On international legal method

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International Authority and the Responsibility to Protect seeks to show that the emergence of the responsibility to protect concept and its embrace by a very diverse range of actors is one sign of a significant shift in the representation of authority in the modern world. More specifically, the book argues that the responsibility to protect concept offers a framework for rationalising and consolidating practices of international executive rule, many of which were developed by Dag Hammarskjöld, the second Secretary-General of the United Nations (UN), in the early years of decolonisation. Since the late 1950s, the UN and other international actors have developed and systematised a body of practices aimed at 'the maintenance of order' and 'the protection of life' in the decolonised world,[1] including fact-finding, peacekeeping, the management of refugee camps, civilian administration, strategic forms of technical assistance and early warning mechanisms. My aim was to explore the ways in which those practices of governing and that form of authority had been represented.

The book is also a wager that there is something to be gained—theoretically, politically and empirically—by developing a primarily juridical (rather than historical, philosophical, economic or sociological) method as a basis for exploring such contemporary international developments. Juridical thinking frames the problems that the book raises, shapes the archival choices made throughout its research and the construction of its narrative, structures its argument and provides its conceptual underpinnings. Of course, this begs the question of just what 'juridical thinking' is, where we might look for it, and to which historical figures and authors we might properly make reference in order to develop a legal analysis that is also critical, idiomatically recognisable and politically useful. I return to these questions below.

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1 UN Doc S/PV.873, 13–14 July 1960, para. 19.

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The readers' responses gathered in this issue of the *London Review of International Law* probe the methodological choices and substantive claims that were made in the book. This essay takes up some of the points raised in that rich set of responses, in order to provide a sense of how and why the book analyses and represents international authority in the way that it does. The first part of the essay addresses the methodological questions raised in the responses. Given that the book makes use of archival and organisational materials to study the lawfulness of international authority, why did I not draw more directly upon methodologies more conventionally related to such materials, in particular historical and sociological methods? The second part of the essay responds to a related set of questions about why I chose Dag Hammarskjöld and Carl Schmitt as two of the book's main characters—indeed, why I adopted the anachronistic device of having main characters at all, when we live in a world of systems, networks, bureaucratic structures and governance by faceless experts. In addressing those questions, I focus on one of the book's themes that is dramatised and developed through the figures of Hammarskjöld and Schmitt: the political stakes of Hammarskjöld's representation of neutrality as the basis of international executive rule and its relation to his training as an economist, and the challenge posed to that model of liberal economic thinking by Schmitt's return to questions of status, representation and the subject of law. The third part of the essay concludes by answering the question posed by Ben Golder: why does the book have a cautiously optimistic ending in the face of the tale it tells of counter-revolution, civil war, emergency rule and authoritarianism?

QUESTIONS OF METHOD: LAW, HISTORY, SOCIOLOGY

The first set of questions raised by the readers' responses gathered here share a concern with method. Questions of method involve key decisions about what and how we read, the nature of the materials with which we engage, how we conduct our research, and how we understand the relation between critical thinking and its object. The essays by Charlotte Peevers and Jacqueline Mowbray ask in particular why the book does not primarily make use of methods that are often associated with the study of archival material or organisational culture—historical method in the case of archival material and sociological method in the case of organisational culture. Peevers suggests that in studying the Suez Crisis, the book should have adopted a historical method aimed primarily at understanding the meaning of an event for the politics of its own time, and Mowbray suggests that in studying the development of international executive rule the book should have adopted a sociological method designed to investigate 'objective social structures' and 'concrete practices of

individuals and groups'. In order to address that central issue of method, I first need to give a sense of the book's overall structure.

The first substantive chapter of *International Authority and the Responsibility to Protect* is entitled 'Practices of Protection: From the Parliament of Man to International Executive Rule'. The decision to begin the book with a chapter that seeks to draw attention to a set of practices that had slowly been consolidated over half a century of humanitarian action at and around the UN was a response to the realisation that there was a striking gap between the way in which humanitarians were thinking about the responsibility to protect concept and the way in which scholars were critiquing the concept and its potential implications.[2] Most of the institutional early adopters of the responsibility to protect concept were using it as a vehicle to expand and unify existing practices of international executive action, such as fact-finding, observation, surveillance, early warning, policing, and civilian administration, in the name of protecting life. Yet scholars demonstrated little interest in the types of practices that the concept was being used to justify, or the institutional processes of centralisation and bureaucratisation that were being adopted in response to it. While most critics were focusing on the concept as a Trojan horse for increased military intervention by powerful states, I became interested in approaching the concept as an articulation of international authority's 'consciousness of itself'.[3] The book thus begins by detailing the development of those practices at the UN in the early period of decolonisation, and the ways in which those practices were understood over the course of their emergence by those engaged in their development. That chapter seeks to convey how UN officials and other humanitarian actors involved in the development of a set of practices aimed at protecting life had reflected upon the lawfulness of those practices and of their ends.

In many ways, the approach I took to researching and gathering material relating to practices of protection and their rationalisation was not dissimilar to the ways in which a historian or a sociologist might have approached that task. In terms of archival material, I conducted research in the UN Archives in New York, the Hammarskjöld archives at the Royal Library in Stockholm and the National Archives of the UK government in London. I read cables, letters and reports related to the Suez and Congo crises, transcripts of General Assembly and Security Council meetings, official reports on peacekeeping operations, judgments of the International Court of Justice, UN internal audit reports,

2 For a more fully elaborated discussion of that gap between practice and critique and of its effects, see A Orford, 'In Praise of Description' 25 *Leiden Journal of International Law* (2012) 609.

3 M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*, trans. G Burchell, (Palgrave Macmillan, 2008) 2.

internal reviews of the peacekeeping failures in Rwanda and Srebrenica, training and instruction manuals, legal analyses of the scope of UN jurisdiction and responsibility in cases of mass atrocity, and biographies of many of the figures involved in the systematisation of executive action at the UN, including Hammarskjöld, Ralph Bunche, Andrew Cordier, Conor Cruise O'Brien, Brian Urquhart and Sergio de Mello. I also conducted what might elsewhere be described as fieldwork, participating in conferences with those engaged in articulating and implementing the responsibility to protect concept, attending public discussions of strategies with representatives of non-governmental organisations, international institutions, development agencies, Christian aid workers, intelligence organisations, military forces and humanitarian funding bodies, and working on committees involved in distributing grants directed at operationalising the concept. At and around these events, I talked with colleagues off the record in bars, over official dinners, walking through city streets and even at hotel swimming pools. My sense of the work that the responsibility to protect concept was doing emerged out of that four-year period of research undertaken in relevant archives and in the 'field'. In particular, I became very aware that there was almost no critical scholarly attention being paid to the possibility that the responsibility to protect concept might be used as its proponents were suggesting it should be used—as a basis for expanding and consolidating 'dynamic' practices of 'executive action' directed at protecting life that had developed at and around the UN since the late 1950s.[4]

Where my approach to writing this book departed from the historical and sociological approaches proposed in the essays by Peevers and Mowbray, however, is in the questions that I asked of the archival and organisational material I assembled, the resulting aspects of the archive and of the contemporary situation that I sought to emphasise in order to address those questions, and the way I presented the resulting material. The book seeks to draw out the significance of ongoing institutional discussions about the lawfulness of authority over the decolonised world by situating what initially sound like technical and institutional questions about the role of the UN within the context of core theological, political and juridical debates about authority that have absorbed Western thinkers for centuries. More specifically, the book explores the stakes of institutional debates about legal authority and jurisdiction over the decolonised world in relation to three sets of legal questions that have concerned jurists, theologians and political theorists since the 17th century—the question of how to recognise lawful authority in the context of civil war or revolution (Chapter 3), the question

4 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) 1.

of who should decide whether authority is lawful in such situations (Chapter 4), and the question of the relation between lawful authority, its officials and its subjects (Chapter 5). In the following two sections, I set out in more detail my reasons for drawing primarily upon juridical rather than historical and sociological methods for thinking about these vital questions.

On anachronism: history and international legal method

The response by Charlotte Peevers raises the question of what methodological approach should be taken to the study of archival material, and in what context that material should be placed. In particular, Peevers asks whether the method I develop in the book takes sufficient account of the 'context' of the Suez Crisis, understood as the great power politics of its time. It would be possible to tell the story of the Suez Crisis by focusing principally, as Peevers suggests the book should have done, on its meaning for the UK and other great powers and for their failed ambitions. This is the context in which international historians have conventionally sought to make sense of Suez, and it was certainly part of my story, as the book's close readings of documents relating to the British, French, US and Israeli responses to the Suez Crisis makes clear. In addition, the book also produces two other pieces of contextualist interpretation of past texts in sections exploring the turn to protection as a ground of authority as a response to the crisis of the state in the work of Carl Schmitt, and in a study of the reclamation by Schmitt of the political thought of Thomas Hobbes.

