

The responsibility to protect human rights and the RtoP: prospective and retrospective responsibility

Article (Accepted Version)

Karp, David Jason (2015) The responsibility to protect human rights and the RtoP: prospective and retrospective responsibility. *Global Responsibility to Protect*, 7 (2). pp. 142-166. ISSN 1875-9858

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The Responsibility to Protect Human Rights and the RtoP: Prospective and Retrospective Responsibility

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Forthcoming in *Global Responsibility to Protect 7* (2015).

Abstract:

This article argues that—contrary to the way that it is often framed—the first pillar of the Responsibility to Protect (RtoP) is not best understood as an instantiation of a broader international responsibility to protect human rights. Firstly, the RtoP reverts to a discourse of powerful savours and passive victims, which runs against advocates' claim that the RtoP is a 'rights-based norm'. Secondly, although it distinguishes between prevention and response, the RtoP is still fundamentally a discussion of retrospective responsibility. The responsibility to protect human rights, by contrast, is importantly prospective. The article's separation of prospective/retrospective responsibility from the responsibility to prevent and to respond is an independent contribution, with broader significance beyond the RtoP context. Thirdly, the RtoP becomes activated when atrocity is building, imminent or underway; whereas the responsibility to protect human rights may be breached even without a clear causal link to harm.

Keywords:

Responsibility to protect; human rights; prospective responsibility; retrospective responsibility; harm; Pillar One

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Publication Information:

This is the peer-reviewed, 'accepted author manuscript' version of David Jason Karp, 2015 (forthcoming), 'The Responsibility to Protect Human Rights and the RtoP: Prospective and Retrospective Responsibility', *Global Responsibility to Protect 7*. It has been posted on the author's own institutional repository in accordance with the journal's policy. For formal citation purposes, please refer to the publisher's typeset version.

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Introduction

Is the Responsibility to Protect (RtoP) policy framework best understood as one specific instantiation of a broader international responsibility to protect human rights? This article answers this question (with an overall ‘no’, or at least ‘not yet’) in two parts. It firstly distinguishes the idea of the responsibility to protect *human rights* from the seemingly eponymous idea contained in the Responsibility to Protect (RtoP) policy framework, as endorsed by the World Summit in 2005. Having made this distinction, it compares the responsibility to protect human rights with the RtoP in three areas: in terms of whether the RtoP is really focused on rights; in terms of whether the kind of responsibility assigned is prospective or retrospective; and in terms of the relationship of each kind of responsibility to the notion of harm. The article’s overall argument is that the responsibility to protect human rights, properly understood—as something distinct from mass atrocity prevention and response—involves the responsibility of public agents proactively to ensure that the structural conditions of human rights protection are systematically institutionalised, before any significant harm to human rights is caused that would require a retrospective response.

The first pillar of the Responsibility to Protect policy framework, the state duty to protect its population from mass humanitarian atrocities, is often regarded as the least contentious of the three. The first pillar is explicitly offered as a consolidation and re-statement of a series of responsibilities to citizens, residents and other civilians that states have already adopted in international law, such as those elaborated in Geneva Conventions in the nineteenth century, in the international human rights instruments that emerged in the aftermath of World War II, and in the Rome Statute of 1998.¹ The ‘determinate’ nature of the pillar one is contrasted in the literature with the ‘indeterminate’ and more novel pillars two and three.² This means that it is supposed (and I choose that word carefully) to be very clear what the first pillar requires states to do. Much critical and policy discussion is therefore focused on the third pillar: the international community’s responsibility to take action up to and including military intervention in response to situations where the state manifestly fails to fulfil its humanitarian responsibilities to its population. There has also been recent interest in the second pillar: the international responsibility to build and to enhance the capacities of states to fulfil their first-pillar responsibilities.

This article therefore fills a gap in knowledge by offering a critical discussion of the first pillar of the RtoP. Firstly, in terms of *which abuses* against people are relevant to the discussion, the RtoP focuses on only the most serious atrocity crimes: crimes against humanity, ethnic cleansing, genocide and war crimes. This is held up by advocates as a strength of the framework, but in fact it is more complicated and contestable from a human rights perspective than might be apparent at first glance. Secondly, the first pillar is often conceived as linked to human rights, in the sense that is supposed to be a (narrow and specific) part of an overall arsenal of state responsibility linked to human rights protection. This under-appreciates the way that the RtoP conceptualises people as passive victims who require powerful actors to

¹ United Nations Secretary-General, *Implementing the Responsibility to Protect*, A/63/677, United Nations General Assembly, 63rd session (New York: United Nations, 2009), p. 12, para. 18.

² Alex J. Bellamy, ‘The Responsibility to Protect - Five Years On’, *Ethics & International Affairs* 24:2 (2010), pp. 161-62.

protect them, which fundamentally runs counter to the purpose of human rights practice. Thirdly, one might assume that because the RtoP is explicitly about ‘prevention’ and ‘response’, that it smoothly incorporates aspects of both prospective and retrospective responsibility. However, on closer analysis, the first pillar, even in its ‘preventive’ mode, is significantly about retrospective responsibility as a main focus. It is an independently significant contribution of this article that it distinguishes prospective/retrospective responsibility from the responsibility to prevent and to respond. Prospective responsibility is not the same as the responsibility to prevent, and retrospective responsibility is not the same as the responsibility to respond. Fourthly, closely linked to the RtoP’s political purpose is the idea that states are only understood to have failed at their first-pillar responsibility when atrocity is imminent, underway, or in the process of being built according to a clear causal logic. This runs contrary to the purpose of the responsibility to protect human rights, which needs to be able to identify failures of responsibility even without any clear causal link to harm.

The responsibility to protect human rights and the RtoP

The responsibility to protect human rights (lower-case letters) refers to the protection of a wide range of civil-political and socio-economic objects. These can be defined as a starting-point by the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The protection of human rights can involve, for example: personal security; freedom from arbitrary detention; freedom of conscience and of assembly; equal access to primary education regardless of gender or ethnic identity; a reasonable level of workplace health and safety, particularly including equally robust conditions for women as there are for men; prevention, treatment and control of epidemic and endemic diseases, at various levels of governance, within the bounds of available biomedical technology; and so on. I treat these covenants as indicative starting-points rather than as definitive lists. Many of the items contained within them can be reasonably contested. It is the indication of the *range* of areas of human life covered on which I wish to focus, rather than on the debates that can and should occur about whether each and every item contained within these covenants is completely sound.

Contrast this with the Responsibility to Protect (RtoP) policy framework. It is widely understood that the RtoP focuses narrowly on four grave humanitarian atrocities—crimes against humanity, ethnic cleansing, genocide and war crimes—rather than on a broader range of human rights issues; that is explicitly stated at the very core of the first pillar of the framework.³ Given that this is well established, one can then ask: How does the responsibility to protect human rights actually relate to the Responsibility to Protect?

