can be a challenge for integrating atrocity prevention explicitly. It is especially difficult for officials from low-risk countries to argue for the importance of incorporating risk and resilience assessments in national reports explicitly. In this thesis it has been argued that a successful integration of atrocity prevention must be regionally balanced, to avoid jeopardizing the universality that characterizes the UPR. With regards to explicit atrocity prevention, there has been observed a disproportionate focus on the African Group in the two first cycles of the UPR. A slowly emerging development in the 27th Session of the UPR and the 28th Session, which followed the UNSG's 2017 report, has been that states like the Netherlands, Rwanda, Armenia, and Switzerland have tried to refocus atrocity prevention in a more regional balanced manner.

Recommendation 7

States should make UPR recommendations to all states that call for the formulation of national strategies for atrocity prevention, to support universality and strengthen the atrocity prevention agenda in domestic settings.

While it is a positive development that there are moves towards a more regionally balanced focus, there is no getting around that atrocity prevention is more pressing in some states than others. All states have certain risks, discrimination being a good example, but different other risks of atrocities will only be relevant for some states. In low-risk countries, the integration

of atrocity prevention should not substitute actual and pressing domestic human rights issues, just to set precedence in national reporting. That said, even the frontrunner states interviewed for this thesis, do not have the resources to incorporate risk and resilience assessments in their national reporting, as many states do not have official policies or domestic action plans for atrocity prevention. The agenda needs to be strengthened domestically if the ambition is to make atrocity prevention more systematised and less ad hoc.

Recommendation 8

States should, to overcome the challenge of limited resources, include atrocity prevention language in the sections of national reports that already deals with risks or resiliencies associated with atrocities, such as sections on discrimination.

Another challenge for advocating this agenda is the limited NGO engagement on R2P and atrocity prevention both nationally and in Geneva. The GCR2P has been identified as an important actor that can strengthen the R2P agenda in the UPR, through increasing its presence in Geneva. It has been emphasised that the stakeholder reports are vital for the credibility for the UPR, why it has been problematized that civil society organizations are not allowed to make statements during the UPRs peer-to-peer dialogues.

Promotion of the agenda is essential, as there are significant variations in the degree to which states accept integrating R2P into UPR. The analysis shows that there is a group of persistent objectors to R2P, which are against the integration. Studying statements of these states there does seem to be some leeway concerning the acceptance of using the UPR to support the prevention of root causes for atrocity crimes, however when such practice includes R2P language these states are highly critical. It is limited what the group of consistent objectors can block with regards to the integration. This is argued because there are currently no prospects of reforming the UPR, why integration of the R2P into the UPR is done individually by states through recommendations and reporting. One issue could be that the group of consistent objectors further distance themselves from international cooperation and engagement here included the UPR. Nevertheless, the majority of states have expressed support for the integration of the R2P into the UPR at relevant forums and adopted the R2P as a formal agenda item at the UNGA. This enables further state deliberation on the subject, which could increase the potential of using the UPR to support the prevention of atrocity crimes.[lii]

Chapter VII: Ideas for Further Research

This thesis is one of the first contributions to study the relation between the UPR and atrocity prevention in a systemised manner. Because of the scarcity of research, we have argued that the UNSG statement that *"the UPR is especially well placed to support atrocity crimes prevention efforts",* in large remained untested.[536] To test the validity of the thesis' problem statement, which took outset in the UNSG's 2017 R2P Report, it was first necessary to analyse current state practice of incorporating atrocity related issues into the UPR to identify the challenges and the potential of using the UPR to support atrocity prevention. Furthermore, this thesis has contributed with an analysis of state acceptance of integrating the R2P into the UPR, which has been seen as a precondition for the integration. The analysis of state practice and acceptance was the first step towards understanding the potential of the UPR for contributing to the prevention of atrocity crimes. The analysis was intentionally kept very open to both study the UPR's potential for supporting direct and structural prevention of atrocity crimes. It has been concluded, that the UPR's potential for supporting direct prevention or if states are not cooperating is very limited. The thesis has contributed with recommendations towards how states can increase the potential of the UPR for atrocity prevention, with a particular focus on structural atrocity prevention. To expand on the understanding of what human rights areas states should prioritise to increase the UPR's potential for supporting structural atrocity prevention, it would be beneficial with more research exclusively dedicated to this subject.[liii]

In this thesis we have argued, that the added value of an explicit atrocity lens in the UPR is that it clarifies the aim and potentially allows support for more targeted and long-term strategies on atrocity prevention. However, because the integration of the R2P into the UPR is a new agenda, the practice of explicitly integrating atrocity prevention into the UPR is still limited. It has therefore been difficult to establish the concrete added value of the explicit atrocity lens. Giving practice a fair chance to evolve, this should be further researched at a later stage, both to see if practice has increased and to specify the challenges and benefits of explicit atrocity prevention in the context of the UPR.

