http://researchspace.auckland.ac.nz

ResearchSpace@Auckland

Copyright Statement

The digital copy of this thesis is protected by the Copyright Act 1994 (New Zealand).

This thesis may be consulted by you, provided you comply with the provisions of the Act and the following conditions of use:

- Any use you make of these documents or images must be for research or private study purposes only, and you may not make them available to any other person.
- Authors control the copyright of their thesis. You will recognise the author's right to be identified as the author of this thesis, and due acknowledgement will be made to the author where appropriate.
- You will obtain the author's permission before publishing any material from their thesis.

To request permissions please use the Feedback form on our webpage. http://researchspace.auckland.ac.nz/feedback

General copyright and disclaimer

In addition to the above conditions, authors give their consent for the digital copy of their work to be used subject to the conditions specified on the Library Thesis Consent Form and Deposit Licence.

Note : Masters Theses

The digital copy of a masters thesis is as submitted for examination and contains no corrections. The print copy, usually available in the University Library, may contain corrections made by hand, which have been requested by the supervisor.
THE QUEST FOR PERPETUAL PEACE

POSSIBILITIES FOR INTERNATIONAL LAW REFORM
BASED ON PHILIP ALLOTT’S THEORY OF SOCIAL IDEALISM

JUDITH HAMMOND

A thesis submitted in the fulfilment of the requirements for the degree of
Doctor of Philosophy
The University of Auckland 2010
ABSTRACT

‘Dare to think! Dare to know! Dare to speak! Dare to hope!’¹

This thesis takes up Philip Allott’s challenge to think beyond the confines of academic and professional disciplines, to formulate new ideas that will transcend the current international order and create a better human future. Part I offers a theoretical exploration of past endeavours to secure perpetual peace and a map of the contemporary theoretical landscape in international law and international relations within which Allott’s theory of social idealism is situated. Part II is an explication and evaluation of Allott’s theory. The evaluation confirms that while the theory prescribes an international constitutionalism for a ‘true’ international society, it does not provide practical guidance for improving the current system of international law. Allott is well aware of this. When referring to his own contribution to the discourse on the nature and function of law in humanity’s integrated future, he declares that the geometer’s work is complete, but that there is a need for more detailed carpenter’s plans. His hope is that (younger) scholars and intellectuals will be inspired to reconnect with their intellectual inheritance, to explore new and better lines of thought, and to seek better connections between ideas – even ancient ones. Consequently, in Part III, Allott’s theory is used as a springboard to construct three practical proposals intended to contribute to those detailed plans. The proposals have been developed to enable humanity to move in the direction of Allott’s ‘true’ international society specifically by transcending the recurrence of mass slaughter that is both condemned and condoned by the current regime of international law. The first proposal of an ethical obligation, and the second of an eventual legal code, concern the holding to account of all capable members of humanity for the protection of vulnerable members from atrocity. The proposals are submitted in the hope that the contemplation – if not the realisation – of these ideas might accelerate the socialisation and democratisation of international society by ‘the people’. This would also accelerate the infiltration of international law by individuals as both subjects and objects, and redirect the central task of international law away from the protection of naked reason of state towards the reconciliation of capability and vulnerability of individual members. The third political proposal suggests how these ideas might be promulgated within the current legal and political milieux. It is

anticipated that these proposals would enhance the development of a ‘true’ international law – one that is a product of the total social process of international society, of all people and subordinate societies. With the actualisation of such an international law, perpetual peace might be realised.
Dedicated to Philip Allott

Your extraordinary work has inspired me and occupied my time for most of the first decade of the 21st century. This is a most privileged start to what, I hope, will be an exceptional century in which humanity matures and transcends the theoretical anomalies of the past five hundred years to create, finally, a world of perpetual peace. I trust I have honoured your work by endeavouring to think at the level of the human race.
ACKNOWLEDGEMENTS

First, I wish to thank my Advisor, Treasa Dunworth, Senior Lecturer, Faculty of Law, whose teaching inspired my interest in international law and encouraged me to launch myself into this project. Your academic guidance and ongoing support enabled me to finish it. Thank you also to my Primary Supervisor, Dr Tim Dare, Head of Department, Department of Philosophy, for adopting me after the retirement of Emeritus Professor Andrew Sharp, Department of Political Studies, and for helping me to cross the finish line. Thank you also to Professor John Morrow, Pro Vice Chancellor (Academic), for your role as Co-Supervisor.