One potential, rather straightforward, answer is that they do not relate to each other very much at all. One could say that the RtoP is simply not about human rights, but about something else entirely—specifically, humanitarian atrocity prevention and response. The prevention of women from voting or driving, unequal pay for equal work, systematically dangerous working conditions, unreasonable limits to free

³ United Nations General Assembly, *2005 World Summit Outcome*, A/60/L.1, 60th session (New York: United Nations, 2005), p. 31, para. 138.

speech, arbitrary detention (outside the context of war): these might all be issues that are desirable to address, but they do not fall within the RtoP framework as potentially warranting global intervention in circumstances where primary responsibility-bearers fail. At its core, this answer is based in the idea that there are simply different responsibility practices for different purposes.⁴ Breakey, for example, is one of several scholars who distinguish between the RtoP and broader norms of Protection of Civilians in Armed Conflict.⁵ He views as both ‘rights-based norms’, which despite both being rights-based, nevertheless have very distinctive features from one another in terms of their scope, their kind of responsibility, and the nature of action that each requires.⁶ I would characterise the point even more starkly than this, by calling into question the extent to which the RtoP is really ‘rights-based’ at all. This simple answer says: perhaps the RtoP, the Protection of Civilians in Armed Conflict, and any number of other discussions that aim at doing good for humans, are all distinct from the responsibility to protect human rights. To share a generalised belief in humanistic values is not enough to qualify an idea or a practice as ‘rights-based’. The international protection of human rights takes, as a necessary starting-point, a wider and indivisible set of (potential) abuses against humans that require those who bear responsibility to act.⁷ The RtoP, by contrast, expressly does not.

I have considerable sympathy with the answer just expressed. Perhaps it should even be the default position. If advocates of the RtoP were prepared to say (and really mean) that their framework is not about human rights at all, but about something else, that might not make a very satisfactory end to the discussion, but it certainly would clarify matters to a very great extent. It would do so in a way that opens up deep critical questions—from post-colonial, post-structural and other perspectives—about what the RtoP is really *for* if it does not seek to be grounded in and to maintain its alignment with the actual notion of human rights protection.⁸ The further problem, however, is that advocates of the RtoP often *do* take themselves to be advancing a framework that they view as linked to the international-level protection of human rights. One can see this in three complimentary ways: at the level of diplomatic practice, at the level of theoretical foundations, and at the level of the RtoP’s core policy documents themselves.

At the level of diplomatic practice, Gareth Evans, who was centrally involved in the creation of the RtoP framework, explains and justifies its focus on the four atrocity

⁴ Saladin Meckled-Garcia, 'The Practice-Dependence Red Herring and Better Reasons for Restricting the Scope of Justice', *Raisons Politiques* 51 (2013), pp. 97-120.

⁵ Hugh Breakey, 'Protection Norms and Human Rights: A Rights-Based Analysis of the Responsibility to Protect and the Protection of Civilians in Armed Conflict', *Global Responsibility to Protect* 4:3 (2012), pp. 309-33; see also Melissa T. Labonte, 'Whose Responsibility to Protect? The Implications of Double Manifest Failure for Civilian Protection', *International Journal of Human Rights* 16:7 (2012), pp. 982-1002.

⁶ Breakey, 'Protection Norms and Human Rights'.

⁷ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton: Princeton University Press, 1996); Daniel J. Whelan, *Indivisible Human Rights: A History* (Philadelphia: University of Pennsylvania Press, 2010).

⁸ For example, see: David Chandler, 'The Responsibility to Protect? Imposing the "Liberal Peace"', *International Peacekeeping* 11:1 (2004), pp. 59-81; Aidan Hehir, 'The Permanence of Inconsistency: Libya, the Security Council and the Responsibility to Protect', *International Security* 38:1 (2013), pp. 137-59.

crimes on the basis that states simply would not have agreed to anything further.⁹ This account makes it seem as though the RtoP started off as a kind of thought-experiment, where its framers wanted to go as far as possible in terms of an effective global framework for human rights protection, within the boundaries of what they assumed would generate the agreement of participants. Those participants are conceived as states that are concerned with, and perhaps even jealous of, their sovereignty. The RtoP's creators used a logic of this kind to arrive at the four atrocity crimes as a realistic limit on what they thought could be achieved in practice. This way of framing the matter makes the four atrocity crimes seem to be a particular sub-set of the universe of human rights issues, rather than something that is entirely distinct. On this view, there is nothing *in principle* or *in the concept* distinguishing the RtoP from the responsibility to protect (all) human rights; the difference is only a political one that stems from a number of assumptions that were made about what would be likely to garner the agreement of states, in the short- to medium-term, in a relatively friction-free way. The description of RtoP as 'narrow' (in scope) and 'deep' (in response) is therefore not ethically or politically neutral.¹⁰ The potential depth of states' response to mass atrocities is typically thought of as an *effect* of the framework's narrowness in scope. This 'deep' intended response is implicitly contrasted with the 'shallow'—less effective, less decisive—responses that are presumed to be achievable if the RtoP were to define its scope in a more expansive way, to include a range of human rights issues beyond just mass atrocities.

In political philosophy, David Miller backs up this view. He defines the very concept of the international responsibility to protect human rights as one that involves protection from large-scale abuses only.¹¹ He says about the 'international responsibility to protect': 'We are not primarily thinking in this context about rights that fall outside this core [of large-scale abuses], such as rights to free speech or political participation, important though these may be in other respects'.¹² Human rights issues outside of what he calls the 'core' of the very worst abuses are thus explicitly excluded from international consideration, and remain domestic matters of sovereign states. Finally, a similar view is reflected in the RtoP policy documents themselves, which exclude a broader range of humanitarian issues: 'To try to extend it [the RtoP] to cover other calamities such as HIV/AIDS, climate change or the response to natural disasters would undermine the 2005 consensus and *stretch the concept beyond recognition or operational utility*'.¹³ This argument, which can be seen both in philosophical interpretations of the RtoP and also in the elaboration of the policy itself, claims that those who use the language of the 'responsibility to protect' in a way that diverges from this focus on mass atrocities are ultimately mistaken or misguided in the way that they are thinking about that idea, and indeed about the kind of international action to protect people that is possible to achieve in the world today. There is a sense of ownership at play here about the use of the term 'responsibility to protect'. This is a tactical way of dismissing non-conforming

⁹ Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect', *Wisconsin International Law Journal* 24:3 (2006-7), pp. 101-20; Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come... and Gone?', *International Relations* 22:3 (2008), p. 295.

