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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.

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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.

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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.

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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.
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<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>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<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>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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ALLOTTIAN DEFINITIONS

Social idealism

The springboard of this thesis is the unifying theme of the studies contained in Philip Allott’s *The Health of Nations. Society and Law Beyond the State*. The theme is a philosophy of social idealism, a belief in the capacity of humankind to transcend itself in thought, to take power over the human future, to choose the human future, to make the human future conform to our ideals, to our best ideas of what we are and what we might be.¹

Allott claims the current state system forms an international non-society. It is a system of international law conceived as an act of sovereignty by independent sovereigns. He argues this era of unsocial inter-statal society is ending and a new era of social international society has begun.² In Allott’s scheme, a ‘true’ international society ought to be one of the whole human race and the society of all societies. In this society, international law is made through the total social process of international society – it is a ‘true’ law of a ‘true’ society. This idea of a ‘true’ international society is centuries late, as is the idea of international law as reflecting the self-creating and self-perfecting of the human species.³

Because law plays the leading structural role in a society’s self-constituting, the future of international law is crucial to the future of international society. By reimagining international law, international society can reconceive itself. Allott argues we can create a new international society through our best ideas of society and law. Therefore, we do not need a revolution on the streets, but in our minds.⁴

Social evil

Social evil is a systematic product of social systems, caused by human beings acting in their official capacity in the public interest, alienated from their moral responsibility as

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² Ibid. p. 420.
³ Ibid. p. 315.
⁴ Ibid. p. 421.
individual human beings, or caused by social systems so complex that their products can be attributed to no human beings in particular. Social systems and their products escape moral judgement. They are beyond good and evil. But the wages of social evil are paid in suffering, the suffering of actual human beings, of whole peoples, of all humanity. The price is paid in corruption, the corrupting of all human values, down to and including the values of the most intimate interpersonal consciousness of individual human beings. And the price is paid in destruction, the relentless degradation of the natural habitat of the human species.\textsuperscript{5}

**True international society**

A true international society is the society of the whole human race and the society of all societies. Everything human that happens in the world is part of the social process of international society. It has a constitution like every other society, which carries the systematic structure of society from its past to its future, determining the way in which all social power is created and distributed in the world.\textsuperscript{6}

**True international law**

True international law reflects the interests and well-being of all of its members. It is the legal system of all legal systems, for the survival and prospering of all humanity.\textsuperscript{7} It is a product of the total social process of international society, in which all people and subordinate societies, including state-societies, participate.\textsuperscript{8}

\textsuperscript{5} Ibid. p. 93.
\textsuperscript{6} Ibid.
\textsuperscript{7} Ibid. p. 399.
\textsuperscript{8} Ibid. p. 420.
INTRODUCTION

1.1 The problem: an international ‘unsociety’

The quest for perpetual peace has occupied countless minds throughout human history. The recurring shock at the human capacity for brutality has spawned innumerable theoretical panaceas, political reforms, and sometimes revolutions – violence to counter violence. A study of the history of international relations and international law reveals numerous endeavours to formulate a theory that would lead to human flourishing, and, if not to perpetual peace, at least one that is regulated and reasonable enough. This thesis evaluates and develops yet another such theory and legal remedy, that developed by Philip Allott1 in his various works: Eunomia. A New Order for a New World (1990); The Health of Nations. Society and Law Beyond the State (2002); Towards the International Rule of Law. Essays in Integrated Constitutional Theory (2005) and in numerous other articles and lectures.

Allott’s first exposition of his theory in Eunomia was recognised by Martti Koskenniemi as ‘an exceptional book, an extraordinary treatise’.2 Subsequent reviews reveal the highest regard, and frustration, with Allott’s work.3 The theory is one of social idealism, of how international society and law ought to be. It is based on ‘a belief in the capacity of humankind to transcend itself in thought, to take power over the human future, to choose the human future, to make the human future conform to our ideals, to our best ideas of what we are and what we might be.’4 The explication and critique of Allott’s theory, and the practical remedial proposals offered in this thesis are a response to his challenge to think beyond the confines of academic thinking. It is hoped that the ideas developed herein might contribute to the unrelenting endeavour for peace – a quest made even more imperative in recent decades by the menacing military capacity of states, and now non-state actors, to execute mass destruction.

3 See Chapter 6 which summarises reviews of Allott’s work.
The idea of perpetual peace connotes a state of permanent resolution, a Sabbath-like rest from strife. It is a positive peace, that is, a settlement and restoration of relationships has been achieved, as opposed to a negative peace, or suppression of tensions, as in a truce. In such a state the probability of conflict has been dealt with, and preparations for conflict are no longer necessary. There is a stable organisation of society in which there is neither need nor inclination to resort to violence. Social justice – a positively defined condition in which there is an egalitarian distribution of power and resources – has been established. Such a positive peace is Allott’s aim.

The quest to achieve perpetual peace, or at least a via media to contain conflict, can be traced throughout modern history and in recurring vacillations between theory and practice, thought and action, diplomacy and militarism. The theoretical approach endeavours to offer explanations that might bring, if not resolution, at least justification of conflict. Such endeavours include: an examination of the causes of conflict; justification of war in order to end it; the argument that, given human nature, war is inevitable and that a permanent peace is unattainable – moral justifications are provided for some lesser compromise, or negative peace; disapprobation of the act of war entirely; or promotion of justice in order to prevent the need for war. More pragmatic approaches have proposed legal, political, and institutional arrangements for the elimination, or at least containment, of conflict.

The relative stability enjoyed since World War II suggests a promise of peace between states that share the ideology of liberal democracy. However, this has been burdened in more recent decades by neo-liberal capitalism, bringing with it new social distortions and challenges of political, economic and social inequality and instability. Today, democracy and a highly contestable concept of respect for the rule of law, galvanises an international community of disparately governed and sized states to resolve conflict through mainly peaceful means. An exponential growth in international transactions (political, legal, economic, and cultural) suggests an inexorable force of integration and cooperation. However, concurrent with this integration, forces of disintegration undermine suggestions of progress. Those states on the margins, and those who have excluded themselves from the community of friendly states, bear much of the socio-economic and environmental burden of modern trade, consumerism, and illegal

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activities such as the burgeoning arms trade and human trafficking. These states are dealt with through regimes of diplomacy, economic policies, international law, and occasionally with force aimed at inducing reform and conformity with what are now considered by the more powerful states as universal norms and practices. In many of these countries there appear to be intractable problems of reversion to the use of force, of atrocities, and war that stain the legacy of countless policies and legal instruments generated by international organisations aimed at their prevention. Even members of the ‘democracy club’ are sometimes instigators of mass crimes, usually denied through the skilful deployment of euphemisms that disguise the reality of the loss of lives and suffering inflicted. Vows of ‘never again’ are repeated in the aftermath of recurring atrocity, for example, in Rwanda, Srebrenica and Kosovo. The various palliatives and punishments administered by the international community to reconcile these tragedies are sincere but inadequate efforts. Millions continue to suffer, such as in Darfur, Iraq, and Afghanistan.

The legal framework of such a dynamic epoch must inevitably respond to these forces of integration and disintegration. Voices of vexation can be heard by both practitioners and academics in international law and international relations. There are many calls for renewal of international law. However, these calls are not necessarily spontaneous or unique to the current age. They join a centuries-long call to discover a legal formula that accommodates ever-expanding interaction and yet guarantees state self-preservation, autonomy, and security within a system of increasingly porous state boundaries. Today’s formula must also facilitate cooperation and integration of increasingly complex statal and non-statal networks of obligation, and seek to resolve interstate, and now increasingly recognised global, issues. Furthermore, political, economic, technological and social transformations demand that international law

6 Even in international law literature one can find collections of books, monographs, articles, and conference proceedings about atrocities such as the former Yugoslavia and Rwanda, and remedies through international criminal law, which avoid any mention of the actual horrors suffered. One needs to go to NGO human rights reports or indictments, or to the works of female scholars such as Kelly Askin and Diane Otto to read of the reality of suffering. See Kelly Askin, War Crimes Against Women: Prosecution in International War Crimes Tribunals (The Hague: N. Nijhoff Publishers, 1997); Kelly D. Askin and Dorean M. Koenig, eds., Women and International Human Rights Law (Ardsley, New York: Transnational, 1999); Dianne Otto, “Common Abuses Against Women,” in Women and International Human Rights Law, ed. Kelly D Askin and Dorean M Koenig (Ardsley, New York: Transnational, 1999).

7 Calls of ‘never again’ have rung out since World War II. In 2005, the phrase was used by then UN Secretary General Kofi Annan while addressing the UN on the 60th anniversary of the liberation of Auschwitz. “On occasions such as this, rhetoric comes easily. We rightly say, “never again”. But action is much harder. Since the Holocaust, the world has, to its shame, failed more than once to prevent or halt genocide – for instance in Cambodia, in Rwanda, and in the former Yugoslavia.” Such an evil must never be allowed to happen again’, Secretary-General tells General Assembly Session commemorating liberation of Nazi death camps, 24 January 2005.
evolves to reflect the disparate values and future aspirations of a nascent international society populated not just by states, but by a collective of individuals in all of its diversity.

Allott’s prognosis of the likelihood for an effective and just international legal realm is grim. He considers the current state system a tragedy, a system that serves primarily those who are supposedly guardians of power, but whom he considers to be, and to have been, abusers. He asks:

Who or what has caused the scandal of international unsociety, the unsociety of all-humanity, an inhuman human reality of everyday social evil and social injustice, of cynical parodies of law and social order, an unnatural state of nature in which social predators oppress, abuse and kill human beings in their millions, a world seething with fraudulent democracies and criminal presidential monarchies, a social reality in which some human beings worry about the colour of the bed-linen for their holiday-home in Provence, while other human beings worry about their next meal or the leaking tin-roof of the shack which is their only home?8

Historically, atrocities were considered misfortunes as opposed to preventable injustices. However, regardless of acknowledgement and condemnation of injustices by states or international organisations in recent decades, the former view is still evident in the lack of response, or acquiescence to, atrocity by the international community at large. We still live in a world where atrocity occurs ‘while someone else is eating or opening a window or just walking dully along.’9 The reasons for indifference to suffering may include our view of human nature, our particular historiographies, or political philosophy, or more pragmatic considerations such as perceptions of our own national and personal security, or even a personal incapacity to empathise with suffering and vulnerability. Such factors influence our willingness to contemplate bearing responsibility for non-action, and also our hope for the possibility of eliminating atrocity.