In terms of approach, the book is thus in some ways informed by the Cambridge school of intellectual history associated with Quentin Skinner. In particular, the book is influenced by Skinner's approach to interpreting classic texts in their 'context'. For Skinner, legal, philosophical or political texts should not be read as sources of timeless truths or authoritative statements about fundamental concepts. In order to understand a particular statement, utterance or text, the historian needs to reconstruct what its author was doing in making that statement, uttering that utterance or writing that text. Skinner's methodological manifestos played an important part in stressing the role of texts, including texts that made normative truth claims, as political interventions in particular social contexts and political power struggles.[5] In sympathy with that insight, my book seeks to understand the key legal texts, institutional reports, official correspondence and doctrinal studies that were central to the expansion of international authority as interventions in political debates and innovative responses to specific problems.

5 See particularly Q Skinner, 'Meaning and Understanding in the History of Ideas' 8 *History and Theory* (1969) 3; Q Skinner, 'Interpretation and the Understanding of Speech Acts', in *Visions of Politics: Volume I, Regarding Method* (Cambridge UP, 2002) 103.

Yet in order to conduct a legal rather than a historical study, the method I developed in the book departed from the approach attributed to the Cambridge school in one important respect—that is, in its treatment of 'anachronism'. For Skinner, the 'particular danger' of histories of ideas or intellectual biographies is the risk of 'sheer anachronism'.[6] He argued that it was a mistake to study past texts in order to trace 'the morphology of a given concept over time', and that instead scholars should concern themselves with studying what an author intended to do in the temporal context of 'the given occasion' when the utterance was 'performed'.[7] Skinner's influence has seen a cultivated 'sensitivity to anachronism' shape much Anglophone history of political thought over the past 40 years.[8] Contextualist historians have focused a great deal of attention on policing the idea that past texts must not be approached anachronistically in light of current debates, problems and linguistic usages, or in a search for the development of canonical themes, fundamental concepts or contemporary doctrines.[9] As the historian Constantin Fasolt has commented critically, anachronism is today treated as a 'sin against the holy spirit of history'.[10] The clear demarcation between past and present, or history and politics, underpinning Skinner's conception of historical research requires that everything must be placed in the context of its time, and present-day questions must not be allowed to distort our interpretation of past events, texts or concepts. Yet what of disciplines, such as law, which resist such an easy temporal division? What kind of method is appropriate to a discipline in which judges, advocates, scholars and students all look to past texts precisely to discover the nature of present obligations?

For historians, including legal historians, who align themselves with that contextualist school, the problems posed by an encounter between different disciplinary methodologies seem not to register. The policing of anachronism has been a major theme in the response to critical histories of international law amongst such scholars.[11] While the turn to history has on the one hand been

6 Skinner (1969) 7; Q Skinner 'Interpretation, Rationality and Truth', in Skinner (2002) 27, 50.

7 Skinner (1969) 49.

8 F Oakley, *Politics and Eternity: Studies in the History of Medieval and Early-Modern Political Thought* (Brill, 1999) 9.

9 Skinner (1969) 3.

10 C Fasolt, *The Limits of History* (University of Chicago Press, 2004) 6.

11 See, e.g., G Cavaller, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' 10 *Journal of the History of International Law* (2008) 181; I Hunter, 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations', in S Dorsett & I Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010) 11; AS Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton UP, 2011) 14–15.

celebrated, on the other, historians have sternly cautioned international lawyers against adopting a 'purely functional' relation to history.[12] The readings of past texts by international legal scholars have been dismissed for 'assuming a false continuity and connectedness that is in fact the work of the interpreter's mind', making 'fanciful connections' between scholars of earlier periods and the modern discipline of international law, or taking 'daring jumps' that destroy the 'complexity and pluralism of the discourses from various (and often very divergent) centuries'.[13] Recent international legal histories of Gentili, Grotius, Hobbes, Pufendorf and Vattel have been criticised for being 'dogged by debilitating anachronism and "presentism" '.[14] According to one particularly strong indictment:

> This kind of historiography sins against the most basic rules of historical methodology, and the results are deplorable. This genealogic history from present to past leads to anachronistic interpretations of historical phenomena, clouds historical realities that bear no fruit in our own times and gives no information about the historical context of the phenomenon one claims to recognise. It describes history in terms of similarities with or differences from the present, and not in terms of what it was. It tries to understand the past for what it brought about and not for what it meant to the people living in it.[15]

When I began writing the book, I was surprised to find that there were few direct responses by international legal scholars to the attacks on anachronism made by the contextualist school, despite the fact that those attacks seemed to challenge the core of legal method more generally. After all, as lawyers, particularly those of us with common law backgrounds, we are trained in the art of making meaning move across time—by learning, for example, how to make a plausible argument about why a particular case should be treated as a binding precedent, or why it should be distinguished as having no bearing on the present. Indeed, attending to Skinner's writing makes clear that his method was staged as a direct attack on what he dismissed as 'historico-legal' interpretations

12 R Lesaffer, 'International Law and its History: The Story of an Unrequited Love', in M Craven, M Fitzmaurice & M Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, 2007) 27, 33.

13 Cavaller (2008) 207–09.

14 I Hunter, 'The Figure of Man and the Territorialisation of Justice in "Enlightenment" Natural Law: Pufendorf and Vattel', *Intellectual History Review* (2012) 1, available at http://dx.doi.org/10.1080/17496977.2012.723335 (last visited 10 May 2013).

15 Lesaffer (2007) 34–35.

of past texts by lawyers seeking to make meaning of earlier cases for contemporary law.[16] In discussing the 'particular danger' posed by 'sheer anachronism', he focused particularly upon a series of articles published in the *Harvard Law Review* and the *Law Quarterly Review* in the 1920s and 1930s exploring the legal meaning of Sir Edward Coke's dictum in Bonham's case.[17] While as good realists we may know that legal transcripts, textbooks or doctrines are never purely legal, here was the rare case of a historian who was ready and willing to criticise legal scholars for exploring the relevance of a past case for present law, on the basis that this approach to texts from an earlier time infringed upon a properly historical method.

Skinner's approach to thinking about 'ideas in context' has been adopted largely without question by those who seek to stamp out anachronism in international legal scholarship, but their adoption ignores the criticisms to and challenges of his method that have since developed in his own field. The approach to interpreting past events or texts only in the context of their time has faced challenges both from within the disciplinary world of practicing historians and from more philosophically oriented scholarship. To take just two examples, Francis Oakley has questioned the idea that the 'context' shaping 'linguistic conventions and ideological concerns' can be confined to one that is 'contemporaneous with the lifetime of the historical author under scrutiny'.[18] Scholars, being 'people of the book', may often have 'more in common, both intellectually and in terms of linguistic conventions followed, with writers of the past' than with many of their contemporaries.[19] The assumptions, questions and concepts that inform an author's work may well be shaped by 'some intellectual tradition stretching back, it may be, to a very distant past'.[20] Thus, for Oakley, it is essential to recognise that the authors whose texts we seek to interpret may well have 'inhabited a world peopled through books with the dead'.[21] Scholars may respond in their thinking to the urgent promptings of the dead just as directly as they respond to the 'pressures, limitations and exigencies

16 Skinner (1969) 9.

17 Ibid 7, 9. The articles Skinner attacks there are TFT Plucknett, 'Bonham's Case and Judicial Review' 40 *Harvard Law Review* (1926–1927) 68; EW Corwin, 'The "Higher Law" Background of American Constitutional Law' 42 *Harvard Law Review* (1928–1929) 368; SE Thorne, 'Dr Bonham's Case' 54 *Law Quarterly Review* (1938) 543.

18 Oakley (1999) 11.

19 Ibid 19.

20 Ibid.

21 Ibid.

of their contemporary predicament'.[22] Similarly, JGA Pocock has distinguished Skinner's strategy of focusing upon 'the language context existing at a particular time', from his own attempt to ask 'what happens when a language of discourse persists and is redeployed in a historical situation, or context, other than that in which it was deployed previously'.[23] The need to think about context beyond that which is contemporaneous with the lifetime of the author, both in terms of what an author was trying to do in writing a text and in terms of the reception of that text in later historical situations, is even more pressing for legal scholarship, given that law relies upon precedent, customs and patterns of argument stretching back, at least in the common law tradition, from as recently as yesterday to 'time immemorial'.

