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In Praise of Description

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Abstract
In his *Philosophical Investigations*, Ludwig Wittgenstein declared: 'We must do away with all explanation, and description alone must take its place.' Michel Foucault in turn repeatedly referred to his method of study as description, arguing that the role of philosophy is not to reveal what is hidden, but rather to make us see what is seen. This essay suggests why the turn to description as a mode of legal writing might be a productive move at this time.

Key words
critique; description; international law; philosophy; practice

Writing is an experimental and unpredictable process. My experience as a scholar has been that the work of writing is not mechanical – it is difficult to know just what a text will transmit or whether an author's ideas can effectively be transferred to the page or, more importantly, to the reader. And, after many years of being involved in the task of writing about law, in different roles, I am still not always sure why it is that a text speaks in the way it does at a particular time and place. My recent experience of writing about law, and in particular writing a book called *International Authority and the Responsibility to Protect*, has left me with the sense that a turn to description as a mode of legal writing might be a productive move at this time.[1] I would like to say a little about the context that led me to come to praise description in this essay, and then to make some more general remarks about the political and aesthetic issues involved in the turn to description.

I

The project that led me to think about description as a method for writing about law was an exploration of the normative significance of the emergence of the responsibility to protect concept. The responsibility to protect concept was initially developed in the 2001 report of the International Commission on Intervention and State

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1 A. Orford, *International Authority and the Responsibility to Protect* (2011).

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Sovereignty (ICISS). ICISS was an initiative, sponsored by the Canadian government, undertaken in response to serious concerns about the legality and legitimacy of the 1999 NATO action in Kosovo and its implications for the international order.[2] The responsibility to protect concept is premised upon the notion, to quote former Secretary-General Kofi Annan, that 'the primary *raison d'être* and duty' of every state is to protect its population.[3] If a state fails to protect its population, the responsibility to do so shifts to the international community.

The responsibility to protect concept was included in the World Summit Outcome of the General Assembly unanimously adopted by heads of states and governments in 2005.[4] The General Assembly there endorsed the notion that both the state and the international community have a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Though the General Assembly confined the situations in which the international community might intervene militarily to those in which a state was 'manifestly failing' to protect its population, it endorsed a broad range of preventive, early-warning, and capacity-building actions to assist states 'before crises and conflicts break out'.

In the wake of the World Summit, many states and regional organizations (particularly the African Union and the European Union) began to refer to the responsibility to protect concept in official statements, stressing its relevance to international order, security, and development. A range of civil society and private-sector actors, from counterinsurgency specialists to human rights activists, refugee organizations, and Christian aid workers, have now begun enthusiastically to redescribe and reconceptualize their missions in terms of protection. All over the world, civil society groups have organized around this issue. Civil society actors have also begun to integrate their activities across a remarkable range of areas within a protection framework and to call upon states to do the same.

The endorsement of the responsibility to protect concept in the World Summit Outcome led to a process of transformation at and around the United Nations. According to Secretary-General Ban Ki-moon, although the jurisdictional 'scope' of the responsibility to protect is 'narrow', the techniques for its realization are broad.[5] In his words, the implementation of the concept will involve 'utilizing the whole prevention and protection tool kit available to the United Nations system', with the aim of 'integrating the system's multiple channels of information and assessment',[6] adopting a 'unifying perspective', and facilitating 'system-wide coherence'.[7] The United Nations has focused attention upon the development of its ability to respond to protection challenges through co-ordinated systems of early warning and

2 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001).
3 UN Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005, (2005), para. 135.
4 2005 World Summit Outcome, UN Doc. A/RES/60/1, (2005), paras. 138–139.
5 Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsibility to Protect: International Cooperation for a Changed World', UN Press Release SG/SM/11701 (2008).
6 Ibid.
7 UN Secretary-General, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/63/677 (2009), at 7.

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information analysis, to ensure that the United Nations 'acts as one in the flow and assessment of information'.[8]

For many commentators, the responsibility to protect concept came of age, for good or ill, with its invocation in SC Res. 1973 authorizing 'Member States that have notified the Secretary-General, acting notionally through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack' in Libya.[9] In the aftermath of SC Res. 1973, the difficulty lies not in making the argument that the responsibility to protect concept has normative significance, but rather in agreeing on what its significance might be.[10]

II

Attempting to grasp the implications of the responsibility to protect concept posed challenges in two ways. The first was that when I tried to understand the significance of the responsibility to protect concept, I was faced with a gap between practice and critique. On the one hand, there was a striking amount of activity and energy devoted worldwide to the adoption of the responsibility to protect concept and, on the other hand, most critics ignored or at best dismissed this activity, insisting that the normative entrepreneurialism around the responsibility to protect concept was at best irrelevant to the conduct and intelligibility of international relations, and at worst a cynical deception designed to mask the reality of international power politics.

In the irrelevant camp were the many commentators who argued that the responsibility to protect concept was insignificant. For some critics, the indeterminate content and uncertain status of the responsibility to protect concept seemed to have been left deliberately vague, suggesting that states had no intention of taking on new obligations to protect suffering peoples in foreign lands.[11] From this perspective, the invocation of the responsibility to protect concept was an empty gesture made by the leaders of Western states to assuage the growing popular pressure for action in situations of humanitarian crisis. Many, if not most, international lawyers took this view, assuming that if the responsibility to protect concept imposes no new binding obligations upon states or international organizations to take action in situations of mass atrocity, it has no normative effect.[12] Most agreed that the responsibility

8 UN Secretary-General, Early Warning, Assessment and the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/64/864 (2010), at 4, 8.

9 UN Doc. S/RES/1973 (2011).

10 See, further, A. Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', (2011) 3 *Global Responsibility to Protect* 400; A. Orford, 'What Kind of Law Is This?', *London Review of Books Blog*, 29 March 2011.