We have in this thesis argued, that it is also too early to establish the impact of the UPR for atrocity prevention, why the focus has been on its potential. It will always be methodically difficult to establish the impact of prevention, which also applied for determining the causal

[536] UNSG R2P Report 2017, *supra* note 5, §35.

relationship between the UPR and impact on the ground. However, using similar methods as in this thesis it will, with the necessary resources, be manageable at a later stage to expand the understanding of the impact of the UPR for atrocity prevention.

This thesis has primarily focused on how states can use the UPR to support atrocity prevention. It could be beneficial with more in-depth research on how the role of civil society can be strengthened to increase the UPR's potential for supporting atrocity prevention.
It has in this thesis been prioritised to focus on a broad spectrum of states with different risk and resilience levels, to provide a set of general recommendations for the way ahead. As atrocity prevention will always be dependent on the country context, more research on case studies will be necessary to give qualified recommendations to specific countries of different risk and resilience levels. [liv]

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ANNEX I - PRESENTATION OF INTERVIEW PERSONS

Alex Bellamy
Affiliation: Director of the Asia Pacific Centre for the Responsibility to Protect and Professor of International Peace and Conflict Studies at the University of Queensland, Australia.
Date and location: 2 November 2017, Brisbane via Skype.
See overview of interview questions in Annex II "2.1. Alex Bellamy".

Aoife Hegarty
Affiliation: Programme Manager at the Geneva-based NGO: UPR-Info.
Date and location: 2 November 2017, Geneva via Skype.
See overview of interview questions in Annex II "2.2. Aoife Hegarty".

Argentinian Government Officials in the Field of Human Rights
Date and Location: 4 December 2017, Buenos Aires via Skype.
See overview of interview questions in Annex II "2.5. Geneva-based Diplomats and Representatives of Foreign Ministries".

European External Action Service (EEAS) Official
Date: 26 October 2017.
Respecting the wish of the interview person, the location is anonymous.
See overview of interview questions in Annex II "2.5. Geneva-based Diplomats and Representatives of Foreign Ministries".

Marc Limon
Affiliation: Executive Director of the Geneva based NGO: Universal Rights Group
Date and location: 26 October 2017, Geneva via Skype.
See overview of interview questions in Annex II "2.3. Marc Limon".

Representative of the Foreign Ministry of Switzerland
Date and location: 15 November 2017, Bern via Skype.
See overview of interview questions in Annex II "2.5. Geneva-based Diplomats and Representatives of Foreign Ministries".

Savita Pawnday:
Affiliation: Deputy Executive Director of the Global Centre for the Responsibility to Protect.
Date and location: 10 November 2017, New York via Skype.
See overview of interview questions in Annex II "2.4. Savita Pawnday"

Anonymous interview persons

Australian Diplomat at the Permanent Mission of Australia to the UN in Geneva

Date and location: 7 December 2017.
Respecting the wish of the interview person, direct quotes are referenced anonymously as Geneva-based diplomat.
See overview of interview questions in Annex II "2.5. Geneva-based Diplomats and Representatives of Foreign Ministries".

Geneva-based diplomats
Dates: 10 November 2017, 16 November 2017, and 11 December 2017.
Respecting the wishes of the interview persons names and country of permanent missions to the UN in Geneva are anonymous.
See overview of interview questions in Annex II "2.5. Geneva-based Diplomats and Representatives of Foreign Ministries".

Representative of WEOG state Foreign Ministry
Date and location: 13 November
See overview of interview questions in Annex II "2.5. Geneva-based Diplomats and Representatives of Foreign Ministries".

ANNEX II - OVERVIEW OF INTERVIEW QUESTIONS

2.1. Alex Bellamy - Interview Guide:

1) In the Secretary-General's 2017 R2P report it is stated that the UPR is especially well placed to support atrocity crimes prevention efforts - What does it take to make this happen and will it make a difference?

- What are the limitations of the UPR with regards to atrocity prevention? How can they be overcome?
- Are you aware of other issues where there have been efforts to integrate them systematically into the UPR and how these efforts have fared? Will R2P do better/worse than other topics and why so?