In a subsequent reply to his critics, Skinner revisited the question of what he had really meant in his 1960s manifestos when he referred to the proper context for understanding the meaning of a text or an utterance. 'There is no implication', he said, 'that the relevant context need be an immediate one'—'the problems to which writers see themselves as responding may have been posed in a remote period, even in a wholly different culture'.[24] As a result, the 'appropriate context' in which to place the writings of historical figures is 'whatever context enables us to appreciate the nature of the intervention constituted by their utterances'.[25] In order to recover that context, it may be necessary 'to engage in extremely wide-ranging as well as detailed historical research'.[26] Interestingly, that reconsideration of the temporal nature of the 'context' of an utterance has not been taken up by later scholars with the same enthusiasm as was Skinner's earlier denunciation of anachronism. As the quotes above illustrate, contextualist critics of international legal scholarship dismiss any 'wide-ranging' studies of the movement of meaning across centuries as at best 'genealogy' and at worst 'anachronism'. Yet meanings and arguments do not necessarily heed the neatness of chronological progression, particularly but not only within the law. To refuse to think about the ways in which a concept or text from the remote past might be recovered to do new work in the present is to refuse an overt engagement with contemporary politics.[27]

22 Ibid.

23 JGA Pocock, 'Foundations and Moments', in A Brett & J Tully with H Hamilton-Bleakley (eds), *Rethinking the Foundations of Modern Political Thought* (Cambridge UP, 2006) 37, 40.

24 Skinner (2002) 116.

25 Ibid.

26 Ibid.

27 Indeed, Skinner's contextualist campaign can itself be seen as an intervention designed to undermine the grand narratives that were still in the 1960s being deployed as rationalisations for the two great

Rather than adopting contextualist historical method wholesale, then, *International Authority and the Responsibility to Protect* assumes that the proper context for understanding the legal meaning of a statement or text is not given, and is certainly not determined by chronology. More specifically, the method I develop there accepts the legitimate role of anachronism in international legal method. International legal scholarship is necessarily anachronic, because the operation of modern law is not governed solely by a chronological sense of time in which events and texts are confined to their proper place in a historical and linear progression from then to now. If the self-imposed task of today's contextualist historians is to understand the meaning of a text in its proper time and place, the study of international law requires attention to the movement of meaning. International law is inherently genealogical, depending as it does upon the transmission of concepts, languages and norms across time and space. The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation.

It is in that sense that international legal method is necessarily anachronistic. In their book *Anachronic Renaissance*, Christopher S Wood and Alexander Nagel sought to contest the 'chronological basis of the discipline' of art history and its aversion to anachronism.[28] For Wood and Nagel, art was the name given during the Renaissance to something that could hold together two ideas about time. On the one hand, the work of art was a material object—an object with a history that had been created by identifiable human agents. On the other, the work of art was a relic, a 'magical conduit to other times and places'.[29] Art had the ability both to gesture towards the 'historical life-world that created it' and to gesture beyond that world 'to symbolise realities unknown to its makers'.[30] It was in the latter sense that Renaissance art was anachronic—other to the notion of chronological time 'flowing steadily from before to after' that was then

supports of the British state—the British empire and the Anglican church: see E Perreau-Saussine, 'Quentin Skinner in Context' 69 *The Review of Politics* (2007) 106. Skinner's approach would amongst other things prove a powerful challenge to that taken by the two Oxford doyens of early modern English history during that period, the Marxist Christopher Hill and the Tory Hugh Trevor-Roper. Skinner's denunciation of anachronism challenged the idea that the movement of meaning beyond the context of its own time, including through the writing of history, was a core aspect of politics. As Tristram Hunt commented following the deaths a month apart of Hill and Trevor-Roper in 2003, '[b]oth Hill and Trevor-Roper believed that history had a political purpose beyond amusing accounts of the past. It often seems we lost that legacy before we lost them': T Hunt, 'Back When it Mattered', *The Guardian,* 5 March 2003, available at http://www.guardian.co.uk/education/2003/mar/05/highereducation.news (last visited 10 May 2013).

28 H Foster, 'Preposterous Timing' 34 *London Review of Books* (2012) 12.

29 CS Wood & A Nagel, *Anachronic Renaissance* (Zone, 2010) 17.

30 Ibid 17.

gaining the upper hand and that was necessary to the emergence of the modern state. For Wood and Nagel: ' "Art" is the name of the possibility of a conversation across time.'[31] Law is another name for that possibility. Law, like art, holds together two ideas about time. In the modern state, the authority of law, like art, derives from its relation to human acts of creation—we look for human sources of law and are no longer impressed by the idea that law is something that can be assembled from canon law, natural law, custom, tradition or moral standards by a group of erudite men.[32] In that sense, we are all contextualists now. Yet law, like art, loses its aura if it is completely reduced to human proportions. We create buildings, artefacts and even texts to embody institutions, and the power of such creations requires that they also gesture beyond the world of their own time.[33] If we want to understand the work that a particular legal argument is doing, we have to grasp both aspects of law's operation—the way it relates to a particular, identifiable social context, and the way in which it gestures beyond that context to a conversation that may persist—sometimes in a neat linear progression, sometimes in wild leaps and bounds—across centuries.

The lawyer's interest in the 'living bond' between the past and the present thus represents an implicit challenge to the approach to history and the history of political thought that has dominated much Anglophone scholarship over the past 40 years.[34] It is an open question whether the meaning of a text should properly be considered only in the context of the contemporary debates in which its author intended to intervene. To return to the example of the Suez Crisis, the method I develop is based on the premise that in order to interpret the legal meaning of past events or texts, material relating to the immediate temporal context is only one part of a much broader archive that international lawyers need to assemble. The institutional responses to the Suez Crisis are explored in the book as just one part of a broader struggle for authority and recognition that has taken place since the 1950s between different institutions claiming jurisdiction (that is, the power to declare what is lawful) and control over the people and resources of the newly decolonised states of the Middle East and Africa. The book focuses upon the Suez Crisis in order to understand how the development of new forms of executive action in response to that crisis

31 Ibid 18.

32 A Carty, *Philosophy of International Law* (Edinburgh UP, 2007) 2.

33 Wood & Nagel (2010) 7.

34 On the 'living bond' between the past and the present of international law, see B Fassbender & A Peters, 'Introduction: Towards a Global History of International Law', in B Fassbender & A Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford UP, 2012) 1, 2.

transformed the legal foundations of control over the decolonised world, and how UN officials and other international actors understood their jurisdiction and its limits—how, in other words, they understood themselves to be bound to take certain kinds of action and to refrain from taking other kinds of action. It is in that sense that a legal reading differs from a historical reading, in that it is not concerned with the past as history but with the past as law.[35]

On dogmatism: sociology and international legal method

One theme that the book explores through studying the transmission of concepts across time is the way that international officials reflect upon and understand their authority to rule. The method I adopt in doing so is influenced by the emergence in recent decades of scholarship that takes a sociological approach to the study of international organisations, and that places 'renewed emphasis on the study of practices, including the study of discourses as practices' rather than the study of 'disembodied structures, even abstractions'.[36] Where I part with sociology is in my attention to the symbolic or metaphysical aspects of the relation between institutional authority and its subjects or officials. Jurisprudence has traditionally offered a rich account of the relation between the symbolic and the material dimensions of authority and of law, one that it inherits from theology. This was precisely the tradition against which Max Weber defined his sociological method.

Just as anachronism is regularly denounced as a sin against the holy spirit of history, dogmatism has been dismissed by sociologists from Max Weber onwards as a sin against the scientific objectivity that is the goal of the empirical sciences. In his introduction to 'empirical sociology', Weber presented sociological method as a challenge to what he called 'the dogmatic disciplines', amongst them jurisprudence.[37] Weber set up a clear opposition between what he called 'the empirical sciences of action, such as sociology and history' and the 'dogmatic disciplines, such as jurisprudence, logic, ethics, and esthetics'. The basis of that distinction was that the empirical sciences sought to observe and understand 'meaningful action' or 'sociologically relevant

35 See further A Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law', in E Jouannet, H Ruiz Fabri & M Toufayan (eds), *Tiers Monde: Bilan et Perspectives* (Société de Législation Comparée, in press), also published as NYU Institute for International Law and Justice Working Paper 2012/2 (History and Theory of International Law Series).

36 D Bigo & RBJ Walker, 'International, Political, Sociology' 1 *International Political Sociology* (2007) 1.

37 M Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1978) 3.

behaviour', being that form of action or behaviour to which 'subjective meaning is attached', whereas the dogmatic disciplines 'seek to ascertain the "true" and "valid" meanings associated with the objects of their investigation'.[38] When sociology talks about meaning, it does not 'refer to an objectively "correct" meaning or one which is "true" in some metaphysical sense'. Thus, Weber introduces his empirical method by rejecting jurisprudence as a dogmatic tradition concerned with the illusory task of revealing the truth.

