A Feuerbachian Inversion:
From Sovereign Rights and Subjects Duties to Citizen Rights and State Duties

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The responsibility to protect (R2P) and the Protection of Civilians (PoC) are emerging international norms (or principles) with similar origins and covering similar ground. One of the most attractive features of R2P and PoC is the priority it gives to human rights over state rights. R2P emphasises that states to not have rights to intervene but harmed civilians have rights to protection and states have responsibilities. This radical inversion carries into international norms the 'Feuerbachian' inversion of domestic norms imposed on Westphalian sovereigns by enlightenment thinkers—who insisted that subjects did not have to prove their loyalty to sovereigns but that states had to justify themselves to their citizens. However, there remains concern at potential overreach and abuse and the ways in which the risk of such abuse may be limited. The reservations are at least as firmly grounded in western and Westphalian traditions. However, I will argue that the latter fear should not trump the feelings of empathy for unprotected civilians whose lives and livelihoods are threatened by conflict. The risk of abuse should be recognised and addressed by legal and institutional means.

The responsibility to protect (R2P) and the Protection of Civilians (PoC) are emerging international norms (or principles[1]) covering similar ground. One of the most attractive features of R2P and PoC is the priority it gives to human rights over state rights. R2P emphasises that states do not have rights to intervene but harmed civilians have rights to protection and states have responsibilities. This radical inversion carries into international norms the inversion of domestic norms imposed on Westphalian sovereigns by enlightenment thinkers—who insisted that subjects did not have to prove their loyalty to sovereigns but that states had to justify themselves to their citizens. These related inversions take the same form as Feuerbach who famously challenged the idea that God created man in His image with the idea that man may have created God in his.

However, there remains concern at potential overreach and abuse and the ways in which the risk of such abuse may be limited. I will argue that they should not be seen as ideas from the West imposed on the rest. They are much more broadly grounded than that, finding support in (i) the empathy for others that is part of being human and which finds a variety of expressions in the religions and cultures of the world; (ii) the claims by all rulers to protect

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[1] Edward Luck, *UN Security Council: Practice and Promise* (London: Routledge, 2006).

their followers and (iii) the fact that many rulers have persecuted rather than protected their subjects.

Similarly, the reservations are at least as firmly grounded in western tradition than that of others. Indeed, it was the miseries inflicted by seventeenth century interventions purportedly to protect co-religionists that led to the principles of non-intervention in the first place—leading to a Westphalian 'wisdom' that interventions generally produce much more harm than good.

However, I will argue that the latter fear should not trump the feelings of empathy for unprotected civilians whose lives and livelihoods are threatened by conflict. The risk of abuse should be recognised and addressed by institutional means.

Shared Origins

It is widely said that R2P and PoC share common origins in international humanitarian law (IHL) and in human rights law. I suggest that they spring from the same roots.

Both norms emphasise the value of protecting members of other communities from violence (R2P and PoC) and other severe deprivations (PoC). Although all cultures celebrate the special ties we have with particular groups of fellow humans (kin, locality, ethnicity, religion and culture itself). While these values may be utilised to generate conflict, most or all cultures recognise, in one form or another, a common humanity—and a concern for others. The duties to avoid harming others and to go to the aid of those who are suffering are a prominent part of many religions. In the last century it has been formalised in IHL, reinforced by the UN Charter, the UN Declaration on Human Rights and the Human Rights Conventions. While these are obligations to which all nations have committed, this does not mean that we should ignore the variety of supports found within the cultures and religions of the world. It means that we should emphasise these as part of 'norm localisation'.

Both norms emphasise the primary responsibility of the relevant sovereign states—an idea that is grounded in the long standing attempts by rulers to legitimise their regimes based on the claim that they protected their people. While there were other claims to legitimacy, this is always, at least, a supplementary claim of those who justify the power they wield.

Protectors and Persecutors—Leviathans and Tyrants

Of course, with every grant of power comes the possibility of abuse. What happens if sovereigns do not live up to their claims? What if they cannot or will not protect their subjects? What if they 'turn feral', threatening the very people whose defence is the core of their *raison d'etre*? There is a special obloquy for those who are entrusted with power for the benefit of another

and use it against them—doctors who murder patients, parents who abuse their children, teachers who brainwash rather than educate their pupils. It is common for the law to treat such abuse of power as aggravating the offence. But sovereigns who turn out to be a greater threat to their peoples than the real or imagined enemies against whom they claim to provide protection are rarely punished at all. Even when they kill thousands, prison doors do not generally open for them. The doors that open for them are those of the palace at home, the embassy abroad and the private jet in between—as well as the doors to bankers who lend the tyrant money to buy the plane, the palace and to pay for the persecution of civilians. And after it is all over, the citizens will have the responsibility to repay this 'sovereign debt'.