Financial support came from The University of Auckland’s PhD Scholarship, the Faculty of Arts, and the Department of Political Studies. This support enabled me to attend conferences in Dunedin, Canberra (four times), Amsterdam, The Hague, and Nicosia, and to spend six months in The Hague in 2004 to research and complete a legal internship at the International Criminal Tribunal for the Former Yugoslavia. Thank you to Lisa Tabassi (at the time Legal Advisor, Organisation for the Prohibition of Chemical Weapons) for sharing your home, love, and professional knowledge during those six months.

I also wish to thank the Department of Political Studies for its academic support, various employment roles, and for being such pleasant colleagues and friends. Thanks also to the Arts and Education and Business Operations teams at Auckland UniServices Limited – in particular the latter which brought much needed laughter and balance towards the end.

Special thanks to fellow PhD candidates for your friendship and support. You made the journey so much easier. In alphabetical order – David Griffiths, David Lindsey, Edwin de Ronde, Guy Charlton, Herman Salton, Julienne Molineaux, Lisa Chant, Lyndon Burford, Sally Simmonds, and Vivienne Hunt. Others who crossed the finish line some time ago and who helped through the peaks and valleys were Dr Marianne Franklin, Dr Heather Devere, and Dr Jane Verbitsky. Thanks to Dr Jane Scott for your guidance and editing of what was supposed to be the home straight but turned out to be the beginning
of the middle of the race. Also, thanks to Andrew Lavery for your skilful formatting and to Paul Vincent for your editing assistance just before the finish line.

Dr Susan Carter’s PhD workshops and her support were most helpful, as were Professor Alison Jones’ writing workshops. Thanks also to Jennifer Graham, Subject Librarian, at the General Library, and Mary-Jane Russell of the Davis Law Library for your professional and personal support. Also, many thanks to Dr Catherine Cook for your guidance and support towards the end.

Thanks to my son, Irving, and the rest of my family for your patience and support. Thanks to all of my friends who have supported me, each in their own unique way; special thanks for your patience and understanding during my ‘absence’ through certain periods, particularly during the last push. I decided not to name you all – you know who you are. I am so grateful that you are in my life and for the unique gifts you bring. I hope I can make up for the preoccupation of the past few years by being more present and supporting you in your endeavours.
# TABLE OF CONTENTS

ABSTRACT ............................................................................................................. II
DEDICATION .......................................................................................................... IV
ACKNOWLEDGEMENTS .......................................................................................... V
LIST OF FIGURES .................................................................................................. XI
LIST OF TABLES ..................................................................................................... XI
LIST OF ABBREVIATIONS ..................................................................................... XII
ALLOTTIAN DEFINITIONS ..................................................................................... XIII

INTRODUCTION .................................................................................................. 1
1.1 The problem: An international ‘unsociety’ .................................................. 1
1.2 The research questions and methodology ................................................. 8
   1.2.1 Three research questions ................................................................. 8
   1.2.2 Part I: Setting the scene: The historical quest for perpetual peace .... 8
   1.2.3 Part II: Defining the ideal: Allott’s new social and legal theory ...... 11
   1.2.4 Part III: Bridging the gap between the ideal and non-ideal: the practical proposals ... 14
   1.2.5 The ethical proposal ........................................................................ 14
   1.2.6 The legal proposal ........................................................................... 14
   1.2.7 The political proposal ..................................................................... 15
1.3 Preliminaries to reading Allott ................................................................. 16
1.4 An interdisciplinary approach .................................................................... 19
1.5 Epistemological and normative assumptions .......................................... 21
1.6 The original contributions of the thesis .................................................. 22
1.7 Conclusion .................................................................................................. 24