Yet in making that move, Weber risked throwing the baby out with the bathwater. He not only rejected metaphysics as a potential ground for his own method, but also rejected metaphysics as a meaningful or good faith basis for 'sociologically relevant behaviour'. Weber's methodology for studying social action in the modern world is embedded within 'a theory of the possibilities and limitations of political democracy in an industrialised and bureaucratised society'.[39] For Weber, that theory and its commitment to a world that had abandoned faith, enchantment or a belief in the authentic truth was preferable to more irrational, idealistic or romantic 'political isms: romanticist nationalism, agrarianism, corporate statism, syndicalism, anarchism, and the Marxism of the time'.[40] The interplay between Weber's method and his theory produced an object of study—modern bureaucracy—that he presented as itself *a priori* devoid of any relation to a third term or a metaphysical referent.

Many sociological studies of international institutions or actors retain this hostile or cynical attitude towards questions of faith, belief, loyalty or obedience that are often associated with metaphysical or theological accounts of authority. We can get a sense of this opposition from the tone of Pierre Bourdieu's introduction to *Dealing in Virtue*, the classic sociological study by Yves Dezalay and Bryant Garth of the construction of a transnational legal field through international commercial arbitration.[41] In his introduction, Bourdieu comments that 'at play' in the 'construction of international institutions' is 'the law . . . that is, piously hypocritical reference to the universal'.[42] This is more than a scrupulous attempt to avoid making judgements about metaphysical truth one way or another, but an attack on the credibility of reference to the universal *per se*. This sensibility is also well illustrated by the work of Michael Barnett, whom

38 Ibid.

39 G Roth, 'Introduction', in Weber (1978) xxxiii, xxxiv.

40 Ibid.

41 P Bourdieu, 'Foreword', in Y Dezalay & BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996) vii, viii.

42 Ibid.

Jacqueline Mowbray proposes as an example of a sociologist who demonstrates the proper way to study international institutions. In his *Eyewitness to a Genocide*, one of the most compelling books to be written about the UN, Barnett explores how and why UN officials came to believe that the organisation should not intervene during the Rwandan genocide. In his deeply Weberian account, Barnett argues that 'those working at the UN approached Rwanda not as individuals but rather as members of bureaucracies' and that UN culture shaped 'what they cared about, what behaviour they considered appropriate and inappropriate, how they distinguished acceptable from unacceptable consequences, and how they determined right from wrong'.[43] The 'inhabitants' of the UN, like any other institution, 'use a discourse and reason through rules that are moulded by a common history', and those rules 'shape what individuals care about and the practices they view as appropriate, desirable, and ethical in their own right'.[44] My book shares with Barnett's an interest in this institutional culture—in my case, an interest in how that culture emerged, the way in which it was transmitted between generations, the intellectual history of core principles such as neutrality and independence that shaped its development and the felt sense of obligation to act in particular ways that it created in UN officials and humanitarian workers.

Where I part company with Barnett and his sociological worldview is in the sense of disapproval that slowly emerges from Barnett's observations. For Barnett, bureaucracies as 'orienting machines' function 'to transform individual into collective conscience'.[45] Those who inhabit the bureaucratic world of the UN run the same risks as any other bureaucrats—in particular, 'Weber famously warned that those who allow themselves to be guided by rules will soon find that those rules have defined their identities and commitments.'[46] Bureaucrats can thus too easily 'suspend personal judgment' and 'begin to treat rules as a source of divine guidance'.[47] The 'dehumanisation' of the individual as bureaucrat can become 'an identification with the bureaucracy' and even a 'loyalty' to the institution and its values once the bureaucrat believes 'that the goals and values of the institution are superior to those once privately held'.[48]

43 M Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Cornell, 2002) xi.

44 Ibid 5.

45 Ibid 7.

46 Ibid.

47 Ibid 9.

48 Ibid.

This is particularly the case at the UN, where 'staff often talk about the UN as if it were a church' and as if its officials 'are guardians of a religion whose tenets are transcendental'.[49] For Barnett, these forms of attachment and loyalty are dangerous and avoidable, and private morality may yet triumph over institutionalised values. In the closing paragraphs of *Eyewitness to a Genocide*, Barnett declares his 'hope . . . that the institutionalisation of ethics does not lead individuals to substitute bureaucratically laced moralities for private moralities'.[50] Instead, his 'wish' is to see realised 'some version of the Nuremberg principle, the belief that individuals are accountable for their actions even if those actions are consistent with the letter of their official responsibilities, if those actions violate a placeless morality'.[51] Barnett then gives the final word of his book to Weber and his celebration of 'those rare individuals who demonstrate "a calling for politics" '.

> It is immensely moving when a *mature* man—no matter whether old or young in years—is aware of a responsibility for the consequences of his conduct and really feels such responsibility with heart and soul. He then acts by following an ethic of responsibility and somewhere reaches a point where he says: 'Here I stand; I can do no other'. That is something genuinely human and moving.[52]

Barnett sees the free will of the individual as the core element of redemption and any sense of obligation or loyalty that hampers the individual's freedom of choice as a problem to be overcome. Hope resides in the act of decision that escapes the constraints of felt obedience to an institution and its values, rather than in the institution itself. For Barnett, writing as a sociologist, the conclusion of his study is that the sense of loyalty to an institution is the problem and individual accountability is the solution. He is interested in studying how officials think and act in order to point out where within a network of official texts and actions and decisions one can find the moment of individual choice and thus responsibility. Loyalty to institutional authority is in this way treated as pathological and avoidable. Sociological method thus involves more than a commitment to objectivity in the study of human action. It also actively marginalises and at times even pathologises actions that are based on loyalty, affect and other irrational or faith-based motivations for human behaviour.

49 Ibid 9.

50 Ibid 181.

51 Ibid.

52 Ibid.

That overt rejection of the 'dogmatic disciplines' by Weber and his heirs limits the utility of sociological methods for understanding how international institutions think and operate. Dogmatics as both a theological and a jurisprudential tradition was concerned with 'the study and reproduction of the founding norms of the Western institution'.[53] Weber is just one of many modern social scientists who has declared that 'dogmatics' is 'incompatible with modernity' and thus should be 'banished'—its occasional use limited to describing 'either the religious vestiges of European textuality or certain totalitarian structures of discourse'.[54] Yet this modern attitude towards dogmatics implicitly recognises that dogma teaches us something about the power of speech, the role of the irrational in human communication and the ways in which certain forms of speech or writing come to be honoured or sanctified. Dogma is 'a logic of attachment, of fascination or fixation, which binds the subject to law'.[55] Its success depends as much upon faith as it does upon reason, and as much upon 'the ritual or theatre which stages the truth' as it does 'upon the content of specific norms'.[56] It is in this sense that dogma has a 'trans-historical quality'—it is a form of reason that 'belongs to the institution and not to its human bearers or mere office-holders' and is thus part of 'the long-term or unconscious structure of institutions'.[57] It is precisely this form of 'reason which belongs to the institution' that is the subject of *International Authority and the Responsibility to Protect*, because it this form of reason upon which the responsibility to protect concept goes to work. As the book seeks to show, the responsibility to protect concept overtly engages with how international institutions think. Rather than relying upon heroic individuals to stand their ground against corrupt worldly institutions and take responsibility for making decisions unbounded by any felt sense of constraint or obligation, the responsibility to protect concept is designed to shift the way that UN officials and other international actors think about the obligations of their office.

The widespread refusal to take seriously the symbolic, metaphysical or even normative grounds of the operation of power within modern institutions makes it harder rather than easier to grasp how international authority takes hold of its officials and its subjects today, and thus the way in which the

53 P Goodrich, 'An Abbreviated Glossary', in P Goodrich (ed.), *Law and the Unconscious: A Legendre Reader* (Macmillan, 1997) 257.

54 P Legendre, 'Hermes and Institutional Structures: An Essay on Dogmatic Communication', in Goodrich (ed.) (1997) 137.

55 Goodrich (1997) 258.

56 Ibid.

57 Ibid.

responsibility to protect concept goes to work. Modern institutions, like political and religious orders of old, are grounded upon a founding reference 'which renders the whole institutional system plausible and conceivable in human terms'.[58] Bureaucratic administrations, like any other form of institutionalised life, have 'authority structures which require legitimation, and memberships which have to be recruited and retained' and are thus 'themselves constitutive of a broad panoply of collective enchantments, in the form of rituals, symbols, legends, traditions and so on'.[59] The Catholic Church is the precursor of all modern institutions that govern 'through a vast body of officials', supported by hierarchical relations, and 'using a formal written law'.[60] The operation of modern institutions depends upon the theological inheritance of a 'formalised rhetoric, designed to make it understood that for legally legitimate institutional power to address itself in a normative form to its subjects, it must speak *in the name of* its absent source'.[61]

Rather than pathologising the affective relation between an institution and its officials, *International Authority and the Responsibility to Protect* takes the nature of that relation seriously as a core question of law and of politics. The book draws upon the tradition of jurisprudence as a dogmatic discipline, not in order to reveal the authentic truth, but in order better to understand the claims of a form of international authority that depends for its operation upon the theological inheritance which Weber sought to disavow.