¹⁰ United Nations Secretary-General, *Implementing the Responsibility to Protect*, p. 8, para. 10(c).

¹¹ David Miller, 'The Responsibility to Protect Human Rights', in Lukas H. Meyer (ed) *Legitimacy, Justice and Public International Law*, (Cambridge: Cambridge University Press, 2009), pp. 232-51.

¹² *Ibid.*, p. 232.

¹³ United Nations Secretary-General, *Implementing the Responsibility to Protect*, pp. 8, para. 10(b), emphasis added.

conceptions of a ‘responsibility to protect’ not only as different, but also as less realistic, less practical, less worthy of the international energy and effort that is properly put into the RtoP.

These are rather specific examples, but they can also be understood in the context of a broader academic and policy discourse in which the phrases ‘the responsibility to protect human rights’ or ‘human rights protection’ are understood in direct connection with the RtoP. One frequently sees and hears the RtoP loosely referred to as a ‘human rights norm’: for example, on the webpage of the International Coalition for the Responsibility to Protect.¹⁴ All of this is a long way away from the view that the RtoP is something fundamentally different from the responsibility to protect human rights. RtoP advocates have sometimes treated the framework as one *instantiation* of a broader responsibility to protect human rights: one which is practically possible to put into practice in a ‘deep’ way at the international level in a way that is supposedly not possible for a broader range of human rights protection issues (however desirable that may be). Alternatively, they have treated the RtoP as one *conception* of the broader concept of human rights protection, and moreover, as the best conception: such that other conceptions are wrong, misguided or overly ‘stretched’ in their use of the ‘responsibility to protect’ concept. On this second view, the RtoP is not exactly treated a part of a (potentially broader) discussion of human rights protection; it is treated, rather, as the correct interpretation of the very meaning of the responsibility to protect human rights of specifically international actors in the world today.

The latter view, that the RtoP is a full-fledged conception of the ‘responsibility to protect human rights’—and moreover one that is particularly well suited to the level of international responsibility—tends to assume, without providing an argument or clear evidence, that state actors would be unwilling to commit to and/or to comply with human rights protection obligations beyond a narrow focus on atrocity crimes. Ironically (because it is an attempt to be realistic), this idea seems to be based on a series of assumptions that were made by the RtoP’s framers, rather than on the best evidence that is available about what states actually do. States have taken on a broad range of human rights obligations in the twentieth and twenty-first centuries. They might not commit to these intending to comply in the first instance, but research has demonstrated that even hesitant, hypocritical or dishonest commitment can lead to future compliance, through a number of specific and demonstrable domestic and international mechanisms.¹⁵ States have recently endorsed their ‘state duty to protect’ a broad range of human rights in the area of business and human rights, through their endorsement of the United Nations Guiding Principles on Business and Human Rights.¹⁶ Making states responsible for the human rights violations of companies, in this way, arguably consolidates, rather than undermines, their sovereignty, so there is no reason in principle to expect that action on this issue will be any less ‘deep’. One can arrive at the same point from a different and more critical angle, by considering

¹⁴ International Coalition for the Responsibility to Protect, ‘Webpage of the International Coalition for the Responsibility to Protect’, World Federalist Movement - Institute for Global Policy, available at: <http://www.responsibilitytoprotect.org/>, accessed 19 April 2015.

¹⁵ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009).

¹⁶ David Jason Karp, ‘The Concept of Human Rights Protection and the UN Guiding Principles on Business and Human Rights’, in Kurt Mills and David Jason Karp (eds), *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors*, (Basingstoke: Palgrave, 2015), pp. 145-46.

that international regimes, even those to which most states agree, are not free from the influence of powerful states.¹⁷ Those powerful states (for better or for worse) will not necessarily view the governance of the world through the practice of human rights, defined more broadly than as simply the avoidance of atrocities, as against their own interests.¹⁸ The point is not that one should be overly optimistic about the actions that states will take. Rather, the point is a comparative one about whether or not the RtoP should be viewed especially ‘deep’, due to its narrow focus on atrocities only, relative to any other area of human rights practice. There is no sound reason that I can see to explain why one should *necessarily* expect less ‘deep’ action to protect privacy rights, or to protect against child labour, or to protect from derisory working conditions, or to protect from discrimination on the basis of ethnicity and gender in primary education systems—even though none of these constitutes the large-scale humanitarian atrocities that activate the RtoP. For these reasons, I do not think this ‘conception’ view is a very strong one (or even that it is one that many RtoP advocates themselves hold). Therefore, I set it aside for the rest of this article.

On the other hand, the idea that the RtoP is an instantiation of human rights protection is more plausible, even if it, too, is ultimately mistaken. It is an attempt to link the RtoP to the broader concept of the responsibility to protect human rights, by saying that this is just one particular segment of a larger and multifaceted project. Rather than either completely rejecting the sincerity of the attempt, on the one hand, or taking for granted that it works seamlessly, on the other, this article now proceeds to evaluate the extent to which the attempt has succeeded and/or failed. It does so by assessing the RtoP framework, and particularly its first pillar, in light of an account of what the responsibility to protect human rights (lower-case) actually requires responsibility-bearers to do.

What does human rights protection require?

Rights and beneficence

The first and most concise problem is that there is no clear link between prevention of and response to humanitarian atrocities, and the idea of having a specific right with co-relative duties.¹⁹ At first glance the logic might seem straightforward: everyone has a ‘right’ not to be massacred, so both the states in which individuals are resident, and also the international community, have co-relative duties to prevent and to respond to violations of those rights. However it is not actually that simple. There are numerous views about the nature of ‘rights’. For example, they can be viewed in a traditional way as political entitlements, or from a more critical perspective as tools to use to struggle and/or resist against those with power. But whatever else they are, rights are typically defined *in opposition to* the discourse of passive, helpless victims, who require powerful, benevolent saviours to be responsible for them.²⁰ Arendt thought

¹⁷ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

¹⁸ Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013).

¹⁹ On the relationship between human rights and duties, see: John Tasioulas, ‘Taking Rights Out of Human Rights’, *Ethics* 120:4 (2010), pp. 647-78.

²⁰ Peter Singer, ‘Famine, Affluence, and Morality’, *Philosophy and Public Affairs* 1:3 (1972), pp. 229-43; Allen Buchanan, ‘Justice and Charity’, *Ethics* 97:3 (1987), pp. 558-75. See also: William Easterly,

that human rights, when they are defined as the only idea that people have to fall back on once their rights of citizenship are stripped away, enabled, rather than resolved, many of the humanitarian atrocities of the inter-war period and World War II.²¹ Human beings who have been stripped of everything else, and who are left nakedly to rely on the beneficence of the powerful, do not really have rights in any sense, even if the powerful are made to feel and to act more responsibly toward them.²² Regardless of the valid (potentially endless) debates that one could have about what rights are, it is fairly clear that this is what they are *not*. This is not really a ‘hard case’, but rather the beginning of the rest of the discussion.