11 D. Chandler, 'Unravelling the Paradox of "The Responsibility to Protect"', (2009) 20 *Irish Studies in International Affairs* 27 ('the R2P is conceptually and institutionally a reflection of the evasion of Western responsibility for others'); N. J. Wheeler and F. Egerton, 'The Responsibility to Protect: "Precious Commitment" or a Promise Unfulfilled?', (2009) 1 *Global Responsibility to Protect* 114.

12 See, as representative examples of legal scholarship, J. Brunée and S. J. Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', (2010) 2 *Global Responsibility to Protect* 191, at 192; H. Charlesworth, 'Feminist Reflections on the Responsibility to Protect Concept', (2010) 2 *Global Responsibility to Protect* 232,

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to protect concept has been carefully couched so as not to impose legal obligations upon states or international organizations to take particular actions in specific circumstances. Legal scholars therefore concluded that, because the responsibility to protect concept appears not to impose new obligations upon states or international organizations to take military action in particular situations, it merely amounts to 'political rhetoric'.[13] The responsibility to protect concept could be added to the proliferating list of unrealized tasks, deadlines, and projects that the international community has set itself during the post-Cold War period.

In the cynical-deception camp were those commentators suggesting that the ambiguity and contingency of the responsibility to protect concept were designed to enable it to serve as a front for business as usual on the part of powerful states – any unilateral military action could potentially be justified as necessary to 'protect populations at risk'.[14] These critics focused upon the possibility that the concept might be misused to justify unilateral interventions by powerful states claiming the role of humanitarian protector. To take one well-known example, in an interactive dialogue that took place before the General Assembly debate on the responsibility to protect in July 2009, Noam Chomsky focused upon the danger that the doctrine of the responsibility to protect could be misused by powerful states seeking to engage in military intervention.[15]

Yet there was almost no critical attention paid to the possibility that the responsibility to protect concept might be used precisely as its proponents suggest it should be used – that is, to expand international executive rule in the name of protecting life. Scholars demonstrated little interest in the types of practice that the concept was being used to justify, or the institutional processes of centralization and bureaucratization that were being adopted in response to the concept. Rather than seeking to unveil what the responsibility to protect concept really meant at some deeper level, I became interested in approaching the concept as an articulation of international authority's 'consciousness of itself'.[16] In this light, it began to seem that while lawyers were right to say that the concept did not impose any new duties or obligations upon states or the international community, it could still be seen to have normative significance in a public-law sense – that is, as a form of

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at 235, 248; E. Strauss, 'A Bird in the Hand Is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect', (2009) 1 *Global Responsibility to Protect* 291, at 296–9; A. Kapur, '"Humanity as the A and Ω of Sovereignty": Four Replies to Anne Peters', (2009) 20 EJIL 560, at 562; C. Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine', (2008) 13 JCSL 191, at 193; C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', (2007) 101 AJIL 99; G. Molier, 'Humanitarian Intervention and the Responsibility to Protect after 9/11', (2006) 53 NILR 37. For the view that the responsibility to protect concept does impose a new obligation upon the Security Council to intervene in situations of mass atrocity, see A. Peters, 'Humanity as the A and Ω of Sovereignty', (2009) 20 EJIL 513, at 540, 544.

13 Stahn, *supra* note 12, at 99; Focarelli, *supra* note 12; Kapur, *supra* note 12; Molier, *supra* note 12.

14 Statement by Professor Noam Chomsky to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect, United Nations, New York, 23 July 2009, available at wwwo.un.org/ga/president/63/interactive/protect/noam.pdf.

15 Ibid.

16 M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (translated by G. Burchell) (2008), 2.

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law that confers powers 'of a public or official nature',[17] that allocates jurisdiction, and that provides legal authorization for certain kinds of executive action.[18] The responsibility to protect concept was being used to rationalize practices of executive action that were not new, that had become extremely significant mechanisms for governing the decolonized world, and yet had minimal legal foundation in the UN Charter.

The emergence of a form of executive action by the United Nations aimed at protecting life in the decolonized world can be traced back to the mid-1950s and early 1960s. The idea that the United Nations has a responsibility to maintain order and protect life in the decolonized world began to take shape with the creation of the United Nations Emergency Force (UNEF) in response to the Suez crisis of 1956 and the UN offer of military assistance to the government of the Republic of the Congo in 1960. The techniques of executive action that Hammarskjöld developed at Suez and the Congo included fact-finding, preventive diplomacy, technical assistance, peacekeeping, and territorial administration. Those techniques for protecting life have since expanded dramatically. The United Nations has developed as an instrument for the preservation of peace and security, and its significance and responsibilities have increased dramatically as a result. UN officials still understand their role in the terms first articulated by Hammarskjöld, as independent, neutral, and impartial mediators between factions unable to reach consensus. The effect has been to create a long-term policing and managerial role for the United Nations in the decolonized world.

There was very little clear authority for this expansion of UN executive action in the UN Charter. For many years, this did not cause enormous problems, but that changed after the Cold War, as international executive action became far more ambitious in scope and complexity. Let me give three examples to illustrate this. First, peacekeeping became established as a core technique of international rule in the aftermath of the Cold War. By the end of 2009, the UN Department of Peacekeeping Operations could claim that it led 'the world's second largest deployed military force (after that of the US)'.[19] Second, UN civilian operations also became significantly more ambitious in scope and scale during the 1990s. While international organizations had long been involved in territorial administration, it was during this period that the United Nations took on responsibility for the plenary administration of Kosovo and East Timor. Third, during the post-Cold War period, UN agencies in the humanitarian field began to exercise an increasing range of governmental powers in order to provide services and protection to populations throughout the decolonized world. For example, by the end of 2008, the UN High Commission for Refugees (UNHCR), the UN agency with responsibility for providing protection and support

17 H. L. A. Hart, *The Concept of Law* (1961), 28.

18 For a discussion of the relevance of Hart's distinction between laws of a public or official nature that confer powers and 'those that impose duties' to the responsibility to protect concept, see further Orford, *supra* note 1, at 22–7.