Why is this tolerated? Why do not other states intervene to protect citizens from the tyrants who oppress them? The answer lies in the wars of religion which involved frequent interventions to purportedly protect co-religionists from persecution. Such interventions were generally undertaken for other reasons and the intervening forces added to the plight of those on whose behalf they supposedly intervened. The 1648 Treaty of Westphalia can be seen as grounded on the view that the consequences of intervention were so bad that it was better to let the tyrant do what tyrants do. It was seen as better to have refugees streaming over the border out of the tyranny than have troops going the other way to stop it. For this reason, I have called the Treaty of Westphalia 'a tyrant's charter'—written of the tyrants, by the tyrants for the tyrants.[2]

Despite the claims of sovereigns to protect their peoples the Westphalian concept of sovereignty and sovereign legitimacy is effectively predicated on its opposite. Sovereignty is based on effective control of territory. The effectiveness is initially established by what I have dubbed, the "prior successful use of force"[3] to gain effective control against a previous sovereign. It is maintained by a continued perceived willingness and capacity to use that force against anyone who would seek to similarly supplant them. The main threat was traditionally other tyrants or groups demanding religious or other freedoms. Members of such groups are not protected from attack but subject to it. If people did not like the sovereign or what was done in his or her name then it was necessary for the sovereign to impose his will and demonstrate his authority by massacring groups of subjects and gruesomely executing their leaders. Rather than giving way to the wishes of the people, sovereigns saw it as their duty to enforce their will and demonstrate their sovereignty. Their '*raison d'etre*' was not the rights of citizens but the preservation of the dynasty and its authority. Where the

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[2] Excepting the United Dutch Provinces.
[3] See Charles Sampford, 'Challenges to the Concepts of "Sovereignty" and "Intervention"', closing keynote at World Congress on Legal and Social Philosophy, 1999, published in T. Campbell and B.M. Leiser (eds.), *Human Rights in Philosophy and Practice*, (Aldershot: Ashgate, 2001), pp. 335–91.

criterion of sovereignty was the prior successful use of force, human rights violations did not so much undermine sovereign legitimacy but prove it.

One may conclude that, despite traditional claims of sovereigns to protect their people, the heart of Westphalian sovereignty undermined it. The authoritarian states that were emerging during the century of Westphalia and those that followed are not so much concerned with protection of civilians but protection *from* civilians and used their claimed monopoly of legitimate force[4] against them. If one were to formulate an R2P or PoC principle for Westphalian states, they would be more likely to refer to a 'Responsibility to Power' and power over citizens. For some of the more religiously minded, it might be seen as the 'Responsibility to Persecute'.

This idea has been embraced by tyrants the world over. This is not an 'eastern' or 'Asian' value. It is a western idea that has been picked up with obscene alacrity.

Sovereign Legitimacy—Domestic and International

As we have seen, in 1648 legitimacy in both domestic and international law and theory was based on the effectiveness of the sovereign's rule. Within some European states, it was challenged almost immediately and within thirty years concepts of sovereignty in domestic and international law started to diverge. John Locke argued that sovereigns were *entrusted* with power. If they abused that trust and became a threat to their people, the latter had a right to revolt. That was a pretty inefficient form of regime change and the right to revolt against governments who did not protect their civilians became a right to choose the government that best reflected their interests and values. This shift was part of what I call the Enlightenment's great leap forward in which a variety of governance values (*liberte, egalite, fraternite*, democracy, human rights, and the rule of law) were demanded and partly secured in United States, United Kingdom and a growing number of European countries. At its centre was a Feuerbachian reversal of the way rulers and ruled related to each other. Feuerbach pondered the relationship between God and Man. Christians imagine that God created man in his own image. Feuerbach suggested that it was at least as likely that Man created God in his own image.