2) The 2017 R2P report focuses on long-term risks, you have identified five key areas useful for structural prevention (Constructive management of diversity etc), do you think that the UPR could incorporate these in a more explicit manner and are there any of these areas that are more suitable and should be prioritised in the UPR process?

- Will atrocity prevention/R2P be watered down to mean anything and everything if all this counts as R2P?
- Do you think UPR has any potential for halting atrocity crimes that are imminent or already occurring and how? Could you give examples?

3) It seems that there exists a gap between state rhetoric and practice with regards to the value of doing prevention - Do you see any new opportunities with regards to bridging this gap?

- Do you see any current (explicit/implicit) practice of using UPR for atrocity prevention?
- Is there an added value by calling it R2P if the UPR already is being used in that sense? Or will it prove counterproductive?

4) We have noticed in state debates that there seems to be broad consensus that development is interlinked with prevention, however, the issue of development does not seem to be prioritized when states formulate UPR recommendations - do you have any thoughts on how this can be explained?

- There are a lot of UPR recommendations focusing on the ratification of human rights and IHL treaties - what do you think the value of such recommendations is for the prevention of atrocity crimes?
- Can you elaborate further on how the atrocity lens can best be integrated into the recommendations given during the UPR sessions?

5) How do you think researchers can best handle the challenges of "proving" the effects of prevention?

2.2. Aoife Hegarty, UPR-info - Interview Guide:

1) In the Secretary-General's 2017 R2P report it is stated that the UPR is especially well placed to support atrocity crimes prevention efforts - What does it take to make this happen and will it make a difference?

2) Is it necessary and possible to reform the UPR mechanism to strengthen its potential to support atrocity prevention?

3) Do you think atrocity prevention as such is being considered by states in their current use of the UPR (both in the preparatory and interactive phase? - Can you give examples?)

4) The 2017 R2P report suggests that states incorporate a risk and resilience analysis in their national reports - do you think this is achievable?

5) How can the role of civil society actors be strengthened, to ensure more reliable information?

6) Is there any cooperation between NGOs working with the UPR and NGOs working with R2P in Geneva?

2.3. Marc Limon, Universal Rights Group - Interview Guide:

1) In the Secretary-General's 2017 R2P report it is stated that the UPR is especially well placed to support atrocity crimes prevention efforts - What does it take to make this happen and will it make a difference?

- Is it necessary to reform the UPR mechanism to strengthen its potential to support atrocity prevention?
- Do you see any developments or opportunities for reforming the mechanism?
- Are you aware of other issues where there have been efforts to integrate them systematically into the UPR and how these efforts have fared? Will R2P do better/worse than other topics and why so?

2) Do you think atrocity prevention as such is being considered by states in their current use of the UPR (both in the preparatory and interactive phase? - Can you give examples?

- In your experience, is the use of the R2P label problematic in Geneva and what consequences would it have for the perception of the UPR to integrate R2P?

3) The 2017 R2P report suggests that states incorporate a risk and resilience analysis in their national reports - do you think it this is achievable?

- How can the role of civil society actors be strengthened, to ensure more reliable information?

4) In your report "Towards the 3rd cycle of UPR", you analyse acceptance and implementation rates of different UPR issues.

- Why do you think extreme poverty has such a high acceptance and implementation rate?
- Do you have any thoughts on why recommendations on racial and other discrimination have such a high acceptance rate, but a relatively low implementation rate?
- Were there any specific findings in your research on acceptance and implementation that you find particularly interesting or surprising?

5) How do you think researchers can best handle the challenges of "proving" the impact of UPR on changes in domestic policies?

2.4. Savita Pawnday, Global Centre for the R2P - Interview Guide:

1) In the Secretary-General's 2017 R2P report it is stated that the UPR is especially well placed to support atrocity crimes prevention efforts - Do you agree with this?

- What role can your Office play in this regard? Who else will be important for this effort?
- What are the limitations of the UPR with regards to atrocity prevention? How can they be overcome?

2) How would the integration of the R2P into the UPR mechanism impact the perception of the UPR as a non-politicised tool?

3) How is the Global Center working towards bridging the gap between states that have a critical vs. positive view on R2P and do you see any new opportunities in this regard?

- Is the Global Centre working to expand its presence in Geneva?

4) Is it vital that the atrocity lens is integrated with an explicit reference to R2P?

- Why/why not?
- How will you count "practice" in future UPR sessions – only when states use explicit R2P language? Or everything counts? Will that be too broad a count?

5) Do you see any new developments with regards to mainstreaming R2P through the human rights pillar of the UN?