19 United Nations, *United Nations Peace Operations 2009: Year in Review* (2010), 3, 5.

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to refugees, asylum seekers, and internally displaced people, estimated that it was responsible for a total population of 34.4 million.[20]

With the expansion in the scope and complexity of international operations, it became clear that existing political and legal concepts could not fully grasp the nature of this form of rule or address the questions about legitimacy, authority, and credibility to which it gave rise. Both the achievements and the failures of UN operations during the 1990s placed the legitimacy of international executive action on the table. The authority of the United Nations to exercise increasing amounts of executive power had continued to be explained in terms of the minimalist principles of neutrality, independence, and impartiality. Those principles were increasingly unable to offer either operationally useful or ideologically satisfying answers to questions about authority that arose as a result of the growth of the power of the international executive. The responsibility to protect concept offers a response to questions about authority that had arisen with the expansion of international executive action in the decolonized world. It seeks to consolidate and systematize the practices initiated by Hammarskjöld, and to offer a coherent account of authority through which international officials can interpret their role to themselves and to those they govern. It has strengthened the idea that the United Nations has the responsibility and the capacity to maintain peace in the decolonized world and to co-ordinate international functions of surveillance, policing, and administration.

Much of the focus, critical and otherwise, in the debate over the responsibility to protect concept remained on the drama of using the concept to justify military intervention (as in Libya) or on the failure of the concept to impose new obligations to take military action in particular situations. There was much less critical attention paid to the far more prosaic and everyday practices involved in the institutional work of international administration.[21] Yet it was in these routine practices – of surveillance, prevention, policing, and administration – that the political effects of the responsibility to protect concept would be determined. My question became: what would it mean if the responsibility to protect concept were used as its proponents suggest it should be used – that is, to consolidate established practices of international executive rule, such as surveillance, fact-finding, security sector reform, peacekeeping, and civilian administration, and to provide a coherent normative framework for those practices? What political possibilities were being opened up – and what possibilities foreclosed – by conceptualizing international authority as the exercise of a responsibility to protect?

I found this first challenge of trying to grasp the situation so difficult that I collected a number of quotes from different authors, typed them out, and pinned them up beside my desk. One that is particularly relevant to this problem is taken

20 UNHCR, *2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (2009), available at www.unhcr.org/4a375c426.html.

21 On the significance of international administration as a political form, see further A. Orford, 'International Territorial Administration and the Management of Decolonization', (2010) 59 ICLQ 227. For the related argument that, in the domestic context, critical attention has tended to focus on the 'dramatic or even theatrical contexts surrounding police work' rather than 'the silent grinding of administrative mills (as in cataloguing, normalizing, data collection and classifying)', see K. Mladek, 'Introduction', in K. Mladek (ed.), *Police Forces: A Cultural History of an Institution* (2010), 1, at 5.

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from Pierre Broué's study of the German Revolution. Broué there writes: 'If, as Lenin believed, the essence of Marxism really lies in first knowing how to analyse a concrete situation correctly, then it was not easy to be a good Marxist in Germany in July 1923.'[22]

That quote reassured me not only that the attempt to try and grasp the concrete situation was respectable intellectual work, but also that other people had found that task difficult.

III

The second problem of writing that I faced during this project involved trying to communicate my emerging sense of the significance of the responsibility to protect concept to audiences in different places and with different disciplinary backgrounds. While I gradually began to understand the responsibility to protect concept as a means of rationalizing and integrating already-existing practices of executive rule, when I tried to convey this, I was invariably frustrated by the response. I repeatedly had the experience of giving a talk about the responsibility to protect concept, stressing the range of practices to which it related, and then having someone stand up early in question time and say 'As Anne Orford says, this is all about military intervention by powerful hegemonic states' or, alternatively, 'Anne Orford is not admitting that this is all about military intervention by powerful hegemonic states'.

I realized that part of the problem was the structure of my argument, which only talked about practices of protection very late in the piece. If I was to come closer to communicating the significance of the material with which I was working, the form of my argument had to reflect its substance. It would be necessary to restructure the argument around what I had found in the archives. That is, the type of executive rule that had emerged in the decolonized world had been marked by the combination of new practices and new rationalizations for those practices through operationally oriented documents such as SC mandates, rules of engagement, instruction manuals, reports, and studies outlining lessons learned from previous experience. To the generations of international civil servants who came after him, Hammarskjöld bequeathed practices that were then systematically rationalized and translated into programmes for further 'dynamic' forms of 'executive action'.[23] Hammarskjöld himself generally preferred to avoid dealing with abstract questions of authority or producing doctrines to define – and thus inevitably circumscribe – his actions. Nonetheless, he was drawn to system building. He systematically digested the principles and lessons to be learned from past operations and turned these into what he called 'master texts' or instruction manuals for emergency action.[24] Decades later, these practices begin to be made intelligible in the form of the new responsibility to protect concept. So while initially I had planned to move from an abstract

22 P. Broué, *The German Revolution 1917–1923* (2006), 733.

23 UN Secretary-General, Introduction to the Annual Report of the Secretary-General on the Work of the Organization, UN Doc. A/4800/Add.1 (1961), at 1.

24 D. Hammarskjöld, 'The Uses of Private Diplomacy', in W. Foote (ed.), *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld* (1962), 170, at 173.