According to Allott, our acquiescence to violence stems from the fact that for the past 250 years a perverted, anti-social, anti-human worldview held by holders of public

power has allowed them to treat social injustice and human suffering on a global scale as if it were beyond human responsibility and beyond the judgement of our most fundamental values and ideals. Allott claims that the holders of public power had imagined an international legal system which enacted and enforced such a worldview, and the peoples of the world simply had to acquiesce to, and to live with, the consequences of this disgraceful perversion of theory and practice.\(^{10}\)

Counter to this tragic history, it is now evident that an emergent international community of states and an international civil society are demanding accountability of the holders of public power. The shock and shame at the magnitude of the human capacity for brutality has generated numerous new legal regimes in an effort to hold the perpetrators criminally responsible, and to secure world peace.\(^{11}\) The Nuremberg Trials for the most prominent Nazi leaders, and the signing in 1945 of the United Nations (UN) Charter,\(^{12}\) marked the beginning of a new era of individual accountability, and proscription of the use of force by states, except in self-defence. In 1948, the Nüremberg Tribunal stated that ‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’\(^{13}\) This established the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law.\(^{14}\)

During the 1990s, the international community took unprecedented steps to develop a system of international justice in an attempt to limit impunity for the most serious human rights crimes, and the invocation of universal jurisdiction became increasingly evident. This new system is believed to have struck at outmoded notions of national sovereignty and the absolute prerogative of states.\(^{15}\) International criminal justice mechanisms have been built on the principles of the laws of The Hague and the Geneva Conventions,\(^{16}\) and the Nuremberg Tribunal. For example, in response to atrocities in

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11 The first Peace Conference in 1899 at The Hague signed the first 3 (of 14) conventions, plus 3 declarations. Subsequent conventions were signed through to 1954. *Final Act Of the International Peace Conference,* (The Hague: ICRC, 1899).
13 *The Nuremberg Trial,* (1946).
Yugoslavia and Rwanda, the UN Security Council (UNSC) created two ad hoc international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. These tribunals revived the idea of an international criminal court, originally conceived in 1948 at Nuremberg. In 1998, more than 150 countries completed negotiations to establish the permanent International Criminal Court (ICC). The necessary sixty states ratified the court’s treaty, the Rome Statute, to bring it into force in July 2002, less than four years after it had been opened for signature.

In the meantime, due to political and financial constraints, the UNSC devised a second generation of international criminal justice mechanisms known as ‘hybrid’ national/international tribunals for conflicts in East Timor, Cambodia, Kosovo, and Sierra Leone. In addition, a spillover effect was evident, with national courts taking on litigation of previously barred cases. Several European states began to seek prosecution of those accused of atrocities against their own citizens using domestic universal jurisdiction laws in domestic courts. The International Law Commission’s (ILC) Draft Articles of State Responsibility now hold states accountable for breaches of community obligations, adjudicated by a permanent court, the International Court of Justice (ICJ). Further, on September 14, 2009, the UN General Assembly (UNGA) adopted the first resolution on the Responsibility to Protect (RtoP) – a norm that addresses the controversial issue of the ‘right to humanitarian intervention’, and when it is appropriate for states to take coercive action against another state for the purpose of protecting people at risk in the other state. With the adoption of the first resolution member states agreed by consensus to support the norm, as well as to concrete proposals on how to take the norm forward. These include strengthening the UN’s early warning capacity and the Peacebuilding Commission, building the capacity of regional and sub-regional organisations, and adopting criteria for the use of force.

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17 For example, the Pinochet case opened domestic courts in Chile to victims who had been denied access to remedies and, in August 2003, trials of military officers responsible for gross violations of human rights during Argentina’s ‘dirty war’ were reopened in Buenos Aires. Dicker and Keppler, “Beyond the Hague: The Challenges of International Justice Human Rights Watch 2004 World Report.”

18 For example, the extradition bids of Spain, Belgium, France and Switzerland for General Pinochet of Chile for crimes committed in Chile during his seventeen-year rule. "Report: The Pinochet Case – A Wake-up Call to Tyrants and Victims Alike,” in Human Rights Watch (March, 2000).


to these regimes, there is a plethora of human rights treaties, as well as conventions, resolutions and declarations all aimed at preventing atrocity. These are monitored by increasingly accountable UN bodies and non-governmental organisations adjudicated by regional and national courts, and the ad hoc tribunals. These new regimes have attempted to codify, restate, or refine customary international law, peremptory norms of *jus cogens* and obligations *erga omnes*, as well as new norms emerging from increasingly complex interactions between members of international society.

The deterrent effect of these various legal regimes cannot be measured. The permissibility of state aggression, especially that initiated and justified by the world’s one superpower, while strongly contested by the international community, has been in recent years the standard practice of a supposed ‘last resort’ for the resolution of disputes. War, atrocities, and suffering of incomprehensible magnitude, or ‘social evil’ as Allott labels it, continue to recur and blot human history. Allott’s analysis claims this is because of flaws in the dialectical process between international society’s ideals (which are still focussed on state interest) and the acceptance of its moral responsibility for social evil. The legal regime of state responsibility shields those humans responsible for the actions that they cause states to perform. It consecrates the idea that wrongdoing is the behaviour of a general category known as ‘states’ and not the behaviour of morally responsible human beings who determine the behaviour of states. Allott argues that responsibility, as a legal category, must have legal substance, but it is, instead, notionalised, which leaves room for argument, which in turn leaves room for injustice. Consequently, there is a disjunction within international law that allows humans to act on behalf of large portions of humanity without any accountability to those who suffer because of those actions or non-actions.\(^{23}\) Our international ethics, painstakingly negotiated and compromised, and our practice, are incongruent. Atrocities continue. Allott argues that this is because international society’s ideal, real, and legal constitutions are incongruent.\(^{24}\) On an individual level such incongruence may have few consequences, but on the international level, it affects the lives of millions. Allott imagines:

> It would be possible, and it is necessary and urgent, to destroy the old international *unsociety* and to create the theory and the practice of a *true*  

\(^{24}\) See Chapter 5.3 on the three dimensions of a society’s constitution, i.e. the real, legal and ideal constitutions.
international society, the society of all societies and the society of all human beings, enacting and enforcing a true international law, the legal system of all legal systems, for the survival and prospering of all humanity.\textsuperscript{25}

As Allott sees law playing a leading structural role in the self-constituting of a society, it is in international law that he see hope for a new future for humanity. The generation of ideas to create that law is crucial to the process. He outlines the essential elements of a new international law and a constitutional framework for a new international society. He then exhorts his readers to build upon these ideas – to dare to think beyond the confines of academic and professional disciplines to formulate new ideas, our very best ideas that will transcend the current order and create a better human future.\textsuperscript{26} This thesis intends to do just that.

1.2 The research questions and methodology

1.2.1 Three research questions

The problems articulated above generate three guiding research questions around which the thesis structure is developed. The first question asks why, given its burgeoning codification, is international law still ineffective in preventing atrocity, war, and state aggression, and why it is unable to secure perpetual peace. This question is addressed in Part I: Setting the Scene: The Historical Quest for Perpetual Peace.

The second question asks how this might be remedied, and whether Allott’s theory of social idealism provides an adequate explanation and solution. This question is addressed in Part II: Defining the Ideal: Allott’s New Social and Legal Theory.

The third question asks whether Allott’s theory provides practical guidance for improving the system of international law and if it is a feasible and accessible normative theory that can be implemented in morally acceptable ways. The evaluation leads to Part III: Bridging the Gap between the Ideal and the Non-Ideal: The Practical Proposals.

1.2.2 Part I: Setting the scene: The historical quest for perpetual peace

The thesis is structured as a journey through time, tracking the evolution of international theory since the early modern period through to the current regime, and then projects

\textsuperscript{25} Allott, \textit{The Health of Nations. Society and Law Beyond the State}. p. 399.

\textsuperscript{26} Ibid. pp. xii-xiii.
forward to future possibilities. Chapter 2 seeks to address the first thesis question by endeavouring to unearth the cause of international law’s perennial ineffectiveness in securing peace. This is achieved by reviewing past endeavours to formulate a political theory and law for a violent and expanding world. Of particular focus are seminal theoretical contributions to the development of the state and the nascent international realm and its law in the early modern period from the 14th to 18th centuries. The theoretical fault lines originating in this early modern period are detected which, when extrapolated to the international realm, created an ineffective, undemocratised, and unsocialised international law.

Deconstruction of the bases of political and legal legitimacy of the state unearths a perennial paradox of political liberalism, aggression, and expansionism in international relations. The liberal imperatives of self-preservation and autonomy (the goal that any conscious soul or state would supposedly desire in the mythologised state of nature) construct a metaphysics of the state and the international realm that justifies violence. Therefore, these imperatives create a tension with the goal of peaceful relations, evident in centuries-long endeavours to resolve the problem of inter-state conflict. Various weightings of theoretical emphasis (together with the balance of power) help to explain historical vacillations within a liberal framework between the retreat or embrace of autonomy and international society; sovereignty and a community of states, federation, or league; self-preservation and protection, intervention, or aid; fear and amity; and pre-emptive attack and diplomacy or pacifism.

These theoretical paradoxes have grave consequences for the fate of humanity. The capability for mass destruction by states, and now possibly non-state actors, is generally acknowledged. That states are able to legally justify aggression that could threaten the survival of humanity through arguments appealing to self-preservation or autonomy has inspired considerable contemporary theoretical revision of the liberal-democratic enterprise. It will become evident through Part II, in which Allott’s theory is analysed, that he does not simply contribute to this revisionism. Rather, he formulates a revolutionary new international social and legal theory to generate an international constitutionalism to surmount these obstacles in an endeavour to secure perpetual peace.