THE RESPONSIBILITY TO PROTECT IN CONTEXT: ECONOMIC THINKING AT THE UN

How then does the book establish the 'context' for understanding the normative significance of the responsibility to protect concept? And how does it explore the relationship between the emergence of that concept and the symbolic dimension of international authority in the 21st century?[62] In short, the book argues that the responsibility to protect concept emerged at the beginning of the

58 A Pottage, 'The Lost Temporality of Law: An Interview with Pierre Legendre' 1 *Law and Critique* (1999) 3, 17.

59 R Jenkins, 'Disenchantment, Enchantment and Re-Enchantment: Max Weber at the Millennium' 1 *Max Weber Studies* (2000) 11, 14.

60 E Troeltsch, *The Social Teaching of the Christian Churches*, vol. 1 (Harper Books, 1960) 325, cited by GL Ulmen, 'Introduction', in C Schmitt, *Roman Catholicism and Political Form* (Greenwood Press, 1996) vii, xxxiii.

61 P Legendre, 'Protocol of the Love Letter', in Goodrich (ed.) (1997) 72, 91.

62 On the significance of 'the symbolic or theatrical dimension of political power', see V Kahn, 'Political Theology and Fiction in *The Kings' Two Bodies*' 106 *Representations* (2009) 77.

21st century as a detailed normative justification for a set of well-established but increasingly controversial techniques of executive action that had been developing since the late 1950s. The idea that there exists an international community with the responsibility to protect populations at risk did not simply emerge because the time was right for humanity to realise its own law, but rather it emerged as the 'the correlative of a particular way of governing'.[63] The emergence and embrace of the responsibility to protect concept is thus part of a protracted process in which power is being reorganised. It seeks to integrate an expansive set of governmental practices into a coherent theoretical account of international authority. *International Authority and the Responsibility to Protect* then seeks to grasp what political possibilities were being opened up—and what possibilities foreclosed—by conceptualising international authority in that way.

That attempt to develop a context within which to understand the significance of the responsibility to protect concept shaped the decision I made to centre the book around the figures of Dag Hammarskjöld, Carl Schmitt and Thomas Hobbes. A number of the responses included in this volume wondered why I chose Hammarskjöld and Schmitt in particular as two of the book's main characters. Before I turn to that question, I would note that while Hammarskjöld, Schmitt and Hobbes are indeed the central figures of my study, it would be wrong to give the impression that the book's account focuses on them and ignores their relation to other participants in the events and debates that the book recounts.[64] It is, nonetheless, fair to ask why the book foregrounds those figures, and why its action is set principally in three scenes: Africa and New York during Hammarskjöld's term as the second Secretary-General of the UN from 1953 to 1961; Weimar Germany during the inter-war period; and England in the first half of the 17th century.

In short, the book focuses on those figures in order to demonstrate that in order to understand the theory of the state and of authority that has become dominant over the latter half of the 20th century and that has remade both Europe and its colonies, it is useful to treat the archives of bureaucrats and international civil servants with the care and attention that was previously devoted to glossing the pronouncements of philosophers, judges or legal theorists. The book contributes to an intellectual history of the 20th century by

63 Foucault (2008) 6.

64 The many supporting characters who feature in the book include William the Conqueror, Cardinal Robert Bellarmine, Queen Elizabeth I, Sir Francis Drake, Richard Hakluyt the younger, John Dee, King James VI and I, the Leveller Richard Overton, Charles I, Oliver Cromwell, James Harrington, Harold Laski, Max Weber, Hans Kelsen, Gamal Abdel Nasser, Ralph Bunche, Andrew Cordier, Sir Pierson Dixon, John Foster Dulles, Lester Pearson, King Leopold II, Patrice Lumumba, Mobutu Sésé Seko, Joseph Kasavubu, Andrew Cordier, Moise Tshombé, Nikita Krushchev, Michel Foucault, Boutros Boutros-Ghali, Kofi Annan, Francis Deng, Edward Luck, and Ban Ki-Moon.

drawing out the changes that legal thinking about authority underwent in response to a series of crises of the state form in Europe and its colonies after World War I. Those crises shaped both the state law theories of inter-war Europe and international legal thinking about the UN and its role after 1945.

As Michael Marder and Russell Berman have recently commented:

> Critical Theory developed historically, in response to what Max Horkheimer labelled the 'authoritarian state', which has now overflowed the limits of the national polity and permeated the fabric of transnational financial and political institutions. This is where we ought to seek the common background of the seemingly unrelated challenges to modernity.[65]

That relationship between the forms of thinking that accompanied the emergence of the authoritarian state and those that accompanied the consolidation of the authority of transnational institutions is the focus of *International Authority and the Responsibility to Protect*. The book seeks to demonstrate 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 rationalisations of the myriad administrators who now shape everyday life for many people on this planet. In the following sections, I sketch one of the themes that the book explores through the figures of Hammarskjöld and Schmitt—the challenge to the state and to all modes of formal representation posed by liberal economic thinking, and the stakes of the turn to protection as the normative foundation of authority as a response to that challenge.

Dag Hammarskjöld and economic thinking

Hammarskjöld is a central figure and reference point for *International Authority and the Responsibility to Protect* for a number of reasons. To begin with, he took up the role of Secretary-General at a moment of crisis for the state-system of which the UN had become the ultimate guarantor. His predecessor Trygve Lie had not been able to assert the independent authority of the office, in large part because 'the clang of the Iron Curtain' had 'sent the institution into a kind of collective shock'.[66] Hammarskjöld is considered by many to have been the most important Secretary-General to date because in that context of an intensifying Cold War that threatened to expand into Africa and Asia, he successfully

65 M Marder & RA Berman, 'Introduction: Politics after Metaphysics' 161 *Telos* (2012) 3.

66 J Traub, 'The Secretary-General's Political Space', in S Chesterman (ed.), *Secretary or General? The UN Secretary-General in World Politics* (Cambridge UP, 2007) 185, 186.

developed the political role of the Secretary-General and championed new techniques of 'executive action' to fill what he called the 'power vacuums' created by the 'liquidation of the colonial system'.[67]

Hammarskjöld's vision of the role of the UN in the context of decolonisation was premised upon two key ideas—the need for executive intervention to maintain order, and the commitment to neutrality. Hammarskjöld's responses to the serial crises of decolonisation that marked his tenure—including those involving the Suez Canal in 1956, Lebanon in 1958 and Congo in 1960—transformed both the UN and the new states of the Middle East and Africa. Hammarskjöld's solution to those crises saw the introduction and development of forms of executive action such as fact-finding, preventive diplomacy, technical assistance, peacekeeping and international administration aimed at maintaining order and protecting life until the newly independent states could take over those tasks.[68] Hammarskjöld considered that the challenges of decolonisation in the context of the Cold War meant that the UN could no longer be a forum for what he called 'static conference diplomacy' and must instead become a 'dynamic instrument' for 'executive action'. He argued that new forms of action were necessary to protect the independence of newly decolonised states and to create an international order that ensured 'equal economic opportunities for all individuals and nations'.[69] The UN had a particular 'responsibility' to put in place a 'framework' within which newly independent states could determine their own 'political personality' within 'the setting of universality as represented by the United Nations'.[70] The UN was the proper actor to play this role because it was 'a universal organisation neutral in the big Power struggles over ideology and influence in the world, subordinated to the common will of the Member Governments and free from any aspirations of its own to power and influence over any group or nation'.[71]

In retrospect, we can see the 1950s and 1960s as the point at which international authority to police and manage the decolonised world began to take a form that would last throughout the remainder of the twentieth century. Perhaps because this was the point at which that form of executive rule

67 UN Secretary-General (1961) 7.

68 Ibid 1.

69 Ibid 2.

70 UN Secretary-General, *Introduction to the Annual Report of the Secretary-General on the Work of the Organization*, UN Doc A/4390/Add.1 (1960) 1.