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discussion of the grounding of authority on protection through the institutional question of who decides what protection means to an analysis of the practices of protection, the book now has the reverse form – it starts with practices and then moves on to their systematization and articulation in the form of the responsibility to protect concept.

In this sense, the emergence of the responsibility to protect concept as a means of consolidating and explaining disparate practices of rule in many ways resembles the emergence of arguments in early modern Europe seeking to rationalize the practices of rule now associated with the state. In his influential reinterpretation of the emergence of the modern state form in Europe, Michel Foucault argued that the state did not appear first as an elaborated concept or idea – rather, its origin lay in the development of governmental practices and their subsequent transformation into concepts like sovereignty or statehood. The state in this account is not a 'kind of natural-historical given' or a 'cold monster', but 'the correlative of a particular way of governing'.[25] Foucault argued that, in order to understand the emergence of the state, it was necessary to analyse 'how it appears and reflects on itself, how at the same time it is brought into play and analyzes itself, how, in short, it currently programs itself'.[26] The choice 'to start from governmental practice is obviously and explicitly a way of not taking as a primary, original, and already given object, notions such as the sovereign, sovereignty, the people, subjects, the state, and civil society'.[27] Instead, by starting from governmental practice and the ways 'it reflects on itself and is rationalised', it is possible to 'show how certain things – state and society, sovereign and subjects, etcetera – were actually able to be formed'.[28]

The shift from a form of political order organized around the personal rule of the monarch to one organized around an impersonal administrative entity distinct from the ruler did not simply occur as a matter of shifts in language or because certain intellectual preconditions (that there can be only one supreme authority in a territory, or that the state exists solely for political purposes) developed incrementally. The state as a 'theoretical construct' would not simply have appeared 'regardless of the historical appearance of any political institution or system resembling the modern state itself'.[29] The emergence of the singular conception of the state was the result of the correspondence of certain material preconditions (such as the centralization of authority, the growth of bureaucracies, and the consolidation of territories with defined boundaries) with the development of new ways of rationalizing and speaking about power. A similar process is taking place in relation to the forms of rule established by Hammarskjöld in the early years of decolonization. The responsibility to protect concept is an attempt, both institutionally and conceptually, to consolidate the new forms of authority that have emerged in the decolonized world through the expansion of executive action. The idea that there exists an international community with the responsibility to protect populations at risk does not simply

25 Foucault, *supra* note 16, at 6.
26 Ibid., at 78.
27 Ibid., at 3.
28 Ibid.
29 C. J. Nederman, *Lineages of European Political Thought: Explorations along the Medieval/Modern Divide from John of Salisbury to Hegel* (2009), 20.

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emerge because the time is right for humanity to realize its own law, or because a set of intellectual preconditions happen to have coalesced in the twenty-first century to produce the responsibility to protect concept. Instead, the responsibility to protect concept is part of a protracted process in which power is being reorganized. It seeks to integrate a set of governmental practices into a coherent theoretical account of international authority.

IV

The method adopted by Foucault in his exploration of the emergence of the state exemplifies the approach he took to the work of understanding transformations in knowledge more generally. For Foucault, the work of philosophy today involves making visible those things that are already visible:

> It has long been known that the role of philosophy is not to discover what is hidden, but to make visible precisely what is visible, that is to say, to show that which is so close, which is so immediate, which is so intimately linked to us, that because of that we do not perceive it. While the role of science is to communicate that which we do not see, the role of philosophy is to make us see what we see.[30]

While this may seem 'a very modest task, very empirical, very limited', Foucault argued that we already have 'very close to us a certain model of such a use of philosophy in the analytic philosophy of the Anglo-Americans'.[31] Analytical philosophy was not concerned with uncovering the deep structures of language – indeed, Wittgenstein argued that the problems that arise through our misunderstanding of language have 'the character of depth' only because the roots of those problems 'are as deep in us as the forms of our language'.[32] Analytical philosophy was concerned with surfaces rather than depths – with the way in which language was used in particular language games or forms of life.[33] 'Anglo-Saxon philosophy is trying to say that language never deceives nor ever reveals either. Language, it is played.'[34] Just as the method of analytical philosophy was to describe the relations between the elements of particular games, Foucault argued that:

> I think we could imagine in the same way a philosophy whose task would be to analyze what happens daily in power relations, a philosophy that tries to show what are the relationships of power, the forms, the stakes, the goals.[35]

Foucault's approach resonates with the passage of Wittgenstein from which I drew the quote for this essay's abstract:

> It was true to say that our considerations could not be scientific ones . . .. And we may not advance any kind of theory. There must not be anything hypothetical in our

30 M. Foucault, 'La philosophie analytique de la politique', in D. Defert and F. Ewald (eds.), with J. Lagrange, *Dits et écrits, 1954–1988*, 4 vols., Vol. 3 (1994), 534, at 540–1 (author's translation).
31 Ibid.
32 L. Wittgenstein, *Philosophical Investigations* (1958), 47.
33 For a discussion of his study of the structure of international legal argument as in part a descriptive project in this sense, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 563–73.
34 Foucault, *supra* note 30.
35 Ibid.