27 The scope of this thesis is such that an historical theoretical analysis is more relevant to the evaluation of Allott’s work than consideration of historical political accounts of the balance of power as a determinant of the ineffectiveness of international law in achieving perpetual peace.
Chapter 3 is a survey of the multifarious philosophies of the nature and function of law in the international realm, and theories of international relations, which have evolved out of the early modern period. A spectrum is constructed (see Figure 2) to provide a visual rendition of this complex theoretical landscape. The more commonly associated constitutive elements of these typologies are presented in a table (see Figure 3). Together, the survey, spectrum, and table of elements provide tools with which to: identify the theoretical genetics of Allott’s work; build a framework within which his new social and legal theory can be theoretically positioned and evaluated (the latter is undertaken in Chapter 6); and theoretically position the remedial proposals that are developed in Part III.

The survey starts by summarising Allott’s own prescription for law and his field-theory classification of legal philosophies (see Figure 1). The classifications endeavour to integrate all of the philosophies of the nature and function of law into five distinct, ever-expanding, explanatory horizons. The horizons reveal a wide range of interpretations, each with a prescribed sphere of influence. The idea of integrating the horizons demonstrates Allott’s immanentist view of society’s self-creating capability and the ‘wonder of law’28 – its ability to link the totality of everyday human behaviour to the order of the universe through the self-ordering of society. He seeks not only to integrate each of the horizons, but to also transcend them. He endeavours to build a new social theory and universal law, not based on a theological or natural law or a particular interpretation or sphere of influence, but on the idea of the embeddedness of law in all social and transcendental reality. He claims that by using an integrated law the human capacity of self-transcendence through the mind is then able to integrate the interests of all humanity.

With the mapping complete and with the theoretical genetics of Allott’s work and the proposals analysed and located on the spectrum, coordinates are provided for the remaining work of the thesis. The proposals endeavour to pull Allott’s theory from the ideal end of the spectrum towards a more feasible, accessible, and morally accessible point. They also seek to balance theory with practice and to accommodate current non-ideal conditions.

This mapping exercise is followed by an overview of contemporary literature presenting theoretically homologous and normative theories of international law and international relations. ‘Theoretically homologous’ theories are defined as theories similar in structure and evolutionary origin, though not necessarily in prescription. The theories are grounded in Kantian/cosmopolitan principles of the worth of individuals, their equality, and the existence of obligations binding on all. The survey will demonstrate how Allott joins a community of international law and international relations theorists and practitioners who call for renewal because of a shared vexation with the current regime of international law due to the dominance of the positivist/realist perspective. Like Allott, some seek to offer proposals for legal reform at the international level.

1.2.3 Part II: Defining the ideal: Allott’s new social and legal theory

Part II focuses on Allott’s contribution to the quest for perpetual peace through a new social and legal theory. Chapter 4 outlines Allott’s reasoning for why, given the plethora of theoretical endeavours offering explanations or solutions, a new general international social theory is both necessary and urgently needed. He provides an analysis of the current disorder and the transformations taking place, and of the theoretical causes which, as demonstrated in Chapter 2, originate mainly from the early modern period. Allott argues international society (insofar as it is one) is the way it is because of the lack of a theory of itself (the way it sees the world). It is an ‘unsociety’, that is, it lacks ideals, and therefore lacks a ‘true’ law. The lack of ideals, and consequent ineffective law, is evident in the real struggles of everyday life, particularly those subject to the abuse of power. The potential for further disintegration (even the demise of humankind) is possible if international ‘unsociety’ is unable to actualise good order, or eunomia, the good order of a self-ordering society.

A concurrent process of integration and emerging human awareness of interdependence of the human spirit is also recognised by Allott as the harbinger of a potential, but imperfect, universal legal system and world order. Theoretical challenges hinder international law’s effectiveness as the old Vattelian international social order is limited to externalised governments. Allott argues that a transformation is necessary, in the form of a revolution of the mind, to create an international constitutionalism in which the interests of the people take primacy over the interest of states. Philosophy is needed.

30 Ibid. p. 410.
31 Ibid. p. lii.
to generate that transformation but, Allott claims, it has gone into hiding, limiting itself to the world of academia. The dialectic of ‘true’ philosophy in the great tradition, a negation of the negation of the 20th century, needs to be resumed. He argues:

The history of human societies contains many examples of revolutionary change not only in the real constitutions of societies but also in their ideal self-constituting, revolutions in the mind. Such events are moments of human self-enlightenment which transform the potentiality and the actuality of those societies. There is no reason why international society should be incapable of such self-enlightening, and every reason, derived from the lamentable history of its own self-constituting, why it should find a new potentiality for human self-creating at the level of all-humanity, the self-evolving of the human species, a revolution in the human species-mind.\(^\text{32}\)

Chapter 5 is an explication of Allott’s theory of social idealism through which a ‘true’ international society can be actualised in the form of an integrated international constitutionalism and democratised international society. It becomes evident that Allott’s work is a contribution to the whole spectrum of rationalist, empiricist, and idealist theories (and their endless possible combinations). He achieves this by gleaning what he considers to be their best ideas, and then syncretises them in order to transcend them.

The explication first outlines the elements of Allott’s theory. These are words, ideas, idea structures, reasoning and imagination. These elements create theories that provide an explanation, or equilibrium, against a constant dialectic of uncertainty and certainty for the self-creating of a society’s ‘theory-of-itself’. Following this is consideration of how a social theory is constructed through a dynamic interaction of three interdependent levels of theory: transcendental, pure and practical. Then, an explication of Allott’s concept of constitutionalism is provided. Generic principles shared by all societies’ constitutions and Allott’s prescriptions for a ‘true’ international society and law are outlined.

The primary goals of Chapter 6 are to address the second and third research questions. These ask whether Allott’s theory of social idealism provides an adequate explanation

of, and solution for, international law’s ineffectiveness at securing peace, and, if so, whether it provides practical guidance in feasible, accessible and morally accessible ways.\textsuperscript{33} The evaluation reveals that while the theory explains the theoretical causes of the problem of international law’s ineffectiveness and proposes a solution of an integrated international constitutionalism, it does not provide practical guidance for its implementation. Rather, its prescription of a revolution of the mind, or moment of enlightenment, limits its accessibility, and its moral accessibility.

The lack of a practical route to implement the theory causes discomfort and frustration amongst Allott’s audiences. There appears to be an isolation of philosophical thought from pragmatism. Allott’s monism, that is, his reduction to a single determinant of human reality as simply our ideas, leads to his conflation of theory and practice. This leads the thesis to focus on the amelioration of the anticipated effects of Allott’s revolution of the mind. It is argued that a universal existential shift could create disruption of the international system, and all subordinate societies, at immeasurable human cost. While Allott demonstrates that a shift in mass consciousness has non-violent precedent, it is intended that this thesis will contribute towards a less risky strategy – one that, in Kantian spirit,\textsuperscript{34} provides a progressive, rather than revolutionary, shift. A response that combines theory and practice is developed.

The development of practical proposals in Part III diverges from Allott’s prescription. They are intended to create a link between Allott’s ideal theory and the current non-ideal conditions through mechanisms that help shift consciousness specifically in regard to our responsibilities to protect each other from atrocities. By means of an articulation of new ideals for the protection of others beyond state borders by individual members of humanity, a gradual thickening of ethical and eventual legal obligation could eventually affect the real and legal constitutions of a currently inchoate international realm, guiding us in the direction of a socialised and democratised international society.

\textsuperscript{33} Evaluation will be against criteria developed by Buchanan and Golove in Allen Buchanan and David Golove, “Philosophy of International Law,” in The Oxford Handbook of Jurisprudence and Philosophy of Law, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002).

\textsuperscript{34} Referring to Kant’s theory of historical progress Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Purpose [1784],” in Kant’s Political Writings, ed. Hans Reiss (Cambridge: University Press, 1970).
Part III: Bridging the gap between the ideal and non-ideal: the practical proposals

The ethical, legal and political proposals are intended to augment Allott’s theory. Bridging the ideal and non-ideal through a synthesis of theory and practice is a method associated with the solidarist Grotian approach.\textsuperscript{35} Each proposal draws on Allott’s theory of constitutionalism and his imperative of the reconciling of the interlocking elements of society – the ideal, legal, and the real constitutions. Thus, each proposal is anticipated to positively affect the other proposals’ actualisation. The goal is to move international society towards Allott’s ideals through a collective legal remedy to prevent atrocity based on a thickening of ethical obligation and responsibility between all members of humanity.

The ethical proposal

The ethical proposal prepares the groundwork for the subsequent legal proposal. It draws on the work of Emmanuel Levinas’ ethics of alterity which provides a rich account of the concept of proximity and the generation of responsibility. According to Levinas, our proximity to the other, and through the other, all others, generates a heteronymous, universal, and infinite responsibility. Desmond Manderson’s work endeavours to extend Levinas’ concept of proximity and integrate it into legal doctrine.\textsuperscript{36} While Levinas claims that politics and ethics (and by default, law) are incommensurable, Manderson sees common law as a nexus of the two. This is because proximity is the unifying theme in common law for recognition of a duty of care to avoid foreseeable risk of injury. Manderson’s work will be extended further and used as the basis for a proposed international ethical obligation that is based on a novel concept of virtual proximity and involves all capable members of humanity having an asymmetrical responsibility to protect vulnerable members from atrocity.

The legal proposal

The ethical proposal’s theory of obligation of humanity to its individual members provides the basis for the legal proposal of an international collective tort for breach of the duty of care in the event of atrocities. While acknowledging that it may be a lofty ambition, it is argued that such a legal obligation could be one contribution (amongst innumerable others) to the realisation of Allott’s international constitutionalism. A

\textsuperscript{35} See Chapter 3, Section 3.2.2 for a description of this theoretical tradition.