71 Ibid.

began to be consolidated, Hammarskjöld was still able directly to express and reflect upon its existence, effects and conditions of possibility.[72] Many international lawyers in the 1950s and 1960s were also well aware of the potentially radical effect of this expansion of international executive action. For example, Stephen Schwebel presciently suggested that 'as the development of the great national civil services profoundly affected the national histories of the nineteenth and twentieth centuries, so the growth of the powers of the international executive may in time influence the future course of world affairs'.[73] Similarly Oscar Schachter, writing in 1962 soon after Hammarskjöld's death, suggested that the expansion of 'executive action' was 'widely regarded as constituting a major feature' of Hammarskjöld's legacy.[74] The radical implications of Hammarskjöld's expansion of executive action were also not lost on governments. In a stock-take of Britain's position at the UN in the aftermath of its 'recent troubles over the Suez affair', Ivor Pink of the UN Department at the British Foreign Office concluded that 'the United Nations is in many ways an unsatisfactory body' and that 'far too much power has passed into the hands of the Secretary-General'.[75] In a subsequent memo written to the Foreign Office, the British Ambassador to the UN, Sir Pierson Dixon, concluded that: 'The outcome of this crisis has left the Secretary-General more than a symbol or even an executive: he has become a force.'[76]

In developing that new role for the UN and for the Secretary-General, Hammarskjöld systematically sought to give expression to the relation between the symbolic authority he was called upon to represent and the material practices upon which that authority depended. Hammarskjöld demonstrated a rare willingness and capacity to reflect upon the conceptual foundations of international executive action and the office of the international civil servant. In

72 For the argument that it was no longer possible to reflect upon the conditions of existence of bourgeois rule once that form of rule was consolidated in the late 19th century, see N Davidson, *How Revolutionary were the Bourgeois Revolutions?* (Haymarket Books, 2012) x–xi.

73 SM Schwebel, 'The Origins and Development of Article 99 of the Charter' 28 *British Year Book of International Law* (1951) 371, 382.

74 O Schachter, 'Dag Hammarskjöld and the Relation of Law to Politics' 56 *American Journal of International Law* (1962) 1, 8.

75 ITM Pink, 'The United Nations: A Stocktaking', confidential memorandum, 7 February 1957, FO371/129903/UN2251/27 (The National Archives, Kew).

76 Sir P Dixon, 'The Secretary General of the United Nations: Mr Dag Hammarskjöld', confidential memorandum to Mr Selwyn Lloyd, 16 January 1958, FO371/137002/UN2303/1 (The National Archives, Kew). For an analysis of De Gaulle's opposition to Hammarskjöld, due in large part to Hammarskjöld's conduct of the Suez and Congo operations, see P Frielingsdorf, 'Entre poésie et politique. La correspondence entre Dag Hammarskjöld et Alexis Léger' 138 *Relations internationales* (2009) 75.

doing so, Hammarskjöld drew upon three traditions in which he had been immersed by virtue of his upbringing and experience—the aristocratic values of the Northern European civil service, the discipline of economics which was becoming an increasingly important site for determining questions of governance in post-war Europe, and—as the posthumous publication of his journal *Vägmärken* makes clear—an austere spirituality informed by medieval mysticism, Lutheran Protestantism and existential philosophy. As I argue in the book, Hammarskjöld's archive is thus an extraordinary resource for those who seek to study how international authority 'appears and reflects on itself, how at the same time it is brought into play and analyses itself, how, in short, it currently programs itself'.[77] I explore that archive in order to show how and why Hammarskjöld represented himself as bound to act in certain ways and not others, and how that sense of limitations, obligations and constraints on conduct has been transmitted between generations of international civil servants.

Here I can just give one example of the themes the book draws from that archive. From his reorganisation of the Secretariat through to the conduct of the UN operation in the Congo, Hammarskjöld treated the commitment to neutrality as a core principle that bound the Secretary-General and the Secretariat. Neutrality is often interpreted as a political concept, but *International Authority and the Responsibility to Protect* shows that Hammarskjöld's treatment of neutrality as a core principle of governance was profoundly shaped by his economic training and experience.[78] While outside Sweden Hammarskjöld is usually remembered for his performance as Secretary-General, the entry on Hammarskjöld that appeared the year before his appointment as Secretary-General in Sweden's principal encyclopaedia, *Svensk Uppslagsbok*, listed him as an 'economist'.[79] Hammarskjöld's vision of the proper role of the state in relation to society and the market was informed by the milieu in which his economic expertise had developed during the 1930s and 1940s, and in particular his involvement with two dynamic generations of Swedish economists, his experience as a senior Swedish civil servant involved in fiscal and monetary policy, and his role as an international negotiator involved in planning for the reconstruction of Europe after World War II. In his varied roles as economic adviser and Swedish civil servant, Hammarskjöld shaped Sweden's post-war

77 Foucault (2008) 78.

78 See particularly A Orford, *International Authority and the Responsibility to Protect* (Cambridge UP, 2011) 52–56. The remainder of this section draws upon arguments made in A Orford, 'Hammarskjöld, Economic Thinking, and the United Nations', in H Melber & C Stahn (eds), *Peace, Diplomacy, Global Justice, and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld* (Cambridge UP, in press).

79 B Kragh, 'Dag Hammarskjöld: The Economist' 3 *Economic Review* (2005) 82.

economic and financial planning, led trade and financial negotiations with countries including the USA and the UK, was the Swedish delegate to the Paris Conference at which the administration of the Marshall Plan was negotiated and was a key player in shaping the terms of Sweden's accession to the Bretton Woods Institutions.[80] His biographer, Brian Urquhart, suggests that 'political economy' remained Hammarskjöld's lasting interest even after he became Secretary-General.[81]

Hammarskjöld had been one member of the group of dynamic young economists that emerged in Sweden during the 1920s and 1930s remembered today as the Stockholm School. Having come of age during a period of rising unemployment in Sweden and depression globally, the Stockholm School economists were concerned with the stabilisation of employment levels and favoured state planning and government intervention as tools to achieve social objectives.[82] Yet while Hammarskjöld was associated with the Stockholm School, in many ways his approach to economic questions was more aligned with that of the older (and more classically liberal) generation of economists that had established the discipline in Sweden. The gap between Hammarskjöld's views and those of his Social Democratic colleagues can be seen, for example, in the debate over what sectors of society should bear the burden of repaying Sweden's public debt after World War II. While economists such as Gunnar Myrdal and bodies such as the *Arbetarrörelsens Fredsråd* (the Peace Council of the Labour Movement) sought to achieve wage rises for workers and full employment through a growth-oriented programme, Hammarskjöld prioritised prolonging austerity in order to achieve price stability and the protection of government bond holders.[83] Hammarskjöld's approach reflected 'the general view of the Civil Service aristocracy' that the state should be 'an arbiter between conflicting interests', and the view of liberal economists that the state should remain neutral and refrain from taking decisions that might redistribute property between groups.[84] His divergence from emerging Social Democratic orthodoxy can also be seen in his approach to

80 G Ahlström & B Carlson, 'Hammarskjöld, Sweden and Bretton Woods' 3 *Economic Review* (2005) 50.

81 B Urquhart, *Hammarskjöld* (WW Norton, 1992) 369.

82 L Jonung, 'Introduction and Summary', in L Jonung (ed.), *The Stockholm School of Economics Revisited* (1991) 1, 6. Economists associated with the Stockholm School include Dag Hammarskjöld, Olf Johansson, Karin Kock, Erik Lindahl, Erik Lundberg, Gunnar Myrdal, Bertil Ohlin and Ingvar Svennilson.

83 Ö Appelqvist, 'A Hidden Duel: Gunnar Myrdal and Dag Hammarskjöld in Economics and International Politics 1935-1955', Stockholm Papers in Economic History No 2 (2008) 8.

84 Ibid.

issues concerning the role of governments in regulating the market. Hammarskjöld considered that governments in post-war Europe would increasingly be confronted with strong groups able to wield power 'on a scale that was inconceivable earlier'.[85] As a result, new forms of state intervention were needed to ensure that 'regular open market operations' could take place.[86] According to Hammarskjöld, the new experiments in economic planning should not, however, be carried out by parliamentary bodies subject to capture by special interest groups. He argued that while new functions were required of governments due to developments in the market, it was preferable that those functions be entrusted to 'institutions that, like central banks, are essentially removed from the direct influence of party politics'.[87]

Hammarskjöld's economic thinking shaped the model of the state and of international administration that he promoted both in post-war Europe and later in the decolonised world. His starting premise—like that of many liberal economists of his age, but unlike many of his Swedish Social Democratic colleagues—was that the state is grounded upon and legitimised by economic freedom, and that executive rule may be necessary to create the conditions needed to secure that freedom. Hammarskjöld's approach to such questions was much closer to that proposed by the emerging Ordoliberal school of economists and lawyers than might have been expected from someone with his background and links to Social Democratic governments in Sweden. The Ordoliberal or Freiburg school is the name given to a loosely affiliated group of economists and lawyers that emerged in Germany during that period, generally taken to include the economist Walter Eucken, the legal scholars Franz Böhm and Hams Großmann-Doerth, and the liberal economists Alexander Rüstow, Wilhelm Röpke and Alfred Müller-Armack.[88] In the aftermath of the Great Depression, Eucken, Rüstow, Röpke and Müller-Armack had analysed what they saw as a crisis of the capitalist economy and had sought to develop the foundations of a new liberalism.[89] The contribution of the Ordoliberal school, with its close collaboration between economists and legal

85 H Landberg, 'Time for Choosing: Dag Hammarskjöld and the Riksbank in the Thirties' 3 *Economic Review* (2005) 13, 28.

86 Ibid 29.

87 Ibid.

88 R Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy', in P Mirowski & D Plehwe (eds), *The Road from Mount Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard UP, 2009) 98, 109–11; K Tribe, *Strategies of Economic Order: German Economic Discourse 1750-1950* (Cambridge UP, 1995).