Enlightenment *philosophes* suggested a similar inversion for sovereignty. Before the enlightenment, 'subjects' had to demonstrate their allegiance and loyalty to their 'sovereign'. The *philosophes* proclaimed that 'governments' had to justify their existence to 'citizens' who chose them. Once the reversal of the relationship was suggested, it was very hard to go back to the old way

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[4] Although Max Weber did not refer to the "monopoly of legitimate force" until 250 years later, the seventeenth century rulers were very much concerned to establish such a monopoly against their 'over-mighty subjects'. Max Weber, *Economy and Society*, (Berkeley, CA: University of California Press, 1922 [1979]).

of looking at things. Indeed, it became as broadly popular with civilians as Westphalian sovereignty was with some authoritarian states.

This approach led to the new basis of sovereign legitimacy in the domestic law and political theory of the increasingly large number of democracies—the acquiescence, then consent, then the active choice of the governed.

International law, however, has continued to recognise states and governments on the basis of who exercises effective political control over discrete territories. Even when a democratically elected government is overturned by a *coup d'etat*, the ambassadors of the new regime are accredited by foreign powers and are allowed to take that country's seat at the United Nations and other international forums. This glaring inconsistency caused considerable tension and great soul-searching within democratic states and led to the tentative and controversial claims that there was an emerging norm of humanitarian intervention. This revival of pre-Westphalian ideas of intervention faced a lot of hostility that not only cited Westphalian norms but also the sorry history of interventions that helped stimulate it. One of the problems was that this was formulated as a right of states rather than civilians. One of the great achievements of the International Commission on Intervention and State Sovereignty (ICISS) was to effect a similar 'Feuerbachian inversion' on the 'Right to Intervene'. The relevant rights belonged to human beings. States had responsibilities to protect them—with the primary responsibility being of the State in which they reside and contingent responsibility on other states. It is radical because it denies tyrants the right to do what tyrants have always done and for which international law rewarded them. Accordingly, I see R2P not a western attempt to interfere in other people's problems but a global attempt to deal with a western problem at the heart of the Westphalian system.

PoC and R2P—Differences in Origins and Exemplars

R2P and PoC share similar normative origins and are both directed at the idea that states should live up to their claims of protecting their civilians, should receive international support in doing so, and could be ultimately required to do so. The two principles came together in Libya. In UN Security Council Resolution 1970, Colonel Gaddafi was referred to the International Criminal Court (ICC) for doing what tyrants traditionally do to protect their power. In UN Security Council Resolution 1973/5, Colonel Gaddafi's domestic responsibility to protect civilians (R2P Pillar One) was explicitly recognised and the use of international uninvited force was authorised for the protection of civilians in Libya. It is notable that the UN Security Council used PoC rather than R2P pillar three in this case.

While the two merged in Libya, R2P and PoC have been developing along different paths and exemplified by different exemplars, which go a long way to explaining the differential level of international support.

Discussion of PoC at the international level started with existing armed conflicts and sought to protect civilians in pre-existing conflicts according to well accepted principles of International Humanitarian Law (IHL). Accordingly, PoC was, from the beginning, about reducing the effects of conflict by an institution established to prevent conflict because of the disastrous effects or previous conflicts. As such, it has grown with less fanfare, much more consensus and does not appear to depart from that core business of the UN.

By contrast, R2P emerged as a proposed response to enormous challenges posed by Rwanda, Srebrenica and Kosovo where the consequences of internal conflict appear so great that the creation of what is effectively a new international conflict was seriously contemplated. Indeed, the United States and United Kingdom considered them so serious that they were prepared to start a war that appeared to be contrary to international law.

In fact, both PoC and R2P represent a continuum of responses. There are three 'pillars' of R2P: (i) the responsibility of the State, (ii) the responsibility of the international community to help the State and, only in rare circumstances (iii) the above responsibility to act in spite of non-consent. PoC can be seen to have a range of 'pillars' or forms with different versions of the norm for relevant actors (*Combatant PoC, Humanitarian PoC, Peacekeeping PoC, Security Council PoC*).

R2P was contentious from the beginning because it was a response to an event that had led to 'Pillar Three' action without the legal authority that many (including this author) argued was necessary at the time and which ICISS later argued. PoC was less controversial because it started with the accepted legal obligations of combatants.