\textsuperscript{36} Desmond Manderson, Proximity, Levinas, and the Soul of Law (Montreal & Kingston: McGill-Queen's University Press, 2006).
disappprobation of acquiescence to mass violence by all members of humanity could then potentially derail the entrapment of human history’s vacillation between violence and peace, conflict and appeasement. This disappprobation, actualised in legal code, would be a positive duty facilitated by a virtual proximity made possible by the immediacy of information, thwarting in real time the violent practices of individuals and leaders of states and international organisations.  

1.2.7 The political proposal

The political proposal outlines a framework for two fora to facilitate dialogue at the international level to explore the feasibility of the ethical obligation and eventual legal code of an international collective tort. The structure and functions of the fora are briefly outlined. The first is a virtual forum that would deploy mass collaboration software to facilitate an international conversation. The second is an ad hoc chamber associated with the ICC. The idea of the ad hoc chamber was inspired by the development of restorative justice mechanisms, in particular truth commissions, and the potential for reflexive dialogue that these offer, as well as the development of the Victims’ Trust Fund adjunct to the ICC. These developments indicate the potential of international mechanisms to facilitate inquiry, dialogue, reflection, and reconciliation. Such an institution would be similar to Royal Commissions of Inquiry and would inquire into international society’s role in precipitating, or acquiescing to, a particular atrocity that has been investigated by the ICC. Eventually, the chamber could progress from being an ad hoc body to an integral component of the Court’s structure. Alternatively, an independent chamber could be established within the UN apparatus, for example, as a permanent Global Commission of Inquiry. It could potentially evolve into a pre-emptive initiative, associated with UN peacekeeping pre-emptive practices. It could also be a precursor to an adjudicative body for the administering of the proposed tort law regime as outlined in the legal proposal.

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37 The protests in Myanmar in September, 2007, are an example of real-time reporting as protesters and military confronted each other. The military junta had a global audience ready to impose sanctions, and invoke individual criminal responsibility on its leaders for crimes against those it oppressed. Philip Allott, “Lecture: The Philosophy of International Law,” (Hague Academy of International Law Summer School, 2004).


The political proposal will be further developed as part of anticipated post-doctoral research. This would be an ideal period for dissemination of the proposals and an opportunity to monitor the response and assimilate critique and further development of the ideas through others’ contributions. This would provide extensive material for ongoing refinement, and provide direction for advocacy work on the role of civil society in the evolution of international society’s constitutionalism.

1.3 Preliminaries to reading Allott

Allott’s theory is intended to act as a catalyst for challenging redundant ideas, theories, and values, and to act as a blueprint for future possibilities. He argues that these redundant views deny the potential for humanity to transcend the tyranny of the actual and to overcome age-old imperatives of the old international system, with all of its fault lines, evidenced in its addiction to war, and acceptance of atrocities as natural and inevitable.

Allott claims that as the mind postulates the ideal by which to formulate values, that ideal can in turn cause the mind to desire their actualisation. ‘As we conceive what we perceive, so we speak, and so we become.’ As we have treated ideas such as sovereignty, state, and international society as natural, so we have them — but we can re-imagine these and thereby change their real and legal expression. The establishment of a perpetual peace in humanity’s future is presented as a choice. Freedom from the actual, and from violence, does not come from some outside source such as a god, a leader, or technology, but from within our minds.

Allott’s theory is a theory of social idealism, of how society and law ought to be. It is both a social and legal theory from a social perspective, that is, law is seen as an aspect of the self-constituting of a society. The theory is idealist, affirming the power, or capacity, of the human mind to make its own reality, the reality of ideas. It is an ideal theory, although not totally so. Ideal theory specifies the ultimate moral optimum, assuming that the principles it articulates enjoy full compliance. Allott’s work is not so simplistic – even the optimum destination point, the ‘true’ international society, is ever-evolving. The theory accommodates pluralities, tensions, and a state of constant flux as tensions between ideals, law and reality are resolved, revised and re-resolved.

41 Ibid. p. 154, pp. 418-421.
42 Buchanan and Golove, “Philosophy of International Law,” p. 880.
The theory does, however, claim certain ultimate and universal ideals for an imaginary future. These include the (ever-evolving) international rule of law, an international constitutionalism, and a written international constitution, the actualisation of which is realised in the process of international society’s self-constituting.

Allott acknowledges the controversial enterprise of doing philosophy and of presenting an essentialist view of society, given philosophy’s 20th century turn to nominalism. He argues the ‘unphilosophy’ of the 20th century has been appropriated by the holders of public power in the form of ideologies. He traces the origins of this ‘unphilosophy’ to shifts in consciousness in the 19th century, produced by revolutionary social transformations. He claims the repetitive patterns of such transformations indicate the likelihood of an imminent epochal change when the inexorable swing of the dialectic towards a negation of the negation of the 20th century will generate a ‘true’ philosophy. The necessary principles of this ‘true’ philosophy would counter the alternative philosophy of globalisation, democracy-capitalism.

According to Allott, the challenge for the coming century is to ensure that the wealth of nations (in the widest possible definition) is enjoyed by all humanity. This challenge requires us to go beyond our current human consciousness, and necessitates new laws inspired by a regenerated philosophy, one that brings together traditions and perspectives from every part of the world. Allott’s work is recognised by elite international law publicists as dissident, necessary, and an indispensable contribution to the development of international law. His presence in publications, at major conferences, on discussion panels, and

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43 Allott, Eunomia. p. lii.
48 For example, Plenary Speaker at the British International Studies Association, 1995; the Snyder Lecture in International Law, Indiana University, 1997; the international symposium: ‘Governance, Globalisation and the European Union: Which Europe for Tomorrow?’, Vienna, 2000; the conference: ‘International Law and Justice in the
professional appointments are indicative of the impact of his work. However, reading Allott is challenging. It was encouraging to read that others have also found it to be so. Judge Roslyn Higgins, a cohort of Allott’s, said at his retirement symposium, ‘Eunomia, a remarkable work of extraordinary depth and profound originality, is not an easy read.’ Koskenniemi also finds Allott’s work difficult and at the same symposium commented that he wonders at times about Allott’s seriousness and whether his writing is, in fact, a prolonged sermon, ‘…an act of imitation of a confession of true faith.’ The leap of faith required of the reader to enter into Allott’s world seems to Koskenniemi to be embedded in a baroque aesthetic of grandeur. An example of the language with which Koskenniemi struggles is when Allott ruminates, ‘In a social international society dominated by human love, to want is to hope, to desire is to create, to live is to grow.’ Koskenniemi likens this language to ‘...a Bernini sculpture, a poetic sermon, Zarathrustra speaking.’ He protests that such stylistic effects unite to create a rhythm of intensive vertigo. The steady beats of opening sentences to sections and the flow of italicisation stream into long and abstract discourses. There is a lightness attributed to heavily repeated words such as ‘international’ and ‘society’ and their various meanings. Also challenging is the aura of a revelation of an incontrovertible truth, created by such statements as ‘So it is…’. Also disconcerting is the numbering of paragraphs. The style invites the reader to step into the stream of history, to participate in the conversation of humankind that is taking place. Within one page, chosen almost at random from The Health of Nations, the reader is invited to agree with – or at least consider – propositions from Hegel, the German Aufklärung, Wittgenstein, Freud, Marx and Charles Darwin – these are not just names, dropped in

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52 Allott, Eunomia. p. 404.

accordance with academic conventions, they are flags for enormous propositions, all fitted within the space of 37 lines.54

Reading Allott’s theory requires a concentrated, sequential approach in that if one skipped ahead, the language (which Koskenniemi identifies as ‘unabashedly nonmodern’55) and concepts would be unfamiliar. It becomes apparent that Allott develops his own lexicon and builds his theory of social idealism, layer upon layer. Like scaffolding, there are universalist, natural law principles and epistemology that assume a fundamental human sociability and a ‘whole’ of humanity; without these, it is difficult to ascend Allott’s edifice to enjoy the view of his grand vision. The view from the top reveals an extraordinary synthesis of ideas, drawing from a range of disciplines including law, philosophy, politics, sociology, and psychology – Allott is endeavouring to create an ideology of such force as to transform the world as we know it. Such revolutionary thought, however, remains just that. The claim that ‘theory is practice’ makes it (unashamedly) fall short of offering practical ways to realise the ideals. This is where the thesis takes up Allott’s challenge to ‘dare to think’ – to formulate new ideas that will transcend the current order and create a better human future. Theory and practice need to be combined in an incremental process over long periods (decades and perhaps centuries) to allow for an organic, mutual recognition of responsibility of all members of humanity to all other members, and the evolution of institutions and practices to reflect that obligation. It is argued that only then might the possibility of a perpetual peace be within reach.

1.4 An interdisciplinary approach

The interdisciplinary approach of this project is in the spirit of Allott’s work. He exhorts scholars to reconnect with their intellectual inheritance and cross the arbitrary and artificial mental boundaries that exist both within and between disciplines and that have limited the potential of the mind for centuries.56 Allott argues that the impact of specialisation has severely limited the possibilities of finding novel solutions to humankind’s suffering. The integration of interdisciplinary discourses (or more correctly, reintegration, as historically these disciplines were not separated) is an essential prerequisite. His own work’s pedigree is that of Kelsen and Unger, but he also

54 Ibid. pp. 331-333.
draws on a range of philosophers and theorists including Confucius, Plato, Kant, Goethe, Hegel, Rousseau, Tocqueville, Piaget, Smith, Freud, Morgenthau, and Gadamer. Religious texts include the Bible, *Tao te ching*, the Koran, the *Upanishads*, and *Brihad Aranyaka*. He deliberately syncretises ideas from many fields, believing that disciplinary barriers have harmed the creative potentiality of the mind.