PART I – SETTING THE SCENE: THE HISTORICAL QUEST FOR PERPETUAL PEACE ....25

2 FAULT LINES IN THE FOUNDATIONS OF LIBERALISM .................................. 25
2.1 Introduction ................................................................................................. 25
2.2 Universalist medieval Christian projects of reconstruction in an age of war 28
2.3 Papal demise: Pre-humanist projects of absolute sovereignty .................. 29
2.4 Scholastic dilemmas: Law – Divine, one and indivisible, in an expanding and violent world ................................................................. 32
2.5 The secular turn: the drive of self-preservation ......................................... 35
2.6 Early positivism: The emergence of inviolability from the influence of norms or values ................................................................. 36
2.7 The Grotian moment: natural law based on human nature, the birth of liberalism and international law ......................................................... 37
2.8 Hobbes’s world of fear: The state of nature and an exit strategy through contract 41
2.9 Post-Westphalian projects of reconstruction ............................................ 44
2.10 The Vattelian worldview: transubstantiation of the state and a new metaphysics of the law of nations ............................................................... 46
2.11 Kant’s perpetual peace: a deontological, positive law of peace .............. 50
2.12 Liberal anomalies ....................................................................................... 54

3 MAPPING THE CONTEMPORARY THEORETICAL LANDSCAPE .................... 58
3.1 Introduction ................................................................................................. 58
3.2 Allott’s prescription for the role of law .................................................... 59
3.3 Allott’s five horizons of legal philosophy and Wight’s three international relations typologies ................................................................. 62
   3.3.1 The legal positivist horizon ............................................................... 64
   3.3.2 The realist/pragmatist horizon ......................................................... 68
   3.3.3 The sociological/historical horizon .................................................. 71
   3.3.4 The natural law/rationalism horizon ................................................. 72
   3.3.5 The idealist/romantic horizon ........................................................... 73
6.2 Does Allott’s Theory Provide Practical Guidance: Is It a Feasible, Accessible and Morally Accessible Theory? .................................................. 168
6.3 Feasibility ........................................................................... 168
6.4 Accessibility ....................................................................... 171
6.5 Moral Accessibility.............................................................. 176
6.6 A Non-Ideal Theory: A Solidarist Grotian Bridge to Balance Theory with Practice.... 179

PART 3 – BRIDGING THE GAP BETWEEN THE IDEAL AND NON-Ideal: THE PRACTICAL PROPOSALS ....................................................... 182

7 PROLOGUE: COMBINING THEORY AND PRACTICE .......................................................... 182
7.1 Possibilities within the Shadowland of Emergent Political Realities ...................... 184
7.2 Distant Legal Possibilities: An International Tort for the Duty of Care .............. 185
7.3 An Ultimate End of Perpetual Peace via an Ethical Obligation to Protect .......... 186

8 THE ETHICAL PROPOSAL: HUMANITY’S OBLIGATION TO PROTECT FROM ATROCITY ................................................................. 190
8.1 Introduction ......................................................................... 190
8.2 Section 1: The Post-Modern Cul-de-sac: Carty, Riceour, De Derian ............ 192
8.3 Section 2: Habermas’ Theory of Communicative Rationality: Transcendence through Deliberative Democracy ........................................ 197
8.4 Section 3: Levinas’ Escape Route – Transcendence through an Ethics of Alterity..... 200
8.5 Section 4: Manderson’s Extension: Melding Legal Responsibility with Levinasian Ethics ........................................................................ 204
8.6 Section 5: An Extension of Proximity and the Duty of Care to the International Realm ................................................................. 210
8.7 Section 6: Reconciling the Demands of a Levinasian Ethics of Alterity .......... 213
8.8 Conclusion .......................................................................... 218