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> considerations. We must do away with all *explanation*, and description alone must take its place . . .. The problems are solved, not by giving new information, but by arranging what we have always known. Philosophy is a battle against the bewitchment of our intelligence by means of language.[36]

So, in this account, the critical project is 'to make visible precisely what is visible' – to arrange 'what we have always known'. But how to make visible what is visible? And how to arrange what we have known? For Foucault, this involved first trying to analyse precisely the internal economy of a discourse and the systematic relations between the elements of that discourse. Foucault was influenced by the insight gained from structural linguistics that it was possible to conceive of logical relations between elements (of a language, or a society) that were not reducible to causal or dialectical relations.[37] According to Foucault, traditional attempts to explain the causes of particular changes in knowledge or society seemed 'more magical than effective'.[38] The relations or connections between elements could take many forms, often imagined by Foucault in spatial terms: 'structures of separation, of relation, of fusion, of opening up, of foundation, of rejection, of reciprocity, of exclusion, or even of "nourishment".'[39] Mapping the many connections or forms of relations between elements would make it possible to describe 'the transformations that had to take place in order for new structures of knowledge to have emerged'.[40] Foucault thus rejected the criticism that such an analysis led to a static, immobile, or anti-historical point of view. It was only by understanding the relations that existed within a language or a society that it was possible to understand all the modifications that had to take place in order for one of the elements to change.[41] This kind of descriptive work was a necessary condition of theory. Foucault chose to leave 'the problem of causes to one side' and 'chose instead to confine myself to describing the transformations themselves, thinking that this would be an indispensable step if, one day, a theory of scientific change and epistemological causality was to be established'.[42]

V

Foucault's study of the operation of power over the past two centuries is relevant to the study of international authority and the responsibility to protect not only methodologically, but also in some ways substantively. It is possible to see in

36 Wittgenstein, *supra* note 32, at 47 (emphasis in original). See, further, A. I. Davidson, 'Structures and Strategies of Discourse: Remarks towards a History of Foucault's Philosophy of Language', in A. I. Davidson (ed.), *Foucault and His Interlocutors* (1997), 1, at 2–3.

37 M. Foucault, 'Linguistique et sciences sociales', in Defert and Ewald, *supra* note 30, 821, at 824. Foucault there suggested that the question whether it was possible to develop a formal rationalization of an empirical field that was not immediately organized around the logic of causal determinism was at the heart of contemporary philosophical and theoretical debates, including within Marxism.

38 M. Foucault, 'Foreword to the English Edition', in M. Foucault (ed.), *The Order of Things: An Archaeology of the Human Sciences* (1994), ix, at xiii.

39 M. Serres, 'The Geometry of the Incommunicable: Madness', in Davidson, *supra* note 36, 36, at 41.

40 Davidson, *supra* note 36, at 11.

41 Foucault, *supra* note 37, at 826.

42 Foucault, *supra* note 38, at xvi.

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Foucault's account of the emergence of new mechanisms of power in Europe since the eighteenth century a prefiguring of the operations of power that are expressed through the responsibility to protect concept. This is a form of international law that, for over 50 years, has had a biopolitical character in the sense developed by Foucault – that is, it explicitly takes the welfare of populations and the protection of life as its object.[43] The responsibility to protect concept holds together two ideas about law – the idea of law as a restraint on power (the power of the dictator, the tyrant, or the warlord) and the more economic idea of law as an internal limitation on what power can effectively achieve. The responsibility to protect concept wants both to end mass atrocities 'once and for all',[44] and at the same time to build the capacity of states so that they can effectively protect the security and welfare of their populations. Foucault explored the emergence of these two different ways of thinking about law in relation to the state – one based on requiring the state to govern according to moral laws largely articulated in terms of the rights of man and the other organized around deriving the limits to governmental practice 'precisely in terms of the objectives of governmentality, of the objects with which it has to deal, of the country's resources, populations, and economy, etcetera'.[45] For Foucault, these two ways of thinking about law exist in a strategic rather than a dialectic relation. They do not exist within 'a homogeneity that promises their resolution in a unity' but are 'disparate terms which remain disparate' while successfully held together.[46] These disparate and stubbornly irreconcilable notions of the law as a restraint on the criminality of tyrants and law as an economic limitation on the ambitions of government have been reflected in the responsibility to protect concept from its inception.[47] With the embrace of the responsibility to protect concept, international action is explicitly rationalized in terms of its ability both to punish evildoers and to realize the objective of protecting civilian populations.[48] The inability to resolve the tensions between these two ways of rationalizing international action is increasingly informing critiques of the responsibility to protect concept, particularly by those who argue that the goal of securing civilian populations is undermined by the desire to see evil rulers punished.[49]

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43 I have explored the biopolitical nature of forms of international law and humanitarian expertise that 'take life as a task' in A. Orford, 'Positivism and the Power of International Law', (2000) 24 *Melbourne University Law Review* 502; A. Orford, 'Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice', (2005) 18 LJIL 179, at 203–4, 208–11; A. Orford, 'Biopolitics and the Tragic Subject of Human Rights', in E. Dauphinee and C. Masters (eds.), *The Logics of Biopower and the War on Terror: Living, Dying, Surviving* (2007), at 205–28.

44 This is the (characteristically ambitious) task set for the concept by Gareth Evans: see G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (2008).

45 Foucault, *supra* note 16, at 40.

46 Ibid., at 42.

47 For an exploration of the ways in which Dag Hammarskjöld's training as an economist informed his ideas about neutrality and about the proper limits to the role of the state in the context of decolonization, see Orford, *supra* note 1, at 52–6, 86; A. Orford, 'Law, Economics and the Administration of Decolonisation: Rethinking the Legacy of Dag Hammarskjöld', in H. Melber and C. Stahn (eds.), *Peace, Diplomacy, Global Justice and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld* (forthcoming).

48 The Secretary-General has specifically included the threat of punishment under international criminal law as a means of preventing mass atrocity and thus as a technique for implementing the responsibility to protect concept: UN Secretary-General, *supra* note 7, paras. 17–19, 54.