Literature abounds on the history and philosophy of politics and international relations, and on the nature and function of international law, but identifying which work specifically supports the inquiries and proposals in the thesis led to the selection of discrete bodies of work. Within the discussion in Part I on the quest for a perpetual peace, literature is included from the seminal works of key theorists between the 14th and 18th centuries. These writings confirm that there has been a centuries-long discourse (which Allott joins) and vexation over a seemingly inevitable and permanent state of warfare, but also an unending quest to formulate an effective law to eliminate it. Literature describing and debating numerous contemporary theoretical perspectives is included in the development of the theoretical spectrum. Buchanan and Golove’s criteria for evaluating if a theory has the necessary elements of a normative theory of international law is particularly helpful for evaluating Allott’s theory. Specialised literature is drawn on for each proposal, specifically in regard to ethics, the philosophy of tort law, and international justice for the ethical, legal, and political proposals, respectively.

A selection of theoretical ‘neighbours’ to Allott’s work is incorporated into Chapter 3’s mapping of the contemporary theoretical landscape. As Allott’s work is both a social and legal theory, it is broader in analysis than most of the literature. However, there is a shared aspiration towards the internationalisation of the peace-creating ideology of democracy and ends are dominated by an approximation of a Kantian ideal of perpetual peace. There is also consensus that the current positivist paradigm is under strain, and in fact facing a ‘Grotian moment’ of transformation.

The limitations of the thesis must be acknowledged. Although drawing on a broad range of literature, the research has not gone beyond consideration of the development of Western theoretical traditions and contemporary perspectives. The scope of the

57 The Index of Names in Health of Nations lists no fewer than 220. Ibid. pp. 423-428.
58 Ibid. p. xii.
thesis was already such that inclusion of other cultural histories and critiques of the international system would have overstretched its goals. Focus is constantly reoriented towards the consideration of Allott’s contribution to the predominantly Western tradition of thought and his critique of, and remedy for, the current international system and law.

1.5 Epistemological and normative assumptions

The normative nature of this project opens up the prospect of either having to convince the moral sceptic of its principles and goals, or accepting that given the dominant influence of the realist perspective, the majority of readers would fundamentally disagree with its principles, arguments, and prescriptions. Posner, a pragmatic moral sceptic, argues that moral philosophising has nothing to offer decision making in the areas of adjudication and the formulation of jurisprudence or legal doctrines, and that ethical positions are only convincing to those already predisposed to the philosopher’s conclusions.60

Allott acknowledges that background beliefs (or ideals) are significant in that they can limit rational argument, and it is these which he seeks to revolutionise. This, he argues, is pragmatic, as what is at stake are not a state’s, group’s, or individual’s self-interest, but rather humanity and its survival. Koskenniemi also provides a sound counter to pragmatists by arguing that thinking about reconceiving international law is as important as doing it and there must be a standpoint for critique that can be articulated by reference to the ideal of universal emancipation, peace, and social progress.61

The universalist scope of Allott’s theory, and the placement of all individuals as the primary subjects of international law, self-defines it as cosmopolitan in terms of interests and agendas. Of course, claiming universality does not mean that fault lines cannot be found. As with any theory, the potential for elitism, legal imperialism, and utopianism with its potential for violent exclusion, might be found hidden within seemingly global humanitarian visions. However, this thesis is not an effort to proselytise or to espouse one particular view, but rather to explore possible ways to develop further an international society in which individuals with diverse values

increasingly participate, with the hope of reducing the likelihood of suffering through atrocities, and of eventually securing a perpetual peace.

It is assumed that a fundamental dichotomy exists in the human capacity for both great evil and for the actualisation of transcendent ideals. However, there is optimism that perpetual peace is attainable through theorising and the articulation of ideals, accompanied by practical ideas to surmount contemporary non-ideal conditions. There is an assumption of a positive development of human consciousness throughout human history, regardless of the evident ubiquity of cruelty, and seemingly insurmountable contemporary global issues.

It is agreed with Allott that the international system is nothing other than a structure of ideas which has been made by the human mind. Therefore, by changing minds, the international system can be changed. However, the suggested process for changing minds differs from Allott’s – an incremental rather than revolutionary transformation of ideas is proposed.

Again, in accordance with Allott, the instrument of law is recognised as being capable of making a new kind of human world. Just as law plays the leading structural role in domestic society, the future of international law is recognised as crucial to the future of international society. Therefore, the generation of ideas to create a new international law is seen as crucial to the survival of the human race.62

1.6 The original contributions of the thesis

Allott’s theory has already been recognised as a significant contribution to the discipline of international law.63 It is hoped that the thesis will contribute to its further recognition and application in the analysis of international law’s nature and function, and ultimately for the development of new ideas to secure a better future. Along with others’ critiques and applications of the theory, it is hoped that Allott’s theory will move out of the discipline-imposed ante-room of critical legal studies of international law, and on to centre stage of mainstream international relations and international law discourse.

63 A description on Oxford University Press’ website of *Eunomia* claims that the book has achieved cult status and Allott is now considered to be the most original thinker in international law. It further claims that Allott’s work is probably the first theory in modern times of international society as a society of human beings and not merely as a system of states, and of international law as the law of that society. http://ukcatalogue.oup.com/product/9780199244935.do?keyword=eunomia&sorby=bestMatches (cited 2008 and revisited 5 August 2010).
The explication of Allott’s theory herein goes beyond other work, as only book reviews have provided cursory analysis, each sharing in their recognition of the originality, magnitude, and abstruseness of the theory, as well as in their criticism of its lack of practical guidance. That only book reviews have provided cursory analysis might suggest that Allott’s work is not significant, perhaps even irrelevant. This thesis is intended to refute this and to demonstrate the theory’s force, but of course also its limitations. It engages the framework of the theory to develop the proposals that seek to provide practical guidance on dealing with contemporary non-ideal conditions. The proposals are intended to contribute to the discourse on the future development, structure, and role of international law.

The construction of a theoretical spectrum in Chapter 3 in graphic form is a novel approach to mapping the complex theoretical landscape of the sub-fields of international relations and philosophy of international law. In addition to providing clarity in the positioning of the various theoretical perspectives referred to in the thesis, the spectrum could also be used in broader application as a pedagogical tool.

The tort proposition of negligence for failure to protect from atrocity based on the novel idea of virtual proximity is intended to be not just a new legal code, but a component of a new international legal regime of collective tort between members of humanity. This would be in addition to the emerging regimes of international criminal law, individual and class trans-national tort claims, and state responsibility. Further research into the potential of such a regime is intended to be undertaken in post-doctoral work.

Just as the generation of ideas and conversation over the past 60 years led to the actualisation of the ICC, it is hoped that the international conversations facilitated through the proposed fora as detailed in the political proposal will lead to some form of institutionalisation specifically addressing international society’s collective responsibility for atrocities, or global injustices generally. The political proposal is for imminent implementation to facilitate the longer-term development of the ethical and legal proposals. It is acknowledged that it may take decades to develop a critical mass of consensus about humanity’s collective ethical and legal obligations in regard to atrocities.
1.7 Conclusion

A sobering shadow lurking throughout the writing of the three remedial proposals in Part III of this thesis was the awareness that dreams of better worlds are generally met with cynicism. Sometimes this is rightly so, as history has occasionally proven the terror of utopian dreams. For some, consideration of alternative ethical and legal norms and codification based on ideals can be destabilising. Silos of disciplinary certainty and expertise create resistance against new ideas that can disturb ‘proven’ theories, entrenched laws, and political realities. In this regard, Manderson’s extension of Levinas’ ethics of alterity to law, drawn on in the ethical and legal proposals, may be helpful. He describes ‘living for the other’ as a difficult freedom, a jurisprudence for adults in which the oscillation between infinity and totality, ethics and politics, or the self and the other can be seen as ennobling an instability usually considered undesirable. So too, using our imagination to oscillate between distant ideals and the stark contrast of the present can be viewed as emancipation from the negation of the actual and the limitations of disciplinary thinking. To ‘think’ this way can be difficult, and there is risk of thinking wrongly. To claim to ‘know’ is to risk accusation of naiveté. To ‘speak’ is to risk silence in response. Regardless of these risks, the ideas in this thesis dare to ‘hope’ that we might be able to transcend the actual, to create a better future, and to one day secure perpetual peace.

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64 Manderson, Proximity, Levinas, and the Soul of Law. p. 200.
PART 1 – SETTING THE SCENE: THE HISTORICAL QUEST FOR PERPETUAL PEACE

2 FAULT LINES IN THE FOUNDATIONS OF LIBERALISM

2.1 Introduction

It is acknowledged that the evolution and analysis of early modern political and legal theory has already been thoroughly researched. Each rendition is a unique viewpoint of the author drawing out particular analysis and synthesis. The inquiry in this chapter delves into the theological and increasingly secular justifications and manoeuvres of key thinkers in the early modern period to explain the violent and expanding geo-political world confronting them. However, it is not so much an examination of their theories of state and law, or their formulas for securing peaceful relations, or justifying aggression. As political theory is recognised as the basis of international law and relations, particular focus will be given to the evolution of the liberal theory of the state, most evident in the early modern humanist tradition. However, attention is also given to the scholastic Christian tradition. While it lagged in its embrace of the idea of state, it did contribute to the work of early humanists, particularly in the conceptualisation of natural law and _jus gentium_, the law of nations. Fundamental principles, many with mythological origins, became entrenched within this period of formation of statehood and international relations. Their presence pervades contemporary rationalisation of political and legal arrangements, and international law, even though they appear as ghosts, and irrelevant to the challenges of our time. Mythologies include natural law; the state of nature and its designated escape route, contractarianism, which was applied to individuals and states; and reification of the state as an autonomous moral ‘person’ driven by self-preservation.