Conversely, many of the world’s states—even those that have a record of preventing the occurrence of large-scale atrocity crimes within their borders—regularly, routinely and systematically engage in the more quotidian violation of civil-political and/or socio-economic human rights. When states fulfil duties that they have been assigned under the first pillar of the RtoP to protect their population from mass atrocities, they have surely fulfilled a duty of some kind: one which is important, and can be justified according to various moral, political and legal foundations. However, this does not clearly or obviously mean that they have fulfilled a duty that co-relates to their citizens’ and residents’ human rights. The first-pillar responsibilities of states to protect populations can be only understood as directed *to* individual people if those people are understood in their role as victims or potential victims of humanitarian disasters. Evans says in one explanation of the RtoP: ‘Focus not on the notion of “intervention” but of *protection*: look at the whole issue from the perspective of the victims, the men being killed, the women being raped, the children dying of starvation’ (emphasis in original).²³ This is not exactly an invitation to treat people robustly as agents and as rights-holders. They are helpless victims that require saving.

Responsibility for human rights, on the other hand, needs to be understood to be directed toward people in their entirety—not viewed partially as bearers of one narrow role or another in which they become subjected to abuses—in order to count as responsibility linked to human rights. A framework that stays inactive when a person does not have access to an equal level of primary education because of his or her ethnicity, or who as an adult lacks empowerment in the workplace and in the public sphere because of gender is about something other than protecting human rights. One might think that the RtoP’s consideration in 2013 of how best to catch atrocities ‘early’ by looking for risk factors—including human rights risk factors—that build up to them, responds to this objection.²⁴ However, not all human rights problems are risk factors for mass atrocities. Any perceived need to link such problems to their potential to produce atrocity crimes at some point in the future, in order to be taken seriously in today’s world as an object of international resources and global action, is a symptom of the disjuncture rather than its solution.

The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Little Good (Oxford: Oxford University Press, 2006).

²¹ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1968), pp. 267-302.

²² David Jason Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (Cambridge: Cambridge University Press, 2014), p. 78.

²³ Gareth Evans, 'The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All', *Irish Studies in International Affairs* 20:1 (2009), p. 9.

²⁴ Compare: United Nations Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, A/67/929–S/2013/399, United Nations General Assembly, 67th session (New York: United Nations, 2013).

Rights-holders are not the objects of charity and/or beneficence of the powerful; this is meant to represent an analytical truth (rather than an empirical or synthetic truth) about the nature of rights and rights-holders. The rights-related purpose of the RtoP might plausibly be to re-establish the conditions of human rights in contexts where those conditions have already been shattered. However, that is not quite the same as saying that the RtoP itself—as a reversion to a discussion of helpless victims and powerful saviours—is the direct enactment of a rights-based duty. This is a non-problem if the RtoP and the responsibility to protect human rights are understood to be radically different concepts and practices. It does, however, pose a challenge to the view that the RtoP is one partial, ‘narrow and deep’ way to instantiate a broader international responsibility to protect human rights.

Prospective and retrospective responsibility

This sub-section and the subsequent one together constitute an argument that the main political purpose of the RtoP is to assign responsibility that is retrospective, whereas the responsibility to protect human rights has an importantly prospective nature. Responsibility can be understood as prospective and as retrospective. Prospective responsibility is forward-looking: something that a moral agent simply has to do, often regardless of consequences. Retrospective responsibility is backward-looking. It is often associated with the legal notion of ‘accountability’: one looks after the fact at a chain of events and outcomes, in order to determine who or what was responsible for them. These are simplified caricatures of a set of very rich debates that have occurred over a number of decades in legal theory.²⁵ Nevertheless, they should still help readers who are unfamiliar with the terms to get an initial lock on the distinction that is being drawn. The term ‘duty’ has sometimes been contrasted with the term ‘responsibility’ on the basis that the former has been understood as prospective whereas the latter has been understood as retrospective. This is the impression, for example, that one gets from Hart’s seminal discussion of the term ‘responsibility’, which defines even ‘role responsibility’—a notion that seems at first glance to be prospective—in terms of knowing who is responsible for negative outcomes in the past, on the basis of a role that should could or should have performed better.²⁶ However, this association has been convincingly challenged by Cane, who argues that responsibility, even in the law, can be understood as having important prospective as well as retrospective elements.²⁷

The prospective/retrospective distinction has an important epistemic element to it. One may categorise responsibility as prospective if one can know before the fact that an agent will be responsible for something that might happen in the future, or for the interests or well-being of someone in general. By contrast, one may categorise responsibility as retrospective if one can only determine after (or sometimes during) an event who or what is responsible for it.²⁸ To draw this distinction does not imply

²⁵ H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon, 1968); Graham Haydon, ‘On Being Responsible’, *Philosophical Quarterly* 28:110 (1978), pp. 46-57; Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002).

²⁶ Hart, *Punishment and Responsibility*, pp. 210-30.

²⁷ Cane, *Responsibility in Law and Morality*.

²⁸ One can also distinguish moral responsibility, which can only be borne by moral agents, from responsibility that is *purely* causal. For example an object that blows into a person’s path causes her to

that prospective and retrospective responsibility are mutually incompatible, and that any kind of responsibility must be either one or the other, with no relationship between them. To the contrary: the prospective and retrospective aspects of responsibility can be viewed as having important links between them.²⁹ It is still possible, however, to assess where the *primary focus* of any form of practical responsibility lies, and how this, in turn, affects the way that ideas about specific kinds of responsibility are put into practice.

The RtoP framework involves a discussion of prevention of and response to mass atrocities. This might be viewed as equivalent to the distinction that I am trying to draw between prospective and retrospective responsibility, and moreover as straightforward evidence that the RtoP is both at once. However, it would be a mistake to associate the notion of ‘prevention’ solely with prospective responsibility and the notion of ‘response’ solely with retrospective responsibility. For example, a lifeguard has a *prospective* responsibility to *respond* to situations of drowning, but this does not make him automatically (retrospectively) responsible if someone drowns. A person might have been swimming while heavily intoxicated; in this case, if the lifeguard has done the best he can, he has fulfilled his responsibility. Note too that this is different from the *prospective* responsibility to *prevent* drowning, for example by setting up signs and flags on beaches, or publishing daily updates about swimming conditions, or educating the public about safe and unsafe swimming. This responsibility might not fall on the lifeguard at all, but rather on some other municipal or national authority. One can fail at both of these kinds of prospective responsibility, by failing to take all reasonable steps to act in the prescribed way, even if no one has actually drowned. It would seem to defeat the purpose of this kind of responsibility if people need actually to start drowning before a failure of responsibility can be identified. Differently still, one can hold a moral agent responsible *retrospectively* for failing to *prevent* a harmful outcome, even if that moral agent had no specific relevant prospective duty. For example, industrialised countries are retrospectively responsible for climate change (which is a failure of prevention), even if they had no way of knowing at the outset of the industrialisation process that climate change would result. This is a separate question from one about who is responsible (retrospectively) to *respond*, even though the answer to one question might partially inform the answer to the other. Table 1 illustrates that the distinction between prevention and response is not the same as the distinction between prospective and retrospective responsibility.

fall: the object is causally responsible but not morally responsible. To be clear, I am addressing moral responsibility in this article, although moral responsibility can sometimes involve causal elements.