49 See, generally, the concept note developed by the government of Brazil on 'responsibility while protecting', annexed to the 'Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United

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Yet having noted this resemblance between the transformations in the operation of power that Foucault described in his study of the emergence of the state in Europe and transformations in the operation of the power in the decolonized world during the past decades, I do not want to suggest that Foucault offers international lawyers a universal model of power, the state, or law.[50] It is neither useful nor desirable to look to Foucault as the patriarchal authority who can offer us either a new methodological programme or a new model of power. Indeed, Foucault repeatedly cautioned against treating his work as establishing either a universal theory of power or a template for political analysis.[51]

To the extent that we might take Foucault as a guide to scholarly practice, it is not in order to adopt his method or his models as authoritative, but rather in order to be influenced by his attentiveness and responsiveness to the archives he assembled. Foucault's 1978–79 lectures at the Collège de France, published in English in 2008 as *The Birth of Biopolitics*, provide an example of this posture.[52] One of the striking features of this set of lectures is the sense it gives of Foucault's openness to a new archive in the history of the making of the modern state and of modern politics. These lectures show that state-law theory is no longer the province of philosophers or jurists, but is now developed by bureaucrats working in the offices of states or international organizations. By reading expert documentation on international institutional arrangements with the care and rigour that we are used to seeing given to the pronouncements of European philosophers, these lectures suggest the wealth of archival material that is available today as a means for making our present situation intelligible. These lectures do not offer a new universal truth about the nature of power or the state. Instead, they show that critical engagement with international law cannot be premised upon an assumption that the form of the state or the meaning of the rule of law is stable, even within twentieth-century Europe.[53] The archive that Foucault assembled with such care in those lectures is not simply a given that is offered up so that the real work of philosophy – the

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Nations addressed to the Secretary-General', UN Doc. A/66/551-S/2011/701 (2011) (pointing to the 'the painful consequences of interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations' and arguing that techniques such as regime change 'may make it even more difficult to attain the protection objectives pursued by the international community'). For an argument that the responsibility to protect has effectively operated as a 'right to punish' in the context of Darfur, see M. Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (2009).

50 For the counterargument 'that Foucault's self-professed objection to theory is somewhat overstated' and that Foucault can usefully be read as offering a theorization of law broadly conceived, see B. Golder and P. Fitzpatrick, *Foucault's Law* (2009), 3–5.

51 See, e.g., *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (translated by G. Burchell) (2007), 1 ('the analysis of these mechanisms of power that we began some years ago, and are continuing with now, is not in any way a general theory of what power is. It is not a part or even a start of such a theory'). For the argument that Foucault's method is a response to or 'a function of the materials and questions examined, and therefore not – a caveat Foucault was often obliged to repeat – a universal recipe prescribed for every form of political analysis', see C. Gordon, 'Introduction', in J. D. Faubion (ed.), *Michel Foucault: Power (The Essential Works, Volume 3)* (2000), xi, at xxiv.

52 Foucault, *supra* note 16.

53 For the related argument that Foucault's earlier 1975–76 lectures (M. Foucault, *Society Must be Defended: Lectures at the Collège de France 1975–76*, (2003)) challenge the conception of the state that appears in much international human rights scholarship, see Orford, 'Biopolitics and the Tragic Subject of Human Rights', *supra* note 43.

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process of abstracting and translating historical insights into dogmatic form – can take place. *The Birth of Biopolitics* is not available to be slotted into a predetermined critical programme. Instead, these lectures suggest that if we want to understand the state-law theory that carried the day throughout the latter half of the twentieth century and that remade both Europe and its colonies, we can no longer simply look to the pronouncements of philosophers, legal theorists, or revolutionaries – not even those of Foucault. Instead, these lectures suggest that there is much to be gained from the work of assembling new archives that might make visible the transformations articulated in the doctrines, practices, and rationalizations of the myriad administrators who now shape everyday life for many people on this planet.[54]

VI

I said in opening that I would say something about why I find the turn to description politically productive and aesthetically pleasing. Description seems to offer a productive alternative to some of the modes of critique that currently dominate international law. There is a tendency in much critical anglophone engagement with law to look to philosophers as authorities on justice or truth. In some ways, the approach taken by contemporary philosophers encourages this. Philosophers, both legal and otherwise, often take up a position made available to them through the turn from theology to philosophy in the late eighteenth century. The German critical revolution taught that:

> [w]hat was normatively in play in Christian religion . . . had turned out to be theology, the articulation in rational form of what was only expressed in Christianity's rites and rituals; but what was normatively in play in *theology*, in its appeal to reason, had turned out to be *philosophy* as 'absolute knowing'.[55]

Those philosophers who take up the role offered to them as the priests of absolute knowing see themselves as speaking about universal truths that operate outside time and space. As a result, they do not represent their theories as historically situated or as existing in relation to a particular concrete situation.

The tendency for philosophical statements to function as universal truths has been intensified in legal scholarship, where lawyers treat philosophers in the way we have been trained to treat other generators of norms, such as judges or legislatures. As Pierre Schlag once commented:

> When legal theorists did 'theory' they tended to do it as an appellate advocate might do theory. To be sure, the nature of the citations changed – from U.S. Reports to

54 On the ways in which the study of international and European law might help to make intelligible the operations of power involved in the administration of everyday life, both in Europe's former colonies and increasingly in Europe itself, see further A. Orford, 'Embodying Internationalism: The Making of International Lawyers', (1998) 19 *Australian Year Book of International Law* 1; A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003); Orford, *supra* note 21; A. Orford, 'Europe Reconstructed', (2012) 75 *Modern Law Review* 275.

55 T. Pinkard, *Germany Philosophy 1760–1860: The Legacy of Idealism* (2002), 244–5 (emphasis in original).

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> 'Philosophical Investigations' – but the rhetoric (not to mention the blue book symbols) remained much the same.[56]

In much of the critical writing about law that I had been reading, the pronouncements of philosophers were deployed as authority for the meaning and demands of justice universally. Yet, embedded in such philosophical pronouncements about justice or power or resistance were particular unarticulated assumptions about the political situation in which justice or power or resistance was understood to be operating. The effect of this unquestioning deference to philosophical truth claims by contemporary critical legal theorists was that legal theory had become extremely well equipped to challenge and denounce the dominant political forces at play in seventeenth-century England, mid-eighteenth-century France, or late eighteenth-century Prussia. It offered much less assistance in comprehending or contesting the political forces that had taken shape internationally in the twenty-first century or in rendering the contemporary situation intelligible in ways that might make it seem amenable to political action.