2.5. Geneva-based Diplomats and Representatives of Foreign Ministries - Interview guide:

***Used with small adjustments and 1-2- additional questions on issues specifically relevant for the state which the given interview person represented.*

1. In the Secretary-General's 2017 R2P report it is stated that the UPR is especially well placed to support atrocity crimes prevention efforts - do you agree with this?

- What steps can/should be taken to have more states integrate R2P? Who are important for this effort?

2. What will be the challenges and benefits of using the UPR for atrocity prevention?

3. In your experience, is the use of the R2P label problematic in Geneva and what consequences would it have for the perception of the UPR to integrate R2P?

4. Do you think atrocity prevention as such is being considered by states in their current use of the UPR (both in the preparatory and interactive phase)? - Can you give examples?
- In your opinion, have there been any changes in the third cycle of the UPR?

5. Will [*name of state*] integrate atrocity prevention into future UPR questions/recommendations? (Why not?) If yes, is there a process to ensure this? Will this be with/without using explicit R2P language?

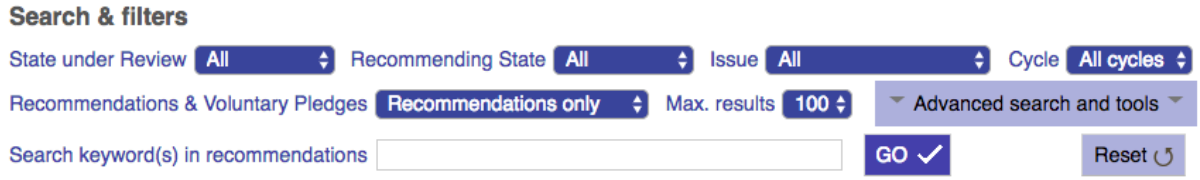
6. Will [*name of state*] include assessments of domestic risks and resilience towards atrocity crimes in the next preparatory national report or follow-up report?

7. How do you see the current cooperation between state actors and civil society organizations on the UPR and the R2P?

ANNEX III - UPR-info DATABASE AND STATISTICS

UPR-info database:

UPR-info's database includes all the **57,686** recommendations given in the first and second cycle of the UPR. The UPR-info's Dataset is made so that one can search for recommendations by the filters: State under Review (SuR), Recommending State (RS), Issue, Cycle (C), Recommendation only or including Voluntary Pledges, and Search keyword(s), as shown in the picture below:



The database allows quick access e.g. to all recommendations containing the keyword 'war crimes' sorted under the issue 'International Humanitarian Law'. The recommendations matching each search are shown with the information: SuR (and UN Regional Group), RS (and Regional Group), Response (Accepted or Noted), Action category (A), Issue, and Cycle.

The search example above would show recommendations such as this one:

SuR	Recommendation	RS	Response	A	Issue	C
Bosnia and Herzegovina EEG	Bring its legislation into line with the international standards related to the prosecution of war crimes of sexual violence	Finland WEOG EU	Noted	5	• International humanitarian law • Justice • Women's rights	2

References to the database in the thesis:

Footnotes to data used from the UPR-info Database will show the filter (s) used in the search for the data referenced. It is not possible to link for the specific searches, why an URL is not included in the references. The database is available at https://www.upr-info.org/database/.

An example for a footnote to the database would therefore be:

- UPR-info Database, Issue: *International Humanitarian Law*, Keyword: *war crimes*.

When recommendations are quoted or if a specific recommendation is analysed in the thesis

the footnote will refer to the HRC Working Group Report where the recommendation (s) is accounted for.

UPR-info statistics:

UPR-info statistics cover all the recommendations in the database. Five sets of statistics are available: 1) Global Statistic; 2) State under Review Statistics; 3) Recommending States Statistics; 4) Issue Statistics, and 5) Actions Category Statistics.

For each of the sets of statistics, different tables arranged from the highest to lowest number of recommendations made or received, are available. One table available under Issue Statistics is e.g. "States which made recommendations on this issue".

References to UPR-info statistics in the thesis:

Footnotes to data used from the UPR-info Statistics will specify, which of the five sets of statistics are used and which of the available tables the used data is derived from. It is not possible to link to specific statistics, why an URL is not included in the references. The statistics are all available at https://www.upr-info.org/database/statistics/.

An example of a footnote for Statistic data would therefore be:

- UPR-info Statistics, *Global Statistics*, Table: *Regional group of recommending state*.

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[x] Author: Marie SC
[xi] Author: Silke KMH
[xii] Author: Marie SC
[xiii] Author: Silke KMH
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