David Miller, 'Distributing Responsibilities', *Journal of Political Philosophy* 9:4 (2001), pp. 453-71.

²⁹ David Jason Karp and Kurt Mills, 'Introduction: Human Rights Responsibilities of States and Non-State Actors', in Kurt Mills and David Jason Karp (eds), *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors*, (Basingstoke: Palgrave, 2015), pp. 7-8.

**Table 1: Prospective/Retrospective Responsibility and Prevention/Response:
What counts as a failure?**

	Prospective Responsibility	Retrospective Responsibility
Prevention	<p>Responsibility for a person, object, outcome or event, irrespective of direct causal involvement (for example, because of one's role or because one had a duty of care).</p> <p>One has failed to fulfil one's responsibility if one fails to take appropriate preventive action, regardless of whether the outcome or event actually comes to pass.</p>	<p>The responsibility to take all reasonable steps to avoid future harm.</p> <p>One has failed to fulfil one's responsibility if harm occurs that can be traced back one's actions or inactions that failed to prevent it.</p>
Response	<p>Responsibility to take future action if a pre-specified set of circumstances arises.</p> <p>One has failed to fulfil one's responsibility if those pre-specified circumstances arise, and if one does not respond at all, if one does not respond appropriately, and/or if one is not in a position to respond.</p>	<p>Responsibility to act in a way that minimises harm or minimises a problem, once harm or a problem is imminent or underway.</p> <p>One has failed to fulfil one's responsibility if one's actions are harmful, or if one callously ignores a problem that one has the capacity to address.</p>

The RtoP's *third pillar*, which involves the responsibilities of outside states to intervene in cases of a failure of a first-pillar responsibility, is quite obviously centred on retrospective duties of response. It is not as clear, however, what kind of responsibility the *first pillar* assigns to states when it says that they have the responsibility to protect their populations. I now argue that the RtoP's first pillar, even (perhaps especially) in its prevention mode, reflects an overriding concern with retrospective responsibility. Paragraph 138 of the 2005 World Summit Outcome document is crisp and concise: 'Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.³⁰ This certainly involves prevention, but is it a prospective or a retrospective responsibility?

In order to be prospective, one would need to be able to say that a state can fail to fulfil its first-pillar RtoP responsibility *even if* no mass atrocity crime is underway or in the process of being built. This would sit uneasily with the RtoP's intention to fit together with the existing international-legal framework of sovereignty. It would enable outside judgement about the conditions of failure, and eventually outside interference, even in cases where there is no evidence of imminent or actual mass atrocity. This is exactly what the RtoP is *not* supposed to be about, in order to justify its (internally produced and contestable) claim to be realistic, in the sense of having

³⁰ United Nations General Assembly, *2005 World Summit Outcome*, p. 31.

the ability to garner the consensus-based agreement of the world's states.³¹ The framework's intention is not to enable an international guessing-game about whether states are doing everything they possibly can to prevent bad things from happening to people, even if there is no obvious causal link to a building mass atrocity. The point of the framework is exactly the opposite: to say that treatment of populations that fall outside the rubric of the four atrocity crimes are also outside of the scope of the RtoP. It is more a more plausible interpretation to say that the RtoP's first pillar is overridingly a *retrospective responsibility of prevention*. This is because it is concerned about causal chains of events leading to serious harm, and with laying the moral and political blame on the states in which populations are resident for such harm if it should ever become imminent or should it ever actually occur.

There is a possibility that the first pillar also assigns a *prospective responsibility of response* to states. In order to assess whether it does this, it matters whether the state itself is understood to be the actor that commits atrocity crimes (as well as being the actor with the responsibility to prevent and to respond to them); or, rather, if the state is understood as a black-box within which members of society act, sometimes harmfully, in relation to each other. On the former understanding, we are straight back to retrospective responsibility of both preventive and responsive kinds. On the latter understanding, the state in which the problems occur is separated from the commission of atrocities, and held in reserve as the institution that does or does not, can or cannot, put an end to them. One can capture the essence of the latter view by borrowing a colloquial expression about guns, and saying that 'states don't kill people; people kill people'.³² This view, in other words, is that states are generally either positive or benign to human rights protection, and only become malignant if they fail to prevent and/or to respond to sub-state actors' commission of atrocities.

There is partial evidence of this latter view from the core documents of the RtoP. For example, paragraph 27 of the Secretary-General's 2009 report on implementing the responsibility to protect says: '[O]ne of the keys to preventing small crimes from becoming large ones, as well as to ending such affronts to human dignity altogether, is to foster individual responsibility'.³³ There is an implication here of visceral responsibility for human rights existing at the level of sub-state actors, with the state as a more abstract and removed actor, existing in a different plane. Even more to the point, the Secretary-General's 2013 report on state responsibility and prevention suggests that 'the presence of armed groups and militias' and 'the government's lack of capacity to prevent [atrocity] crimes' are two of the risk factors that can lead to atrocity.³⁴ This builds an imagery within which atrocity crimes (can) happen when the state is absent or weak, even if the state is not, in a direct causal sense, retrospectively

³¹ Evans, 'From Humanitarian Intervention to the Responsibility to Protect'.

³² This relates to debates about the corporate agency and responsibility (or lack thereof) of states. See: Morton J. Horwitz, 'The History of the Public/Private Distinction', *University of Pennsylvania Law Review* 130:6 (1982), pp. 1423-82; Christopher D. Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?', *University of Pennsylvania Law Review* 130:6 (1982), pp. 1441-509; Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984); Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', *Ethics & International Affairs* 15:2 (2001), pp. 67-85; Alexander Wendt, 'The State as Person in International Theory', *Review of International Studies* 30:2 (2004), pp. 289-316.

³³ United Nations Secretary-General, *Implementing the Responsibility to Protect*, p. 14, para. 27.