Sections 2.2–2.7 cover a period of vexation over religious wars and the challenges of expansion into new worlds in the 16th and 17th centuries during which religious dogmas were rejected or modified, and new humanist conceptualisations emerged. Considered ‘the heartland of the history of political thought,’ this period generated new ideas including: a natural state, or eventually a state of nature (essentially a state of equal vulnerability), for both states and individuals; natural law, separate from divine

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law; *jus gentium* which was gradually extricated from natural law; and assumptions of the true nature of man, concluded as driven by fear. These rationalist humanist theories rapidly subverted scholastic moral theology. While the separation of natural law from divine law enabled secularisation of legal reasoning, the separation of natural law and *jus gentium* saw the generation of laws of utility between states. The separation from divine law enabled expansion into, and embrace of new worlds of commerce, culture and religion, and the possibilities of a human family of diverse peoples. These developments were in contradistinction to the simultaneous development of the concept of state and of the drive for self-preservation, autonomy, and sovereignty.2

Section 2.8 focuses on the acme of this period of reconstruction of human reality with Hobbes’s formulation of the state of nature which built upon Grotius’ natural state of man. From the passions and rationality of man in this mythologised human condition arose the theory of the impersonal sovereignty of the soulless state as an ‘artificial man’ whose primary function was ‘welfare, the security and the comfort of individual men’. This theory changed political debate across Europe and spawned other post-Westphalian projects of reconstruction (see Section 2.9). It enabled the radicalisation of Grotius’ republican model by the Dutch brothers De la Court, and Spinoza, and the departure from the absolutist political Aristotelianism in Germany through Pufendorf’s new school of natural law theory.3 In either direction, liberalism and its notions of natural rights of self-preservation, autonomy, and pre-emptive strike were fossilised and etched into the theoretical neural pathways of subsequent Western thought.

In the 18th century Vattel’s theoretical manoeuvre in the displacement of natural law (see Section 2.10) created, with extraordinary repercussions, a new inter-statal-only international realm populated by transubstantiated states imbued with the moral qualities of persons. During this time, the state became elevated to an almost divine expression of human rationality, with Hegel seeing the state as ‘the march of God in the world’4 and Ranke perceiving states as ‘spiritual substances, original creations of the human mind – I might say, thoughts of God’.5 These ‘persons’, or externalised public

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realms of states, were similarly challenged as Hobbes’s individuals. Theoretically alone in a state of nature, but no longer subject to natural law, they were obliged to create social relations for their survival, but were fundamentally driven by fear and liberal notions of self-preservation and autonomy.

Based on these perceptions, modern international law emerged justifying a universal social reality occupied by states only, poised for pre-emptive strike. Thus, the right to wage war was increasingly legally justified by referral to custom, backed by the balance of power, rather than by moral or philosophical reasoning. The analogy of individual-state in a state of nature ceased at this point, because the doctrine of sovereignty denied the possibility of relinquishment of sovereignty. It was only in domestic society, created through contract to a Leviathan of sorts, that power was distributed, rights and duties were assigned, and conflict controlled. In statal society, only sovereign, independent, and self-regulating states were possible. Legitimation of state citizenship in this international society of equals came from a mutual assumption (based on the mythology of contractarianism) of delegated, or sometimes seized, power from within the state. It is only in recent decades that the credentials of statehood have been queried, raising questions of legal and/or political legitimacy.

Throughout this entire period the quest for perpetual peace remained persistent but elusive, and regardless of human progress in other areas. However, the human capacity for optimism may prove to be more enduring than the deep-rooted liberal construct of the fear-driven, autonomous Hobbesian man and state. In this vein, Kant’s refrain in Perpetual Peace outlining the concept of a future federation of states (discussed in Section 2.11), has been recognised as an indication of his superior reasoning and confirmation of belonging to the ‘dreamer’ school of international political planning, of which Saint-Pierre and others (perhaps Allott will be enlisted too) are considered members. His optimism was affirmed when he said of himself:

> The scales of the understanding are not quite impartial; and one arm of them, which bears the inscription: Hope of the future, has a mechanical advantage...This is the sole error which I cannot set aside, and which in fact I never want to do.
For some, the quest is a feasible one – hence Allott’s contribution and this optimistic inquiry. While anomalies of liberalism and aggression inherited from the early modern period continue to destabilise a nascent international order, it is increasingly subject to moral and legal constraint. The foundation of a global society which reflects the oneness of human nature is being laid. This is now imperative as the challenges we face are global. Morality from 500 years ago needs to be transcended – hence the need for a new social theory and global law.

2.2 Universalist medieval Christian projects of reconstruction in an age of war

Projects of reconstruction of the political world for the attainment of perpetual peace are evident in Christian writings in the Middle Ages. These writings provided the idea of a source of unity transcending borders. They also transmitted the universalist elements of classical Greek and Roman thought, the idea of objective reason embodied in natural law, and the theory of just war, laying the bases of modern international law. The first known project was developed by the French lawyer Pierre Dubois in 1306 in a pamphlet titled On the Recovery of the Holy Land. Through the establishment of a council presided over by the Pope, war would be outlawed. Disputes would be settled by arbitration and appeal would lie to the Pope. Violators would be subdued by joint armies of the other council members, all properties confiscated, and the culprit banished to the Holy Land where he could use his talents against the infidels. While arbitration was familiar in the Middle Ages, this is the first known conception of international arbitration based on a political organisation.

Various other schemes of confederation or coalition of Christian states were conceived in the following centuries, usually in an alliance against the Turks but with the ultimate goal of perpetual peace. For example, in 1462, Marini proposed an alliance between King George Podebrad of Bohemia and King Louis XI of France, and in 1518 a treaty between Henry VIII of England and Francis I of France envisaged a league against the Turks and any other aggressors, with the ultimate aim of perpetual peace. This latter proposal thwarted a similar idea proposed by Pope Leo X. Further attempts failed to be implemented, primarily because of the hegemonic positioning of the convoker of any proposed council. While such proposals have been often viewed as forerunners to the

10 Ibid. pp. 42-44.
League of Nations, there is little similarity; their usual purpose was to form an alliance against an enemy or to secure political power as the Holy Roman Empire waned. Nussbaum cautions against fantasising that these efforts are links in an historical process leading to the League (and ultimately to the UN). He suggests that such projects are only valuable when they are substantially linked to existing political conditions and are able to effect change.\textsuperscript{11} However, they are relevant to this thesis as evidence of the perennial quest for peace at the international level (even if tainted with pride and prejudice) and that ideas of constitutional arrangements of shared powers are not new. With this extended view, they also demonstrate two extraordinary feats: the European states’ establishment of the European Union (EU) and maintenance of internal peaceful relations, and the international community’s establishment and maintenance of the UN, which, although limited in its ability to resolve conflict, is perhaps a harbinger of global community possibilities.

2.3 Papal demise: pre-humanist projects of absolute sovereignty

During the 16th century the Church’s power was eroded by its entanglement in temporal affairs and a European mood of anti-clericalism, thus shifting the role of the preservation of peace to the Roman emperor. The religious and political role of the Papacy inspired Dante’s earlier pre-humanist work \textit{De Monarchia}\textsuperscript{12} in which the Holy Roman Emperor as supreme arbiter would exercise universal imperial authority (by threat of excommunication) in order to bring the multiplicity of contentious cities, states and kingdoms into tranquillity. Although the Protestant Reformation also inspired ideas of human unity, rivalries between princes and their territories, and religious divisions intensified as the unifying effect of a common religious faith was eroded. Nationalism shifted allegiances towards monarchs and inspired the early 16th century writings of political thinker Machiavelli,\textsuperscript{13} and later in the century Bodin,\textsuperscript{14} both of whom developed the idea of the non-moral, self-sufficient sovereign state with a unified government.\textsuperscript{15}

The pervasive influence of Roman and Greek antiquity is evident in both the humanist and scholastic traditions throughout the 14th to 16th centuries, differentiated primarily

\textsuperscript{11} Ibid. p. 44.
\textsuperscript{12} The date of publication is disputed but is assumed to be in the second decade of the 14th century. Dante Alighieri, "The De Monarchia of Dante Alighieri," (New York: Houghton-Mifflin Co, 1904). p. xxxvii.
\textsuperscript{15} Nussbaum, A Concise History of the Law of Nations. pp. 76-77.
in their treatment on the place of war and of the limits of state action. The evolution in Italy of the Roman rhetorician tradition in the interests of the *polis* was the starting point for the humanist focus on *raison d’état* and the subsequent liberal notion of the modern state leading to ‘thin’ obligations based on natural law. The theory of *raison d’état* and its primacy of preservation of the prince or state, and by default citizens, with no moral or constitutional consideration, were mixed with the sceptic detachment from all contestable beliefs. These included commitments such as patriotism and sectarian loyalty, considered hazardous to ‘the wise man’ who should cultivate a sceptical detachment in order to preserve himself from the dangers of life. From this combination of *raison d’état* and scepticism, radically simplified (immune to scepticism) natural law theories of the universal right of self-preservation are seen to emerge in the 17th century. The paramount principle of the moral right of self-preservation was seen as the basis for any universal morality, as without it, no society could be established. This humanist tradition developed as a systematic alternative to the arguments of the Christian scholastic theologians who drew on the Greek philosophical tradition of viewing the human individual independent of any political context, leading to ‘thick’ obligations based on natural law.\(^{16}\)

Echoing Aristotle, who viewed man as by nature a political animal, and positioned the city state prior in nature to the household or individual, Machiavelli conceived of politics as the practical art of obtaining and preserving state power as an end in itself – politics for politics’ sake – in defiance of any supra-national religious loyalties.\(^{17}\) The doctrine of *raison d’état* is implicit in his writings in that everything is dependent upon circumstances, particularly in the keeping of promises. There were no ethical presuppositions. A bitter enemy of the Church and papacy, which he held responsible for Italy’s demise, Machiavelli undermined the scholastic theologico-ethical rationalism and universalism dominant in the Middle Ages.\(^{18}\)

Similarly, Bodin’s theory of sovereignty was developed within the turmoil of a newly unified France. He applied the idea of sovereignty as absolute and perpetual power over the people, unrestrained by human law, thus able to attain a well-ordered state.\(^{19}\)


\(^{19}\) Ibid. p. 77.
Bodin’s sovereignty was indivisible, with the repercussion that it was impossible to constitute a republic. This definition made an impact also on Dutch thinking. However, it was out-maneuvered by humanist Marnix of St Aldegonde (of the Dutch Revolt) and by Grotius. During negotiations with the Duke of Anjou who had aspirations to succeed Philip II, Marnix denied (in effect he lied) that there existed any Dutch equivalent for the word ‘sovereignty’. Grotius dealt with Bodin and the issue of absolute sovereignty in his writings and became the most prominent thinker in the unique Dutch amalgamation of humanist jurisprudence and republicanism.20

In their focus on the rise of national states and political theory, both Machiavelli and Bodin had indirect influence on the development of international law. As progenitors of modern realism21 (which was further developed by Hobbes in the 17th century), the notion of absolute sovereignty was to become the cornerstone in the secular structure of international law. It also acted as a counterweight to the scholastic rendition of the same Aristotelian concept of the pre-eminence of the whole over the part. Humanists (including Grotius, Hobbes and Spinoza) based their theories of state on the tradition of natural law. Meinecke observed a constant tension in subsequent Western history between reason of state (dominant in the 16th century) and natural law (17th century), and The Terror (18th century) which represented naked reason of state, after which Hegel endeavoured to reconcile the two traditions.22 In the 20th century, the failure of this synthesis led once more to the dominance of naked reason of state.23

The rise of national states in the early modern period saw the number of players in the international realm decrease as national communities consolidated. Spain, England, France, and The Netherlands in particular, provided impetus to the growth of international law, gradually replacing ecclesiastical and feudal law and the relevancy of city-states. The motivations for developing international law varied – sometimes to justify imperial aspirations, formalise trading, secure the seas, justify confiscation of indigenous peoples’ lands, or in reaction to the horrors of war. Treaty law, law of the sea, diplomatic law and private international law evolved, while the law of war lagged behind as municipal and military law.