89 Ptak (2009) 110.

scholars, was to approach the question of how to create a competitive market economy as a question of constitutional order.[90] They criticised the Weimer Republic as an 'economic state' that had too easily become the prey of organised special interests and was unable to act for the collective good. Drawing particularly on the critique of parliamentary democracy by Carl Schmitt,[91] Rüstow and Müller-Armack argued that economic order required a strong state that could stand above all other powers or interests.[92] Limiting parliamentary democracy would make it possible to free the market from special interests, enable competition and realise the social potential of the economy.[93] For the Ordoliberals, the problem with democracy was its dependence upon interests as expressed through political parties and popular voting—the result was that the government lacked authority, the ability to assert leadership and the capacity to act.[94] The solution was to allow for temporary dictatorship, which would make it possible to implement the measures necessary for the maintenance of social order and the market economy in a timely fashion, while providing for such measures later to be subjected to democratic debate.[95] In addition, the Ordoliberals had a distinctively anti-modernist dislike of bureaucratisation, urbanisation and redistributive social policies.[96]

As *International Authority and the Responsibility to Protect* shows, Hammarskjöld's views on the role of the state echo these trends in European economic thought, in particular his commitment to limited forms of state or international planning designed to support a well-functioning economic order, his concern with the capture of the state by special interests, and his scepticism about entrusting economic decision-making to parliamentary bodies. Hammarskjöld thus enshrined a particular form of economic thinking at the heart of the UN. This may prove to be one of his most important legacies. When asked at a press conference in 1957 whether the retirement of Gunnar Myrdal from the Economic Commission for Europe would mean a shift in

90 VJ Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism', Freiburg Discussion Papers on Constitutional Economics No 04/11 (2004).

91 C Schmitt, *The Crisis of Parliamentary Democracy*, 2nd ed., trans. E Kennedy (MIT Press, 1988) [1926].

92 Ptak (2009) 111.

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid 104–05.

the nature of economic thinking at the UN Secretariat, Hammarskjöld commented:

> I think that our duty is collectively to reflect as well as we can not this or that trend in political thinking in economics, but certainly the development of economic thinking at its best. It is eclectic; it is pragmatic, if you want. From that point of view, the scientist may sometimes feel a little unhappy because everyone who has this kind of academic background, whether it is Mr Myrdal or Mr Hammarskjöld, of course likes to think in his own way. But I think we are all solidly and well coordinated and subordinated to the major responsibility.[97]

While Hammarskjöld considered that the UN had a significant role to play as a neutral administrator of the decolonisation process, 'economic thinking' had taught him that such a role was 'subordinated to the major responsibility'. He insisted that the scope of governmental action, whether undertaken by the UN or by decolonised states themselves, must be limited. He considered that government (whether by states or by international administrators) should be premised upon principles of neutrality and impartiality. While the commitment to administrative neutrality rather than state planning, and the preference for executive and expert rule over democratic politics, would prove controversial even in Europe,[98] the application of this model of economic thinking in the context of decolonisation would have the tragic consequences that the book explores in detail.

As *International Authority and the Responsibility to Protect* shows, Hammarskjöld had little time for legal formalities or issues of representation when they stood in the way of establishing economically rational government. He was committed to 'bringing the underdeveloped countries into the world market in the proper way',[99] and saw no problem with championing executive over parliamentary rule in order to do so. He considered that useful and valuable experiments in governance were best realised through 'appropriate informal planning within the administration' rather than through attempts to create something 'permanent' or formal.[100] That nonchalant approach to questions of representation shaped the rationalisation of UN authority for the next 50 years. With the end of the Cold War, however, the ends to which the conflict

97 Urquhart (1992) 370–71.

98 A Orford, 'Europe Reconstructed' 75 *Modern Law Review* (2012) 275.

99 Urquhart (1992) 376.

100 See particularly 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* (The Bodley Head, 1962) 170, 172.

prevention machinery of the UN was put became more ambitious. The scope and complexity of international executive action expanded dramatically during the 1990s. Peacekeeping became established as a core technique of international executive action in the aftermath of the Cold War, civilian administration became significantly more ambitious in scope and scale, and UN agencies in the humanitarian field also began to exercise an increasing range of governmental powers.

With that 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. The authority of the UN 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 seemed increasingly unable to offer either operationally useful or politically satisfying answers to questions about authority that arose as a result of the growth of the power of the international executive. Many of those concerns came to a head in 1999 when NATO intervened in Kosovo without Security Council authorisation. While some states and commentators saw the NATO intervention as illegal, others argued that it was legitimate on functional grounds. This was the logical extension of the functionalist justification for the expansion of UN jurisdiction that had accompanied international executive action since the 1960s.[101] If the functions of sovereignty had been disaggregated and the international community had become the agent of a system for ensuring peace and protection, why did it matter who exercised those functions? If the UN failed to make the right decisions, failed to protect populations at risk effectively and failed to conduct itself in conformity with fundamental human rights values, what was wrong with coalitions of the willing, powerful states or regional organisations taking its place as executive agents of the world community, particularly if they could do so more efficiently?

In light of this history, the responsibility to protect concept can be understood as an attempt to answer growing questions about the legitimacy of international authority that had been systematically displaced by liberal economic thinking. That failure to take questions of representation seriously was met with a turn to protection as the foundation for authority in the form of the responsibility to protect concept. In the next section, I turn to consider the writing of another thinker who was concerned with the ways that liberal economic thinking bypasses formal issues of representation and who sought to

101 For the judicial endorsement on largely functionalist grounds of the expansive approach adopted to UN executive action during Hammarskjöld's term as Secretary-General, see *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 168.

respond with an appeal to protection as the foundation of authority—the German jurist Carl Schmitt.

Carl Schmitt versus economic thinking

The expansion of executive rule overseen by Dag Hammarskjöld was shaped by what he referred to as 'economic thinking'. In order to grasp the stakes of that expansion of executive rule, *International Authority and the Responsibility to Protect* turned to a key protagonist in debates about the relation between state-law theory and economic thinking in Europe during the inter-war period, the jurist Carl Schmitt. Schmitt remains a controversial figure due to his relationship to the Nazi party, his role as the unofficial 'Crown Jurist' of the Third Reich during the 1930s and his anti-Semitism.[102] Nonetheless, perhaps because of his anti-liberal politics, he was a keen critic and analyst of the challenge posed by liberal versions of economic thinking to questions of juridical form and representation. Thus, Daniel McLoughlin's concern that an analysis of Schmitt's support for executive rule must distract attention from questions of structural social and economic context is misplaced.[103] *International Authority and the Responsibility to Protect* shows that Schmitt's turn to protection as the basis for an expansion of executive rule was a counter-revolutionary attempt to address a series of economically based challenges to the authority of the German state, both materially and conceptually. The material challenges to the state in Germany included the wave of mass strikes and armed struggles for the streets that accompanied the rise of the German Communist Party, increasing levels of unemployment, hyper-inflation, and the banking collapse and global financial crisis of 1929. The conceptual challenges to state authority were posed both by revolutionaries seeking to politicise the claim that the state exists to further the general interest of the collective and by new forms of liberal economic thinking that sought to sideline the role of the state altogether.[104]

As noted in the previous section, Schmitt was seen as a fellow-traveller by those Ordoliberal economists of the inter-war period who sought to resist the forms of 'welfare state interventionism' that they foresaw as the inevitable result of parliamentary democracy.[105] For the Ordoliberals, Schmitt's theory of the strong state as the necessary condition of order and security provided the

102 G Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (Verso, 2000) 7–9, 176–200.

103 I thus disagree with Benno Teschke's position that 'Schmitt is not known or read as a theoretician of the inter-war economic downturn, revolutions and civil wars', and therefore he should not be known or read in that way: B Teschke, 'The Fetish of Geopolitics' 69 *New Left Review* (2011) 81.