³⁴ United Nations Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, p. 5, paras. 22 and 24.

responsible. This would be example of a state's prospective responsibility, because one can know before the fact that the state is responsible for any future atrocities that occur within its borders, even if the state is not directly involved in those atrocities. I have said 'partial' in the first sentence of the current paragraph because there is also plenty of evidence in favour of the former view that public institutions enable and/or commit atrocities themselves. Paragraph 21 of the same 2009 report says: 'Genocide and other crimes relating to the responsibility to protect do not just happen. They are, more often than not, the result of a deliberate and calculated political choice'.³⁵ I agree.

In terms of the political practice of the RtoP, one could further the argument for separating the states from the individuals and groups whose acts are physically responsible for atrocities through the case of Kenya in 2007/8, in which the RtoP is taken to have been invoked. Presidential elections occurred on 27 December 2007. These subsequently featured allegations of electoral fraud viewed as privileging one ethnic group, the Kikuyu people, of which the winning candidate, Mwai Kibaki, is a member.³⁶ In the aftermath of the election, the Kikuyu became subject to brutal ethnic violence. In the ordinary sense of criminal responsibility, one could easily lay the blame on the militias and youth gangs who were rounding up (mostly poor) members of the Kikuyu group as the targets of ethnic attacks.³⁷ The first pillar of the RtoP, however, enables one to say that the state is responsible, despite the fact that the group associated with the state's ruling elite's were the main initial *targets* of the violence (as opposed to the other way around: the state using its power to commit atrocities against a weaker group). This would be a prospective responsibility of response: one can know that the state is responsible despite a lack of causal involvement in—or even, in this case, any clear interest in—ethnically-driven attacks against a group.

I am not fully convinced by this analysis. In many ways, I view the state's separation from the violence as a legal fiction, which reflects neither a proper historical perspective on the events in question nor a rounded understanding of the nature of violence itself. Even putting this aside, it is very clear that other cases in which the RtoP has been invoked more straightforwardly involve those with formal political power committing atrocities, rather than states simply being unable or unwilling to act in the face of them, with Côte d'Ivoire (2011) and Libya (2011) both being important recent examples.³⁸ In these cases in particular, it would be unrealistic to separate the individual political leaders, members of the military, and other formal power-holders, from a black box called 'the state', which has a separate power to prevent and to respond. For better or for worse, the RtoP has been primarily targeted so far at cases where the government is actively involved in atrocities, rather than at those cases where the state is an abstract entity, standing above and beyond the sub-state-level commission of violence. Where the state is thought to be weak or failing, the foreign

³⁵ United Nations Secretary-General, *Implementing the Responsibility to Protect*, p. 12, para. 21.

³⁶ Jeffrey Gettleman, 'Disputed Vote Plunges Kenya Into Bloodshed', *New York Times*, 31 December 2007.

³⁷ Evans, 'The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All', p. 11; Abdullahi Boru Halakhe, "'R2P in Practice': Ethnic Violence, Elections and Atrocity Prevention in Kenya', *Global Centre for the Responsibility to Protect Occasional Paper Series 4* (2013).

³⁸ Alex J. Bellamy and Paul D. Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', *International Affairs* 87:4 (2011), pp. 825-50.

policies of Western powers typically consider this under the rubric of state-building, peace-building, or the ‘security-development nexus’: a part of ordinary public policy, rather than a part of the ‘high politics’ of the UN Security Council and the Responsibility to Protect.³⁹ The state is not always best understood, for the purpose of human rights protection, as a neutral Weberian shell within which members of society interact in a private or non-state sphere: it is often an active participant, an actor in and of itself, one ‘side’ amongst many in a problem or a conflict.⁴⁰

What the RtoP seems not to do is assign a prospective responsibility of prevention. If it were to do so, this would mean that failure of a first-pillar responsibility would be possible even if no mass atrocity occurs or becomes imminent. It would be a misunderstanding of the political purpose of the RtoP to think that it assigns a responsibility of this kind. The entire point is to link international action to failures of first-pillar responsibility, with those failures of first-pillar responsibility involving either actual atrocities or causal paths that can be demonstrated to lead directly to them.

Harm and human rights protection: a contestable relationship

By contrast, the main political purpose of human rights protection is associated precisely with responsibility that is both prospective and preventative. It goes beyond responsibility not to harm people, and includes the creation of political institutions that systematically and proactively enable people to access the objects of their human rights. As I have argued at more length elsewhere: ‘Human rights protection is best defined as the specific duty of some agents, including but not necessarily limited to states, to put in place the structural conditions where the moral rights that all humans have because they are human can be secured’.⁴¹

Many standard views of responsibility for human rights treat it as a kind of responsibility not to harm people. This is the meaning of the responsibility to ‘respect’ human rights as defined in the respect-protect-fulfil conceptual framework, which emerged in the context of academic and practitioner work on the right to food in the 1980s.⁴² The responsibility to ‘protect’ human rights, within this tripartite framework, is defined as the duty of third parties, typically states, to make sure that moral agents

³⁹ Christopher Cramer, *Civil War Is Not a Stupid Thing: Accounting for Violence in Developing Countries* (London: C. Hurst & Co., 2006); Mark Duffield, *Security, Development and Unending War: Governing the World of Peoples* (Cambridge: Polity Press, 2007); David Chandler, ‘R2P or not R2P? More Statebuilding, Less Responsibility’, *Global Responsibility to Protect* 2:1 (2010), pp. 161-66; Jan Selby, ‘The Myth of Liberal Peacebuilding’, *Conflict, Security and Development* 13:1 (2013), pp. 57-86.

⁴⁰ This connects to the ‘new wars’ thesis. See Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 3rd ed. (London: Polity, 2012).

⁴¹ Karp, ‘The Concept of Human Rights Protection’, in Mills and Karp (eds.), *Human Rights Protection in Global Politics*, p. 154.

⁴² Asbjørn Eide et al. (ed), *Food as a Human Right* (United Nations University, 1984); Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*; Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’, *Human Rights Law Review* 5:1 (2005), pp. 81-103; Thomas Pogge, ‘Are We Violating the Human Rights of the World’s Poor?’, *Yale Human Rights and Development Law Journal* 14:2 (2011), pp. 1-33; Mátyás Bódog, ‘Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in the Jurisprudence of the UN Committee on Economic, Social and Cultural Rights’, in Kurt Mills and David Jason Karp (eds), *Human Rights Protection in Global Politics: Responsibilities of State and Non-State Actors*, (Basingstoke: Palgrave, 2015).

do not violate their ‘respect’ duties not to harm the human rights of individual people. Similarly, Pogge’s ‘institutionalist’ approach to responsibility for human rights focuses on ‘do no harm’ as at the core of responsibility for human rights.⁴³ The difference, however, is that Pogge views economic, political and social institutions, for which we are each ultimately responsible when they act ‘in our name’, with our active and/or tacit support, as relevantly harmful—as opposed to the relevant harm arising from isolated interactions between individual agents.⁴⁴ In the respect-protect-fulfil framework, the point of the ‘protect’ component is to say that states will be responsible for what happens, even if they are not the most direct and final cause of non-state actors’ harmful interactions with one another in the private sphere. In Pogge’s institutionalist approach, we are each ultimately responsible for what our public institutions do. These views from both the policy and the philosophy of responsibility for human rights share a concern with prospective responsibility, as I have defined it in the previous sub-section of this article. There is room for disagreement about the substantive answers that are provided to the question of which agents are specifically responsible, but at the same time, one can track a similar prospective logic of specifying in advance who will be responsible for any harm that is not yet underway or imminent, but which might occur in the future.