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20 Gelderen, "The State and Its Rivals in Early-Modern Europe." p. 84.
21 Realism regards states as unitary and rational actors, each seeking to maximise their power relative to other states, and the realisation of their national interests. Their only constraints are the power and interests of other states.
23 Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant. p. 3.
2.4 Scholastic dilemmas: law – divine, one and indivisible, in an expanding and violent world

The chasm resulting from the Reformation between Protestant and Catholic limited the universalisation of international law although a number of new projects emerged that attempted to secure perpetual peace through political and legal reconstruction. However, in the scholastic Catholic Spanish world, the role of papacy and empire continued to dominate, as did ecclesiastical authority in the definition of just or unjust war. Just war theory was considered moral theology rather than an issue of sovereignty, thus limiting the latter’s development. To the Spanish, relations between princes were contemplated from the viewpoint of war. As divine natural law was one and indivisible, a war could be ‘just’ on only one side, condoning brutality to the unjust (which was always the other side). The extreme suffering of such a moral theology became inappropriate at the national level. Private wars with brutal consequences may have acted as deterrents to aggression, but the scale of brutality at national levels, exacerbated by the invocation of national pride, forced examination for more sound legal theory. The result was contributions incorporating varying degrees of secularisation or the thinning of traditionally thick obligations of divine and natural law. The challenge was that the scholastic concept of resemblances or concentric circles of law essentially viewed divine, natural and jus gentium as all divine in origin. Reconciliation of the divine with an increasingly secularised, internationalised, and non-Catholic world led to some spectacular claims to justify aggression and expansionism.

The works of Spanish scholastics such as Dominican de Vitoria (1480-1546), Luis de Molina (1535-1600), and Jesuit Suárez (1548-1617), together with the early humanists such as Anglicised Italian Gentili (1552-1608) who drew on secular Roman law which was respected in both Catholic and Protestant Europe, all acted as predecessors to the watershed humanist contribution by Grotius (1583-1645). These late scholastics and early humanists and their works were judged by each other, and posthumously, as being variously rigid; humane and inhumane; lacking in common sense; absurd; objectionable; obsequious; excelling in juristic acumen; illustrious; and courageous. They interpreted their changing worlds and anticipated an international law that would accommodate these changes. While dealing with specific issues such as state,

25 Defined by Isidore of Seville (506-636) and generally accepted as the universal law recognised by almost all nations. Ibid. p. 36.
26 Ibid.
sovereignty and citizenship; whether both parties to a war could have just cause; whether to consider non-Christians as bearing any rights; whether to spare the defeated enemy’s prisoners and families; or whether to trade with or claim other nations’ land and property; they were endeavouring to address the question of whether there was such a thing as a universal law for Europe and the newly discovered non-European world. Their contributions had repercussions on the survival of entire peoples and cultures, and also on the expansion of fledgling states and their claims to sea routes and continents to secure their wealth and dominance of the new world.

The following overview of these late scholastics’ contributions segues into early humanist works which synthesised some of these ideas with their own adaptations of the medieval humanist and sceptic Roman traditions, or with their own radical innovations. The underlying question for these scholastics was whether there was a universal society and law applicable to the whole of humanity. Each contribution provided impetus towards Grotius’ synthesis and innovations when, in 1625, he presented for the first time a system of international law acceptable to all states and to both Catholic and Protestant. The work was essentially a non-sectarian expression of tolerance and expressed his desire for the reunion of the Christian churches.27

As a scholastic, Vitoria’s works derived from Holy Scripture, natural law and *jus gentium* (or universal law). His innovation was the view that *jus gentium* reflected a human society of all humanity. The basis of this law was natural reason which generated a natural society and fellowship which binds all human beings and survives the establishment of civil power over particular peoples. The rules for this law were derived from natural law as well as a consensus of the greater part of the whole world.28 Vitoria also contributed to the idea that trade among individuals of various nations must be permitted. This innovation was later taken up by Gentili and Grotius. Vitoria also made a significant contribution to the law of war, recognising that both pagan and Christian rulers had legal positions and that war could be just on both sides (although based on ignorance), thus extending the law of war to both belligerent parties. However, his works also led to specious conclusions. These included condoning Spanish conquest (although tempered by his warnings to conquistadores not to misuse their power); the claim that under natural law and the writings of St Matthew, the

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Indians had to love the conquering Spaniards; his attribution of the role of a judge to the victorious prince, if his cause was ‘just’; and also his permitting of indiscriminate killing of Moslem prisoners of war and slavery for their wives and children. He was fundamentally authoritarian in his extreme advocacy of ecclesiastic and papal authority, and recognition of Christianity as a kind of state, res publica. This implied that by majority decision the whole Christian world could unite into one state (by the compulsion of the Church) under a divinely appointed monarch.\(^\text{29}\) In concession to these essentially brutal conclusions, the concepts of the modern state and sovereignty, and international law, were still muted in Vitoria’s world, awaiting the work on sovereignty by such humanists as French political theorist, Bodin, later in the same century.

Following Vitoria, Molina, a contemporary of the early humanist Gentili and in express opposition to his and other humanists’ views, argued in *De Justitia et Jure*\(^\text{30}\) that states were subject to a network of moral obligations, based on natural law, including limitations on state aggression that distinguished between defensive and offensive war. Defensive war, limited to moderate and proportionate application, was available to anybody who was subject to immediate and actual attack. Offensive war was restricted to sovereigns (or their equivalent in less structured situations) in retaliation for, or for recovery of, property. The pursuit of glory or pre-emptive strikes were prohibited, and like Vitoria, Molina believed that war could be just, at least subjectively, on both sides.\(^\text{31}\)

Theological, but more juridical than Vitoria, the highly acclaimed Suárez, dubbed ‘the most scholastic of the scholastics’ but also ‘the last of the scholastics’ wrote in *De legibus* of the idea of self-sufficient commonwealths joined as members of a universium, the human race. He claimed that all human relations were first governed by natural law of divine origin, supplemented by jus gentium which he defined as human or intermediary – between natural and civil law.\(^\text{32}\) The rational basis of jus gentium was in the fact that even though it was divided into many different peoples and kingdoms, the human race ‘always preserves a unity, not only as a species, but also a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy; a

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\(^\text{31}\) Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. pp. 51-52.

precept which applies to all, even to strangers of every nation.”33 States too, although communities in themselves, were also members of this universal society. Suárez singled out the principle of the mutual interdependence of states – pointing for the first time to an important determinant in the formation of international legal relations.34 Based on actual practice, he saw possibilities of a common interest in the *jus gentium* in which the realities, even inevitability, of mutual assistance and cooperation would be regulated. Through law, sovereign states would reconcile their independent national wills with the principles of international justice and peace.35 Elsewhere, however, Suárez stressed that there was not, nor ever had been, a real global commonwealth and that *jus gentium* was the result of agreement between autonomous commonwealths.36 Suárez’s most controversial but least admirable contribution was his strikingly legalistic ‘judicial’ theory in the treatment of just war, which condemned as entirely absurd the idea that war may be just on both sides. He argued that a prince who waged a just war had a real ‘jurisdiction’ pertaining to ‘vindictive justice’, based on the claim that war as an act of vindictive justice was indispensable to mankind, and that no better method had been found.37

### 2.5 The secular turn: the drive of self-preservation

Alberico Gentili (an exiled Protestant Italian based at Oxford), has been considered both epigone of the humanist tradition38 and originator of the secular school of thought in international law.39 He drew heavily on Protestant sources as well as on the scholastic school associated with Italians Bartolus and Baldus. However, he also initiated juridical inquiry over traditional moralising and defended a secular account of just war doctrine,40 the antithesis to Molina’s scholastic treatment on the limits of state action. He drew on Roman law, recognised by the English government to this day as the proper tool for ascertaining rights and duties in international relations.41 While acknowledging a natural society of the human race, Gentili gave paramountcy to the survival of the state overriding moral constraints, and argued princes were free to wage war in defence. For

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36 Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. p. 77.
Molina, the state was subject to moral obligations of natural law, prohibiting pre-emptive strike; Gentili’s principle of self-preservation was to become the basis upon which humanists justified the liberty of the individual within the state, and of the liberty of the state within the international realm.\footnote{Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant. p. 36.}

Gentili also argued that a war may be just (by degrees) on both sides objectively – raising the concession of Vitoria who considered war just on both sides because of excusable ignorance. Drawing on the works of Alciatus (1492-1550), an Italian writer on civil law, Gentili argued that rights of belligerents were independent of the justness of their cause.\footnote{Ibid. p. 31.} Again, drawing on ancient Roman law, he argued for the protection during war of women, children, priests and other groups based on grounds of humaneness. Recognising war only as a contest between public armed forces, he discarded private wars.\footnote{Nussbaum, A Concise History of the Law of Nations. pp. 95-97.}