104 See the arguments made in Orford (2011) 110–11, 125–27.

105 Ptak (2009) 111.

needed authoritarian supplement to more liberal economic theories. Schmitt presented his state-law theory as a counter to those versions of liberal economic thinking that had sought to do away with questions of juridical form and political representation, and which as a result could offer no response to the revolutionary situation with which Weimar Germany was confronted. In particular, Schmitt presented his 1923 essay *Roman Catholicism and Political Form* as a challenge to 'the economic thinking of our time'.[106] The essay was a direct response to Max Weber's classic text, *The Protestant Ethic and the 'Spirit' of Capitalism*.[107] As a comparison of the two titles suggests, in his essay Schmitt sought to oppose Roman Catholicism to Protestantism, and Spirit to Form. In addition, Schmitt opposed economic to juridical thinking. Schmitt characterised the 'struggle for economic thinking' as 'a struggle against politicians and jurists'.[108] For Schmitt, juridical thinking is oriented towards the public sphere, and economic thinking is oriented towards the private sphere. Indeed, for Schmitt economic thinking is openly hostile to questions of representation and juridical form in relation to public life. 'Political and juridical forms are equally immaterial and irritating to the consistency of economic thinking.'[109] Economic thinking is only concerned to preserve juridical form in relation to private law conceptions of property and contract, while '[p]ublic life is expected to govern itself.'[110] Thus for Schmitt, liberal economic thinking desires the representative function of the state to wither away—'the understanding of every type of representation disappears with the spread of economic thinking'.[111] Schmitt considered that this type of thinking was unsustainable—eventually, all power has to become political, or else the situation will dissolve into civil war between different groups claiming loyalty and authority. Thus, faced with the challenges to the state by the revolutionary situation in Germany, and with the rise of a form of liberal economic thinking that sought to sideline the question of public authority altogether, Schmitt sought to develop an authoritarian defence of both the state form and of the concept of representation.

106 Schmitt, *Roman Catholicism* (1996) 13.

107 Ulmen (1996) xix, xxii. See also C Colliot-Thélène, 'Carl Schmitt versus Max Weber: Juridical Rationality and Economic Rationality', in C Mouffe (ed.), *The Challenge of Carl Schmitt* (Verso, 1999) 138; K Engelbrekt, 'What Carl Schmitt Picked Up in Weber's Seminar: A Historical Controversy Revisited' 14 *The European Legacy* (2009) 667.

108 Schmitt, *Roman Catholicism* (1996) 13.

109 Ibid 27.

110 Ibid 28.

111 Ibid 25.

For Schmitt, at stake in any theory of the state was the way in which unity could be created in a situation of conflicting claims for loyalty, fidelity and recognition. According to Schmitt, sovereignty is the name given to the 'political unity' that is capable of creating a 'normal situation' out of the potential for 'civil war'.[112] The capacity to secure peace and guarantee order depended upon the existence of one superior authority that could create unity and command loyalty. For Schmitt, 'the factual, current accomplishment of genuine protection is what the state is all about'.[113] The authority of the state as protector was premised upon its capacity to defend the will of an 'indivisibly similar, entire, unified people'.[114] In Schmitt's view, it was far from clear that parliamentary democracy was capable of creating unity in such a situation.[115] A new guardian of the political order was needed—a sovereign who could both enable and represent the general will, decide on the exception, and distinguish between friend and enemy. During times of emergency or civil war, the preservation of security depended upon the existence of a strong state that could command 'a different and higher order of obligation than any of the other associations in which men live'.[116] For Schmitt, 'the totality of this kind of state power always accords with the total responsibility for protecting and securing the safety of citizens'.[117] In the context of Weimar, Schmitt argued that in order to achieve social integration and guarantee the existing political order, it was necessary to question the acceptance of parliament as the locus of authority and the source of valid law. Schmitt's turn to protection was thus a counter-revolutionary attempt to explain why executive rule was the answer to the problem of authority in the revolutionary conditions of the Weimar Republic.

Despite the political uses to which he put these insights, Schmitt was nonetheless right to argue that liberal economics and legal positivism had too readily abandoned the question of representation. Normative questions about the grounds of authority (and thus of law) cannot be avoided, particularly but not only in revolutionary periods—that is, precisely the periods in which protection has been invoked as a justification for recognising particular claimants to power as legitimate. As *International Authority and the Responsibility to*

112 C Schmitt, 'Ethic of State and Pluralistic State', in Mouffe (ed.) (1999) 196, 203.

113 C Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. G Schwab & E Hilfstein (Greenwood Press, 1996) [1938] 34.

114 C Schmitt, *Legality and Legitimacy*, trans. J Seitzer (Duke UP, 2004) [1932] 28.

115 Schmitt (1988).

116 Schmitt (1999) 196.

117 Schmitt, *The Leviathan* (1996) 96.

Protect seeks to show, however, that is not to say that the turn to protection has a predetermined political effect.[118] The turn to protection to challenge old political forms and champion new forms has historically been a strategy of both revolutionary and counter-revolutionary movements. The claim that authority to be lawful must be capable of securing the welfare of the people is a radical one. Yet whether that radicalisation of authority, and the resulting militarisation of civil life that often accompanies it, serves revolutionary or counter-revolutionary ends cannot be answered abstractly. To argue that the capacity to protect grounds authority is itself a normative claim. *De facto* authority, the capacity to protect in fact, is only perceived as giving legitimacy to power where protection is already invested with a normative value. Differences in the bases of that normative claim give rise to differences in the project of creating institutions that can realise protection in this world. The turn to protection as the grounds of international authority thus opens up the questions of who can rightly claim to speak in the name of the 'international community' in a given situation, what vision of protection the international community will seek to realise, and on whose behalf the responsibility to protect will be exercised. These questions are unavoidably political. Answering them involves determining which authority, representing which normative commitments and acting on behalf of which people, will have the jurisdiction to state what protection means and which claimant to authority is capable of delivering it in a given time and place.

ON OPTIMISM

Why then, as Ben Golder asks, does the book end on a cautiously 'optimistic' note? It does so because for decades, there was no account of authority in international law that was adequate to the task of understanding the practices of international executive rule that have been steadily expanding since the 1950s. Core questions about status and representation have been dismissed as anachronistic by legal scholars rationalising the exercise of administration by the UN and other international actors. International authority has received no further justification than the functionalist claim to be acting as executive agent of the international community or the moralist claim to be representing the 'collective conscience of humanity'.[119] More often, humanitarian governance has been represented as an exceptional measure, to be undertaken in situations

118 Orford (2011), see particularly the discussion at 135–38, on which this paragraph draws.

119 'Secretary-General Presents His Annual Report to General Assembly', Press Release SG/SM/7136, GA/9596, 20 September 1999.

of emergency. From Hammarskjöld onwards, intervention has been characterised as temporary, and administration as a form of rule with no implications for questions of status. As formal authority remained with the state, there was no need to develop any elaborate normative justifications for what were after all just temporary situations of emergency governance. Yet over the intervening half century, the UN has established a long-term managerial and policing role in the decolonised world. That role has ensured the formal independence of states, but it has also served to ensure that decolonisation does not disrupt the 'vital systems' for accessing and transporting resources established during the age of formal empire.[120]

My sense of the articulation of the responsibility to protect concept as a significant and productive development arises because that concept puts the question of authority back in its rightful place at the centre of discussions about international action. As *International Authority and the Responsibility to Protect* attempts to demonstrate, the concept thus allows us to think anew about authority 'as a factor' within international society's 'relations of production'.[121] The responsibility to protect concept turns away from the now reflex gesture of expressing contempt for the ties of worldly institutions through dreams of heroic individuals or moral internationalists who can exercise their freedom of the will in moments of sovereign decision-making unbound by constraints of loyalty or obligation. Instead, it—and my book in turn—takes the obligations, loyalties, practices and faiths of international officials seriously. *International Authority and the Responsibility to Protect* can thus be read as a kind of 'anti-Schmittian parable',[122] in which the legacy of political theology turns out to be found not in the heroic decision that transcends the felt obligations and loyalties to worldly institutions, but in our responsibility for those institutions themselves.

120 See particularly Orford (2011) 55–56, 66–68. On 'vital systems', see SJ Collier & A Lackoff, 'Vital Systems Security', Anthropology of the Contemporary Research Collaboratory Working Paper No 2, 2 February 2006.

121 H Marcuse, *A Study on Authority*, trans. J De Bres (Verso, 2008) [1936] 87.

122 I borrow this phrase from R Halpern, 'The King's Two Buckets: Kantorowicz, *Richard II*, and Fiscal *Trauerspiel*' 106 *Representations* (2009) 67, 71.