It would be tempting to end the analysis at this point, but there is still one important problem. In these discussions, the meaning of ‘harm’ is often underspecified. What might it mean to ‘harm’ human rights, such that third parties might be under a further prospective obligation to ‘protect’ individuals by preventing and/or responding to that kind of harm? This can be answered in at least three different ways. To different degrees (ratcheting up in degree as the analysis proceeds), each of these ways teases the notion of human rights protection apart from the notion of ‘harming’ human rights, and each points in a different way to the importantly prospective nature of the responsibility to protect human rights.

Firstly, most people will intuitively think of ‘harm’ in terms of doing something *to* somebody: causing an outcome or state of affairs, in which a person ends up in a more ‘harmed’ state than they were but for another’s actions or omissions. Feinberg calls this ‘harming as wronging’.⁴⁵ For example, one person imprisons another inside of his own home; or an employer fires a woman because she is pregnant rather than because she has breached any aspect of her contract. These are surely harmful actions to those affected individuals. But are they forms of *human rights* harm? Possibly yes, but simply to cause harm of this kind in and of itself is not enough to determine the answer. In order to link such actions and outcomes to the idea of human rights, one need something more: either an account of which specific agents need to commit the harm in order for it to count as a human rights issue (for example, was the agent who caused the harm directly acting in a relevantly public role?)⁴⁶, and/or an account of how a specific third party with the prospective responsibility to do so has failed to protect human rights, ultimately enabling that harm to be caused at some point further downstream along a causal path.

⁴³ Pogge, ‘Are We Violating the Human Rights of the World’s Poor?’.

⁴⁴ Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002), ch. 2.

⁴⁵ Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law, volume 1* (Oxford: Oxford University Press, 1984), pp. 105-25.

⁴⁶ Karp, *Responsibility for Human Rights*, pp. 116-51.

Secondly, however, the notion of harm just discussed can be contrasted with a different notion of harm that Feinberg calls ‘setbacks to interests’.⁴⁷ Not all interests are human rights, but all human rights do seem to be interests. Say that the only primary schooling in a large rural area is provided by religious actors. The schools educate boys but not girls. Are the girls ‘harmed’ by the education system? According to the notion of ‘harm’ that defines it as someone doing something directly to someone else—as in, X does A to Y; Y is more harmed than before as a result of A; therefore X is responsible for harming Y—it is challenging to see the harm. To receive a failing mark that one does not deserve fits easily into the notion of ‘harm as wronging’ (though, depending on the reason, it may fall outside the context of human rights). By contrast, for an individual or a group not to be in the educational system at all is a more complicated issue to digest for the sake of qualifying harm and attributing responsibility for it. For example, some of the girls themselves (and their parents) might not even feel particularly harmed, or have any desire for change; they might be ardent believers in the religious rationale for the current practice. Indeed, one of the features of structural violence is that it socialises people into not seeing harm, whereas to others it might be quite evident.⁴⁸ However, one could still say that the harm has been caused in a different sense, if one believes that the girls are being deprived of the tools and opportunities that would be needed for the robust exercise of agency, in order to make decisions about their lives that are authentically their own. Their ‘interest’ in primary education, which can be viewed as a human-rights-based interest due to its link to basic security, basic welfare and/or basic human agency, is harmed.⁴⁹ One element that would need to be in place for an interest to be constituted as based in human rights is that it would need to be justifiable to assign duties to specific actors to protect those interests.

This line of analysis changes the notion of human rights protection from the third-party-oriented one just mooted—Z preventing and/or responding to X harming Y—into something different and richer. When harm to human rights is viewed in terms of ‘wronging’, then a failure to protect is *not* the harm in and of itself. Rather, on that view, the failure to protect consists merely in allowing the harm to happen. By contrast, when harm to human rights is viewed in terms of ‘setbacks to interests’ (always remembering that not all human interests are human rights), then the failure to protect by failing systematically and proactively to ensure that all individuals have access to the objects of their human rights, is *in and of itself* the harm. Importantly, however, this is not as amenable as the notion of harming as wronging to retrospective causal logic. This operates at a point in time earlier than that at which one or more individuals end up in a demonstrably ‘harmed’ state, as compared to a ‘less harmed’ or ‘unharmed’ state in which they supposedly were in before, but for another agent’s actions.

Thirdly, one could put forward an even stronger argument that ‘harm’, even in this more indirect and abstract sense of ‘setbacks to interests’, is not central to the notion of human rights protection at all. To be clear, the argument is not that harm lacks

⁴⁷ Feinberg, *Harm to Others*, pp. 31-64.

⁴⁸ Johan Galtung, ‘Violence, Peace, and Peace Research’, *Journal of Peace Research* 6:3 (1969), pp. 167-91; Karp, ‘The Concept of Human Rights Protection’, in Mills and Karp (eds.), *Human Rights Protection in Global Politics*, p. 142.

⁴⁹ Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

centrality to *human rights*, which seems so odd as to be absurd; the argument, rather, is that the notion of harm is separable from the specific responsibility of human rights *protection*. Harm can often *result* from a failure to protect human rights—if so, those who failed to protect can be held accountable for that harm—but this does not mean that the identification of harm is *necessary* in order to identify a failure to protect. The responsibility to protect can be breached, even if harm is not demonstrably caused. As an analogy, think about employers' responsibility not to allow a culture that is conducive to bullying to exist in the workplace. This responsibility can be breached if (and simply because) a culture that is conducive to bullying exists, even if no one is actually bullied. This structural notion of responsibility can be extended to the notion of human rights protection, by thinking about the protection responsibility of specific actors as prospective, and as separable from the retrospective responsibility for any harm to human rights that is caused.