Here I continue to find Foucault's work useful because, although throughout his life, he remained interested in the problems that traditional philosophy posed for contemporary thought, he did not look to the archive of European philosophy in order to generate absolute truths about the human condition or dogmatic programmes for realizing justice, peace, or liberty. According to Foucault, philosophy may be able to play a role in the struggle against power, but only on condition that it ceases to think of itself as prophecy, pedagogy, or legislation, and instead 'sets itself the task of analysing, clarifying, making visible, and thus intensifying the struggles that take place around power'.[57] The writers whose work I found inspiring as I tried to make sense of the responsibility to protect concept (such as Harold Laski, Franz Neumann, Herbert Marcuse, Alva Myrdal, and Louis Althusser) seemed in similar ways to be seeking to make sense of specific legal and political developments of their time, while exploring new and productive ways of making those developments comprehensible.[58]

On an aesthetic level, the turn to description also offered a means of countering the tendency of the dominant mode of critique to flatten everything, so that the world and all the people in it turned out to be describable in terms of an extremely limited set of characteristics.[59] Everyone, everywhere, was the same and every historical development could be understood, denounced, or celebrated in terms of the same causes – elite competition for influence, or human self-interest, or the dictates of

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56 P. Schlag, 'A Brief Survey of Deconstruction', (2005) 27 *Cardozo Law Review* 741, at 743.

57 Foucault, *supra* note 30.

58 See, e.g., L. Althusser, *Machiavelli and Us* (translated by Gregory Elliot) (2001); H. Laski, 'The Responsibility of the State in England', (1919) 32 *Harvard Law Review* 447; H. Marcuse, *A Study on Authority* (translated by Joris De Bres) (2008); A. Myrdal, *Nation and Family* (1941); F. Neumann, *Behemoth: The Structure and Practice of National Socialism* (1944).

59 Foucault makes a related argument when he comments that 'in the theoretical domain, the imperative discourse that consists in saying "love this, hate this, that is good, that is bad, be for this, beware of that," seems to me, at present at any rate, to be no more than an aesthetic discourse that can only be based on choices of an aesthetic order' and that such a discourse 'seems to me to be very flimsy when delivered from a teaching institution or even just on a piece of paper': Foucault, *supra* note 51, at 3.

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desire, or the will to power and so on. That was what I read and yet, the longer I lived in the world and the more people I met or worked with, the less I felt that history or politics could be predicted or understood in terms of a small number of causal relations.

The best account of this aesthetic response I had begun having towards much critique about law comes from a novel by A. S. Byatt called *The Biographer's Tale*.[60] The tale is narrated by a young scholar – Phineas G. Nanson. His story opens in the middle of 'one of Gareth Butcher's famous theoretical seminars'.[61] It was a sunny day, and Phineas was sitting in Butcher's seminar, listening to his professor and looking at the dirty windows of the seminar room, when he suddenly thought, 'I'm not going to go on with this any more'. He continues:

> It is odd that I can't remember what text we were supposed to be studying on that last day. We had been doing a lot of not-too-long texts written by women. And also quite a lot of Freud – we had deconstructed the Wolf Man, and Dora. The fact that I can't remember, though a little humiliating, is symptomatic of the 'reasons' for my abrupt decision. All the seminars, in fact, had a fatal family likeness. They were repetitive in the extreme. We found the same clefts and crevices, transgressions and disintegrations, lures and deceptions beneath, no matter what surface we were scrying. I thought, next we will go on to the phantasmagoria of Bosch, and, in his incantatory way, Butcher obliged. I went on looking at the filthy window above his head, and I thought, I must have *things*. I know a dirty window is an ancient, well-worn trope for intellectual dissatisfaction and scholarly blindness. The thing is, that the thing was also there. A real, very dirty window, shutting out the sun. A *thing*.[62]

So Phineas leaves the seminar and decides to become a biographer. Once he had thought that biography was a dilettante pursuit: 'Tales told by those incapable of true invention, simple stories for those incapable of true critical insight.'[63] But suddenly, he saw that biography was 'a noble thing' – 'the art of things, of facts, of arranged facts'. In the best biography, one could find 'an almost impossible achievement of contact with the concrete world'.[64]

Before we send him off to begin his biography, however, I would like to recount one more scene from the book. This scene comes just after the first, after Phineas has left the seminar where he had his revelation that he no longer wants to be a critical literary theorist. He walks out with the rival professor in the English department, Ormerod Goode, who has been attending Gareth Butcher's seminars. Phineas confides in Goode his decision to give up theory. Goode makes no secret that he is pleased with this decision, but asks Phineas what had led to it. Phineas replies:

> 'I felt an urgent need for a life full of *things*'. I was pleased with the safe, solid Anglo-Saxon word. I had avoided the trap of talking about 'reality' and 'unreality' for I knew very well that postmodernist literary theory could be described as a reality. People lived in it. I did however, fatally, add the Latin-derived word, less exact, redundant even, to my precise one. 'I need a life full of *things*', I said. 'Full of facts'.

60 A. S. Byatt, *The Biographer's Tale* (2001).
61 Ibid., at 1.
62 Ibid., at 1–2 (emphasis in original).
63 Ibid., at 5.
64 Ibid., at 18.