From Pillars to Pyramids

While the architectural metaphor of a pillar is a common one, I am increasingly inclined to doubt its utility here.[5] Pillars are seen as separate and of similar size and height (without which they cannot hold up a lintel). But in R2P and PoC, the various elements are only effective if they interact and neither are, nor intended to be, of similar size and weight. In R2P, the primary emphasis is on the responsibilities of host governments and the responsibility of other states to assist them in that responsibility rather than to supplant them in this role. In PoC the primary obligation is on combatants and the state (if it is not one of the combatants) with international actors filling in gaps. This suggests a different architectural metaphor—a pyramid:

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[5] See Discussion in Charles Sampford, Rodney Smith and A. J. Brown, 'From Greek Temple to Bird's Nest: Towards a Theory of Coherence and Mutual Accountability for National Integrity Systems', *Australian Journal of Public Administration*, vol. 64, no. 2 (2005).

1. The less coercive versions of the norm will have the largest application—indicating the solid and broad base of the pyramid. The more interventionist and ultimate coercive measures are the higher and narrower steps on the pyramid.

2. Even if the norms covered by Pillar Two or Pillar Three are called on, the Pillar One responsibility of states remains in force and the state will be expected to contribute where it can. International assistance is still to assist, not to supplant that responsibility. Thus the various norms build on each other and are simultaneously present and in force. The same is true of PoC where combatant PoC is primary.

3. It gives the greatest role in protection to the sovereigns who claim to provide it as justification for their sovereign power.

4. In terms of protection actually given, most is provided by intra-state forces—though it is important to emphasise the critical role of non-state elements. The latter play a critical and not always recognised role in normal times when civilian security is not merely supported by security forces such as army, police and fire brigades but by community groups, the way people live and physical barriers such as locks on doors which together constitute what I call "civilian protection systems".[6] It is even more relevant in times of disorder when the security forces are ineffective, feral or partially replaced by international civil-military forces. Effective international assistance with the agreement of the sovereign state (Pillar Two) or with UN Security Council mandate (Pillar Three) can only do so much and needs the collaboration and support of community groups from the populations to be protected even more than they need it from international NGOs.

5. One might go further and suggest that communities have been protecting themselves since pre-historic times and that this constitutes the real base of the pyramid on which the state (generally) provides another, smaller step and international action an even smaller one.

This approach reflects much thinking about norms and regulation such as Braithwaite's 'enforcement pyramid' for corporate regulation.[7] Regulatory goals are not principally achieved by the threat, let alone the imposition of sanctions. The availability of sanctions is useful, sometimes necessary to secure compliance from some and to provide extra reasons for compliance

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[6] See Charles Sampford, *Protection of Civilians and the Rule of Law*, Challenges of Peacekeeping Forum, 2010.
[7] See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1995).

from others. But most compliance needs to be through norm-setting that taps into pre-existing norms—the lowest and broadest step. These should be publicised and justified with the engagement of relevant sanctions—one view of the next step. Minor and first breaches generate reminders (another step) which, if ignored, lead to minor or conditional sanctions (yet another). The imposition of significant sanctions is near the top and 'corporate capital punishment' as the tiny but very useful peak. While capital punishment for individuals is unacceptable for most, using it for organisations may be a very sensible approach and should be considered more often. If a regime is no longer recognised by the international community as a whole and by key international institutions (such as the UN, World Trade Organisation or Bank of International settlements) its viability is, at the very least, limited.

The pyramid metaphor might be useful in emphasising the time and effort that must go into building them. The pyramid metaphor is also useful in understanding the greater difficulties in securing acceptance for R2P. While PoC has been built up from its broad base—and the pointy end has only been attached this year through UN Security Council Resolution 1973—with R2P, the construction had to start from the pointy end because that was what addressed the Kosovo issue which was the *raison d'etre* for its creation. While there is a great deal of mystery about the way that the pyramids were built, one does not have to be either a stonemason or an engineer to know that this is not the recommended method of building pyramids. Given the construction brief, progress has been remarkable.

Potential Overreach and Abuse

The largest obstacle to securing broader support for R2P is, of course, the concern that it may be abused through its use to justify invasions mounted for other reasons. This is a concern that should be fully acknowledged and addressed. The thoroughly western Westphalian principle of non-intervention was generated by direct experience of the consequences of abuse. The ICISS report acknowledged the risk—a risk that materialised almost immediately when Commissioner Ignatieff used it to justify the invasion of Iraq.[8]

The potential of overreach is not confined to R2P. The Red Cross defines PoC as "all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law"—a formulation that seems to go beyond protection to promoting rights and better societies. I could imagine a member of the G6 seeing in those words the possibility that foreign forces might enter a country with UN Security Council and home state approval but would then be engage in set about pursuing "all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of