The harm principle is deeply embedded in a liberal discussion of the justifiable limits of public coercion and interference in the private sphere.⁵⁰ At its core is the idea that we can each do what we want, as long as we do not harm others in the process. This is the idea of non-interference. There have been attempts to bring positive duties in to the harm principle, but these have focused on defining a failure to 'rescue' as also constituting harm.⁵¹ However, neither the classical minimalist/negative formulation nor the subsequent attempt to bring duties of rescue into the picture seem best to capture what one would need to do, in order to protect the right to personal security, the right to primary education, the right to non-discrimination, the right to free assembly, and so on. Human rights protection calls for a qualitatively different set of actions, centred on the structure within which social action occurs. Going more deeply, the notion of harm is intended to guide decisions in criminal-law and civil-law contexts.⁵² If I am being sued for damages, or being accused of criminal action, I can try to defend myself by saying 'I did not actually *harm* anyone at all', or 'the harm was necessary in the circumstances, given harm that I was facing to myself'. To take the universal responsibility of all moral agents, acting in their private capacities, not to harm others—even/especially total strangers—out of these contexts, and to place it at the core of the responsibility to protect human rights, seems to miss out on the specific political relationship that the concept of human rights protection invokes. This is the relationship between agents of human rights protection and those whose human rights they are meant to be protecting. The answers to the various questions that one can raise about 'harm', and what counts as evidence of it for the sake of knowing whether a particular putatively harmful act is justified, should not matter to the question of whether a failure to educate girls is a failure to protect human rights. It is a failure to protect human rights *even if* it is contestable to define, or difficult to demonstrate, whether harm has been caused.

Furthermore, to use 'harm' as the main lens through which to assess the point at which a failure of responsibility can be identified can activate a discussion of how to balance the harm to those whose human rights are under-protected, with the harm to the human-rights-based interests of others (for example, the religious members of society in the school example) that would be caused if powerful authorities, at any

⁵⁰ John Stuart Mill, *On Liberty* (Oxford: Oxford University Press, 2008/1859).

⁵¹ Andrew Linklater, 'The Harm Principle and Global Ethics', *Global Society* 20:3 (2006), pp. 329-43.

⁵² Donald A. Dripps, 'The Liberal Critique of the Harm Principle', *Criminal Justice Ethics* 17:2 (1998), pp. 3-18.

relevant level of governance, would insist on changes to the way they run their societies and their lives. The notion of harm subtly yet powerfully embeds such debates within a rigid conception of the public and the private, according to which public protection prevents private harm. This, in turn, assumes: that human rights protectors are always states, that states are always fully public, and that human rights protectors themselves (being fully public, and being states) cannot be harmed in a way that is relevant to human rights. These assumptions might be relevant to ideally functioning liberal-democratic societies—I make no judgement on that in this article one way or the other—but they can be very far removed from the facts on the ground in contexts where human rights problems are apparent and urgent. These assumptions, which stem from the lens of the harm principle, need to be tackled and analysed in order to move forward, rather than left untouched as the supposed baseline that underlies what the entire discussion of human rights protection is about.

As a response to this, the responsibility to protect human rights (lower-case letters) can be viewed as deeply *constitutive* of public actors, whereas the RtoP framework is mostly *regulative*.⁵³ The RtoP works within a positivist international-legal framework, where some actors have already been constituted as sovereign. The RtoP's first pillar takes this as given, picks out these sovereign actors as the responsible agents, and spends most of its time and energy on questions of their retrospective responsibility to prevent and to respond to imminent and actual atrocity. The only potentially constitutive elements of the RtoP centre on sovereignty rather than on human rights. One may ask within the RtoP: when does a state behave so badly that it does not count as sovereign any more? The responsibility to protect human rights, by contrast, does most of its work at the prospective end. It gives actors information about who they would need to be, and what they would need to do, in order to count as human-rights-responsible agents. The point of human rights practice is to change the reality of social practices at a point far earlier than, and far deeper than, that at which individuals are at concrete risk of harm. Rights can be unprotected, and agents can fail to protect human rights, even if no harm is caused.

Conclusion

This article first drew an analytical distinction between the responsibility to protect human rights (lower-case letters) and the Responsibility to Protect policy framework, or RtoP. On the one hand, the article put aside the view that these are *so* radically different that the process of trying to investigate their relationship is a non-starter. On the other hand, the article put aside the view the RtoP is the only proper way to understand the nature of an international responsibility to protect. Moving forward on the basis that the nature of the relationship *could* be one of set and sub-set—with the RtoP being one specific and non-exhaustive instantiation of a broader responsibility to protect human rights—the article proceeded to investigate in substantive terms how the kinds of responsibility assigned to agents under the responsibility to protect human rights and the RtoP match up with one another.

In the final analysis, the differences between the two are significant. Firstly, the RtoP is a reversion to a discourse of helpless victims and powerful saviours, whether those saviours exist at the level of the responsible domestic state, or at the level of the

⁵³ John R. Searle, *The Construction of Social Reality* (London: Penguin, 1995), pp. 27-29.

broader international community. By contrast, the responsibility to protect human rights, in order to count as such, needs to treat people as rights-holders; the responsibility assigned needs to co-relate to rights. The RtoP is overridingly concerned with a discussion of retrospective responsibility, whereas the responsibility to protect human rights needs to start with a focus that is prospective. This is different from the distinction between prevention and response; there can be prospective and retrospective responsibilities of prevention, as well as prospective and retrospective responsibilities of response. The political purpose of the RtoP is associated with defining a failure of responsibility, at the level of the supposedly least-contentious first pillar, in terms of a clear link to building, imminent or actual harm. The responsibility to protect human rights does not need to be understood in this way. The point of the concept of the responsibility to protect human rights is to constitute human-rights-responsible agents, who can fail to count as such—and therefore fail at their responsibility—even if there is no clear link to harm.

It seems to me that there are two ways forward for those who want to work constructively within the RtoP. The first way forward is to separate the RtoP very clearly from the responsibility to protect human rights: simply stop referring to it as linked to the broader framework of international human rights, or as a human-rights-based norm. The RtoP is about atrocity prevention and response. This is a very valuable and important endeavour, but it is not the same as protecting human rights. I suspect that this way forward will not be adopted, as the RtoP draws heavily on its claim to being based in human rights for moral authority and rhetorical support; however this does not make the finding any less significant or any less important to say. The second way forward would be for scholarship and practice to engage much more systematically with the distinction that I have drawn between prospective and retrospective responsibility. This involves the investigation of more ways that the RtoP's first pillar can be genuinely engaged in the assignment of prospective responsibility to public institutions and agents. This is not as easy as it seems. It is not enough to say quickly and uncritically that 'sovereign states are responsible', and then to move on to discuss retrospective responsibility. It would mean thinking more deeply about the constitution (rather than simply regulation) of agents as human rights protectors, separately from their status as sovereign states.

Date accepted: 1 June 2015