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> 'Facts', said Ormerod Goode. 'Facts'. He meditated. 'The richness', he said, 'the surprise, the shining *solidity* of a world full of facts. Every established fact – taking its place in a constellation of glittering facts like planets in an empty heaven, declaring *here* is matter, and *there* is vacancy – every established fact illuminates the world. True scholarship once aspired to cast its modest light to that illumination. To clear a few cobwebs. No more.'[65]

Phineas found it hard to let go of his 'ingrained habits of suspicion and contentiousness' when he heard the kinds of claim that Goode made about facts and the work of scholarship,[66] and, like Phineas, I think that many of us find claims about objectivity and facts and illumination a little naive today. Indeed, the rest of Byatt's book goes on to complicate this turn to biography as the art of arranging facts.

After all, historians of science remind us that facts only mean something within a broader system, and the broader system will shape why facts are produced and how they are used.[67] The idea that facts could produce the foundation of a disinterested approach to government emerged in Britain in the late sixteenth century, and gained ground during a period in which European states were wrestling with questions of poverty, famine, and revolution.[68] The attempt to develop a governmental science based on facts emerged as a response to those challenges. Today, before questions of law and government can be determined, issues of fact have to be addressed. Knowledge has to appear objective, impartial, and disinterested if it is to authorize government. Yet, in an increasingly globalized world, where many policy questions are shaped by competing knowledge communities and resulting factual uncertainty, it has become increasingly difficult to produce that kind of knowledge about matters of political controversy – as the climate change debate illustrates well. Questions about the reliability and interpretation of data and about who should be the source of authoritative knowledge about a particular question have become central to many of the most pressing political issues of our time.

Having said all that, I still find a significant contrast between the texture of work that tries to undertake the kind of precise description that Foucault attempts and the texture of work that sees itself as engaged in pronouncing universal truths about the human condition, global justice, or the nature of power. The work of description (or re-description) requires an attention to facts and values, where both are understood as historical creations rather than timeless givens.[69] This approach to developing

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65 Ibid., at 4 (emphasis in original).

66 Ibid., at 25.

67 M. Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (1998).

68 Ibid.

69 One of the most significant attempts to rethink the relation between fact and value in the human sciences can be found in the work of the postwar generation of Swedish jurists, social scientists, and economists in Uppsala and beyond who were influenced by (their interpretation of) Axel Hägerström's critique of value metaphysics and magical thinking. For a discussion of the influence of Hägerström on a generation who included the young Dag Hammarksjöld, see G. Myrdal, 'Postscript', in P. Streeten, *Value in Social Theory* (1958), 237, at 250–1, and for an introduction to the relevance for international law of the Scandinavian realism that was shaped in part by Hägerström, see M. Koskenniemi, 'Introduction: Alf Ross and Life Beyond Realism', (2003) 14 EJIL 653. It is interesting to speculate about the influence that the intellectual climate in Uppsala and the nearby Stockholm during the 1950s had on Foucault's desire to avoid 'magical' rather than 'effective' thinking. For a discussion of the period Foucault spent from 1955 to 1958 as a French instructor at the Romance Language Institute of the University of Uppsala and as director of the Maison de France,

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theory involves attempting to describe practice while recognizing that the choice of what to include in such a description is always value-laden. As David Dyzenhaus puts this:

> [A] theory of law, like any social and political theory, cannot be merely reflective of what is in fact the case without ceasing to be a theory ... [A] theory, in seeking to understand what is, makes sense of its object of inquiry in a way that is prescriptive for the future.[70]

In closing, I would like to refer to one other practice of description that has a complicated relationship with reality – the practice of cartography or mapping. When we make a map, we always have to decide what details to leave in and what to leave out. We have to think about our audience and the purposes for which they will use the map. We have to think about how to design the map so that the information in it can be absorbed – a map cannot simply reproduce the world if it is to take a useful form. Perhaps, after all, it is not necessary to dismiss the 'magical' quality of scholarship in favour of 'effectiveness', but rather to recognize that the work of description is both magical and realistic, shaped not only by attentiveness to the material with which we work, but also by pleasure in the work of map-making and care for those who might seek to follow our trail:

> Maps are magic. In the bottom corner are whales; at the top, cormorants carrying pop-eyed fish. In between is a subjective account of the lie of the land. Rough shapes of countries that may or may not exist, broken red lines marking paths that are at best hazardous, at worst already gone. Maps are constantly being re-made as knowledge appears to increase. But is knowledge increasing or is detail accumulating?
>
> A map can tell me how to find a place I have not seen but have often imagined. When I get there, following the map faithfully, the place is now the place of my imagination. Maps, growing ever more real, are much less true.
>
> And now, swarming over the earth with our tiny insect bodies and putting up flags and building houses, it seems that all the journeys are done.
>
> Not so. Fold up the maps and put away the globe. If someone else had charted it, let them. Start another drawing with whales at the bottom and cormorants at the top, and in between identify, if you can, the places you have not found yet on those other maps, the connections obvious only to you. Round and flat, only a very little has been discovered.[71]

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see D. Eribon, *Michel Foucault* (translated by Betsy Wing) (1992), 73–86. Admittedly, in Eribon's telling, the influences on Foucault's thought during that period all resulted from encounters with French visitors to Uppsala and Stockholm – but can it really have been like that? At least one sign of the ongoing effect that this period had on Foucault's thought is the central role played by Linnaean systems of classification in Foucault, *The Order of Things*, *supra* note 38.

70 D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1997), 164.

71 J. Winterson, *Sexing the Cherry* (1990), 81. For an earlier attempt to reflect upon the forms of knowledge and political projects involved in mapping (which also closes with this quote from *Sexing the Cherry*), see A. Orford, 'A Journal of the Voyage from Apology to Utopia', (2006) 7 *German Law Journal* 993.

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