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[8] M. Ignatieff, 'Why Are We in Iraq?' *New York Times*, 7 September 2003, 38ff.

law". Given the range of international human rights laws and their expansive and ambitious spirit the foreign forces would be there forever. Indeed, none of the western countries that contribute to peace keeping forces provide full respect for individual rights set out in the UN Conventions that they have ratified. Of course, the Red Cross did not intend such outcomes. In international civil military operations, foreign forces are fully extended trying to secure basic protection, securing food and medical supplies and support for the rule of law. The spirit of human rights is left to supportive NGOs and state officials. However, fine words penned with good intentions by those with the purest motives can be used for other purposes and it is well to address and limit those risks.

Limiting the Risk of Abuse

Three ways of limiting this risk occur to me—sticking to the Westphalian formula, narrowing the scope, utilising two R2P 'moves' and subjecting all action in pursuit of R2P and PoC to the international rule of law. I will discuss the third and conclude with the last.

The ICISS made two very important moves in constructing R2P to make it less amenable to abuse. The first was to perform the 'Feuerbachian inversion' on the claimed 'right of humanitarian intervention' by insisting that the only rights were those of the civilian population—states had responsibility. The second was to emphasise that the primary responsibility was that of the state where the relevant civilians lived. Responsibilities of others was to assist that state with its agreement and only in the rarest of occasions, and even then only with full legal authority, without that agreement. This was formalised in the 2005 three pillars approach.

PoC effectively operates under a similar regime—starting with, and defined by, individual human rights and with a strong emphasis on assisting states to fulfil their primary duty. I have suggested that similar moves might clarify PoC and avoid any concerns at overreach under the Red Cross definition. The number and scope of rights covered by PoC stands: but the primary responsibility for their realisation lies with the state where the civilians are located. Humanitarian actors and peacekeepers have a role in assisting—with the latter involved in more limited security roles set out in their mission. The UN Security Council has an overall responsibility for helping to marshal international support and, in very rare cases, insisting on it.

The pillars approach is not only a means for preventing abuse but enables clearer thinking and more effective action. A general norm is not self-implementing. Such implementation will usually require several actors to contribute consecutively, contemporaneously and sometimes in both ways. If they are to play their role in implementing the norm, it is important to ensure detailed normative guidance through customised norms and, where necessary, formal prescription through detailed laws. They also need

appropriate institutional structures and operational procedures to fulfil that role. The R2P pillars can be seen as structured in this way. Pillar one addresses the role of the state. Pillar two addresses the role of other states when consensually assisting a state. Pillar three addresses the role of the UN Security Council and member states providing that assistance without the consent of the host state.

As indicated, PoC could be similarly pillarised (if not pilloried). Combatant PoC deals with the role of the combatants, PoC2 with peacekeepers, PoC3 with other humanitarian actors and PoC4 with the UN Security Council. We have sought to identify the relevant norms, institutions and operational procedures for each (though we do not attempt, in this project, to do so in the detail that military and police forces do).

R2P and PoC ultimately give the UN Security Council, and those they authorise, power. The natural concern that such power might be abused can be addressed by making the conferral of such power conditional on those so authorised accepting the jurisdiction of the International Court of Justice and ICC.

There should be no irony in insisting that new international norms take their place within, rather than outside the international law among which their proponents would like it to take its place. That is how the Westphalian tyrannies became the eighteenth century *rechstaats* and ultimately liberal democracies. And it is how the potential tyranny of self-serving interventions can be addressed.

Conclusion

As we have seen, R2P and PoC are deeply embedded in the claims of sovereigns to protect their people—claims with which they justify sovereign power. Unfortunately, the abuse of such power was not only frequent but grounded claims to sovereignty in both domestic and international law and politics because it demonstrated effective control. This made the Treaty of Westphalia a 'tyrant's charter'. The enlightenment inspired democratic revolutions of the eighteenth century performed a Feuerbachian inversion of the relationship between sovereign and subjects by which sovereign states had to justify themselves to, and be ultimately chosen by, those they now called 'citizens'. R2P and PoC offer a similarly Feuerbachian inversion within international law and politics. The concerns about R2P are not particularly eastern/southern but reflect the disastrous experience with interventions that spawned Westphalia. Part of the solution is to emphasise the primary responsibilities of states for the protection of civilians. But the only effective solution in international affairs is the same as that in domestic affairs—to subject the use of force to legal rules.

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