9 THE LEGAL PROPOSAL: TOWARDS LEGAL EXPRESSION FOR FAILURE TO PROTECT ................................................................. 220
9.1 Introduction: Closing the Gap between Inchoate Regimes of Accountability ....... 220
9.1.1 The limitations of international criminal law and individual responsibility ...... 221
9.1.2 The flawed regime of state responsibility ........................................... 224
9.1.3 The gap in accountability .................................................................. 225
9.1.4 The power of political rhetoric and law to support non-rescue .................. 226
9.1.5 Moving beyond legality to the reality of mass violence and suffering .......... 227
9.1.6 The vexed question of collective responsibility .................................... 228
9.2 Transformations, Creativity, and Emerging Norms: Reason for Optimism ....... 230
9.2.1 Revolutionary and Incremental Change ............................................. 230
9.2.2 Moments of Creativity ..................................................................... 231
9.2.3 Legal Fictions to Guide the Way ....................................................... 232
9.3 Emerging Norms ........................................................................ 233
9.3.1 An increasingly obligatory duty to rescue .......................................... 233
9.3.2 Exceptions to the doctrine of state immunity for civil liability ................ 237
9.3.3 Emerging general principles of international civil litigation .................. 240
9.3.4 Transformative Possibilities ............................................................ 241
9.4 Why Look to Tort as a Remedy? ................................................................ 242
9.4.1 An international law of obligations .................................................... 242
9.4.2 A responsiveness to the complexities of human behaviour .................... 243
9.4.3 Causation – the nexus between responsibility and harm ...................... 245
9.4.4 Fairness and causation .................................................................... 248
9.5 The Proposition – A Hybrid Tort of Negligence for Failure to Protect ........... 249
9.5.1 Legal remedy ................................................................................. 253
9.5.2 Goal ............................................................................................. 253
9.5.3 Source ......................................................................................... 254
9.5.4 Adjudication .................................................................................. 254
9.5.5 Plaintiff ......................................................................................... 255
9.5.6 Defendant ..................................................................................... 255
9.5.7 Cause of action .............................................................................. 255
9.5.8 Type of action ............................................................................... 255
11 SUMMARY .................................................................................................................. 273

11.1 PART I: THE CAUSES OF THE CURRENT DISORDER ........................................... 273
11.2 PART II: ALLOTT’S THEORETICAL ANALYSIS AND PRESCRIPTION ............ 276
11.3 PART III: COMBINING THEORY AND PRACTICE ........................................... 282
11.4 CONCLUSION ......................................................................................................... 287

APPENDICES .................................................................................................................. 288

APPENDIX 1: TREATY ON THE ELIMINATION OF WAR ...................................... 289
APPENDIX 2: TREATY ON THE CONSTITUTING OF INTERNATIONAL SOCIETY ....... 291
APPENDIX 3: TREATY ON THE ELIMINATION OF FORCE IN INTERNATIONAL SOCIETY .... 293

BIBLIOGRAPHY ............................................................................................................. 295
LIST OF FIGURES

1. Allott’s Field-Theory Classification of Legal Philosophies ........................................ 63
2. Theoretical Spectrum .................................................................................................. 78
3. Allott’s Theory of a Society’s Self-Constituting ....................................................... 145

LIST OF TABLES

1. Theoretical Elemental Variants .................................................................................. 80
2. The Conventional and the Proposition’s Application of the Elements of Tort ....... 250
### LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FSIA</td>
<td>Foreign Sovereign Immunities Act</td>
</tr>
<tr>
<td>G-20</td>
<td>Group of Twenty Finance Ministers and Central Bank Governors</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
</tr>
<tr>
<td>RtoP</td>
<td>Responsibility to Protect</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>