\section*{2.6 Early positivism: the emergence of inviolability from the influence of norms or values}

A successor of Gentili and contemporary of Grotius, the English Richard Zouche (1590-1660) was the first to undertake a systematic treatment of international law. In positivist fashion (free from reference to the extra-legal, mysterious, ideal or moral) Zouche based international law on custom (if it was reasonable) and treaty, with little mention of natural law doctrine, and ambiguous use of \textit{jus gentium}, although his contemporary, Grotius, was his most respected authority. Rather than from an external source, he claimed natural law was knowable by men’s attitudes.\footnote{Ibid. pp. 164-167.}

Of particular note, Zouche coordinated the laws of war and of peace, thus elevating peace from an incident of war to a status. He also placed the law of peace ahead of the law of war, made possible perhaps by England’s relative freedom from foreign wars at the time. It may also have been in response to the end of the Thirty Years War and fresh confidence in Europe after the signing of the Peace of Westphalia.\footnote{Ibid. p. 166.}

Dutchman Cornelis van Bynkershoek (1673-1743), another early positivist, contributed to the increasing codification of a secular international law based on custom and treaties
and by appeal to reason and precedent, rather than theology or natural law. German Samuel Rachel (1628-1691) followed Zouche in asserting *jus gentium* consists of customs and treaties, but also recognised a law of nature defined as a matter of God’s will. He assigned the question of just war and methods of warfare to the law of nature but declaration of war to the law of nations. In the absence of custom and treaties, conscience was the guide.\(^{47}\)

### 2.7 The Grotian moment: natural law based on human nature, the birth of liberalism and international law

The transition from the 16th century Greek-based Spanish scholastic moral theology and Roman-based political theory of *raison d’état* to the 17th century’s liberal political theory and natural rights theories is generally attributed to the contributions of Grotius. Founder of the modern natural law school, he is also often referred to as the ‘father’ or ‘founder’ of international law.\(^{48}\) Three central issues with consequences of extraordinary violence challenged the development of Grotius’ and his contemporaries’ work: preventive and punitive war; expansionism and the acquisition of outer-Europe; and freedom of the seas. Grotius addressed these as theoretical issues for the first time, attributed as giving birth to liberal ideas. He owed much to Gentili and the scholastics generally in his substance and method of argumentation, referring often to moral theology, and particularly to Vitoria’s works. However, in seeking to accommodate the complexity of international politics and to establish legal rules, as well as refer to moral rules, his efforts sometimes led to ambiguous method. Wight observed, ‘He reproduces an endless dialectic of the real and ideal, the actual and permissible, with all its tensions and facets, hesitations, and qualifications.’\(^{49}\)

Deeply affected by the horrors of the religious wars, Grotius’ greatest work was published in 1625, *On the Law of War and Peace*, in which he constructed a general theory of law in an effort to bring order to the chaos. It was composed of general principles of law drawn from all the major systems of jurisprudence.\(^{50}\) Themes of just

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\(^{47}\) Ibid. pp. 167-174.

\(^{48}\) This has been contested in James Scott Brown’s Introduction to Hugo Grotius, *De Jure Belli ac Pacis Libri Tres,* (Washington DC: Carnegie Institution of Washington, 1925). Here he claimed that Grotius was in reality a member of the Spanish School of which he was its conscious expositor; and that he merely gathered the ripened fruit. Such criticism is now generally discredited and the Spaniards designated as merely precursors to international law. p. xiv.


war, divine law, natural law, *jus gentium*, and civil (municipal) law were investigated for their sources, mutuality, and their relation to the idea of justice. The theory posited the idea that states form a community regulated by universal commitments of value that constituted a law of nature – a law removed from theology, and separate from the law of nations. It is based instead on human nature, specifically an Aristotelian psychological proposition, the sociability of man (referred to as a law of reasonableness). While not contradicting the theory that natural law was divine, Grotius claimed it would be valid even if there was no God (which he was not claiming). Natural law, he argued, is known by reason, is self-evident, and is based on the nature of human beings, not by their will, or God’s. It is reducible to a system and codifiable, but is unchangeable. This is opposed to positive law, *jus gentium*, which is the product of the common will of states acting in the common interest; thus it arises from utility to the advantage of a society of states.  

Although natural law is without human sanction, it is not ineffective as justice brings peace of conscience, while injustice causes torment and anguish. Thus, law’s sanctions are both utility and morals, a combination of voluntary and natural law. Natural law forbids or restrains while *jus gentium* permits. This separation of laws was done precisely to indicate to sovereigns that their will was not the sole test of what is right. Sovereigns were constrained equally by the law of nations, natural law, as well as by a moral order which comes directly from God. Therefore, while just war is legal, even a sense of honour might forbid what the law permits. This reflects Grotius’ endeavour to bring moderation between extremes. He wrote, ‘A remedy must therefore be found for both schools of extremists – for those that believe that in war nothing is lawful and for those for whom all things are lawful in war.’  

He did not imagine that war could be abolished but rather through law, its brutality could be restrained. War, if conducted by lawful authority and for proper reasons, would lead eventually to peace as its ultimate goal. This restraint, moderation, proper measure – the Grotian doctrine of *temperamenta* – is still evident in modern international relations. According to a 20th century review by Butler and Maccoby:

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It has tempered obligations, reduced rights, protected the indefensible, and mollified harshness. Grotius went to the Law of Nature to find in it principles which should overrule the crude and at times inequitable enactments of positive law.\footnote{Sir Geoffrey Butler and Simon Maccoby, \textit{The Development of International Law} (London: Longmans, Green & Co. Ltd, 1928), p. 193.}

Grotius’ views on the individual in nature (before transferring any rights to a civil society) as being morally identical to a state, represented a major shift in moral thinking. Until now, only the state was understood as possessing the right to judge and execute criminals, the \textit{ius gladii}. By removing this assumption, the powers of the individual in nature became identical to the powers of the state, that is, liberty (the power to act in accordance with one’s own will) and sovereignty. Thus, whether amongst individuals or states, a relationship of guarded cooperation ensued.\footnote{Tuck, \textit{The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant}, pp. 82-84.} Grotius’ jurally minimalist inhabitants were not at war with each other, as later humanist renditions claimed, but were geared more toward pre-emptive strike in order to enforce respect for each other’s rights upon recalcitrant men.\footnote{Ibid. p. 228.}

Grotius’ concept of justice in the state of nature was diluted from the Aristotelian concept of universal justice (the sum of moral virtue) to a commutative justice (the right administration of punishment) indicating a ‘thin’ notion of human sociability. It also excluded notions of distributive justice. In contrast to the scholastic tradition, this concept justified punishment of those for whom there were no political rights, and also the acquisition and protection of goods, as long as they were not the legitimate goods of another. This justified the Dutch seeking trade in the East Indies, regardless of Portuguese attempts to prohibit it, and declaring ownership of the sea routes based on a re-examination of the idea of property.\footnote{Ibid. pp. 88-90.} The likening of the individual to the state also justified the engagement of war by private trading companies.

Grotius set out two fundamental laws of nature in justification of violent incursions by the Dutch into the Indies. The first law was that it was permissible to defend one’s own life, and the second, that it was permissible to acquire for oneself, and to retain, those things which are useful for life. However, in having to justify offensive wars that were...
being conducted, Grotius developed further laws that provided a minimal picture of the natural moral life. While still advocating the primary obligation of self-preservation, as per Gentili, two further laws were stipulated: that no one should inflict injury on another, and that no one should seize possession of another’s possessions (identified as laws of inoffensiveness and abstinence). However, ‘thicker’ obligations were necessary within a civil society, such as the protection and aid of others individually, and as a whole, over self-interest. A further obligation was to punish those who transgressed these laws.58 In ambiguous fashion, Grotius argued that the above principles gave rise to ‘that brotherhood of man, that world state, commended to us so enthusiastically by the ancient philosophers and particularly by the Stoics.’59

In terms of international political arrangements, Grotius considered Dante’s idea of a single world government disadvantageous, given the unwieldiness of the size and distances of a world order, but instead imagined a half-anarchical republican state of affairs of both good and evil, and happiness and suffering.60 Grotius’ doctrine of prescription based on continuity or precedent would lead to political heterogeneity, thus accommodating monarchy and dictatorship, and precluding revolution – a harbinger of the Ancien Régime which accommodated a variety of political forms. This can be contrasted to a doctrine of conformity, where political uniformity would follow. Wight observed this pendulum swing since the early modern period. This is somewhat analogous to Meinecke’s observation of the swing between natural law and raison d’état; between a prescriptive cultural and political inclusion (Grotius), and of legitimacy through conformity (as in Kant’s republicanism of the following century) which can be traced throughout the succeeding centuries. Political multiformity versus uniformity, or Grotius versus Kant (the latter referring to Plato and Aristotle on the moral standpoint of the unity of virtue). The consequences were as radical as the French Revolution against the Ancien Régime and as grave as the failure of the democratically-qualified League of Nations.61

59 Ibid. p. 13.
2.8 Hobbes’s world of fear: the state of nature and an exit strategy through contract

In tracing the evolution of the humanist tradition, it is of interest to note the transition from Gentili to Hobbes via Grotius. Tuck claims a closer relationship between Grotius and Hobbes than 18th century writers (except Rousseau) would admit. Rather than being antagonists as traditionally portrayed, Tuck argues that Grotius influenced the subsequent work of Hobbes and Kant, in the sense of an ongoing development of humanist thought on war and international society. Tuck also cites a direct link between Hobbes’s and Gentili’s work on colonisation. The dominance of justifications were initially closely linked to secular raison d’État literature but were replaced by Gentili’s and Grotius’ views about the moral rights of cultivators of unoccupied lands based in terms of a view of moral agency. Hobbes’s work also drew on the earlier thought of Machiavelli, as well as on contemporary works by Pufendorf, Saint Simon, and Leibniz, among others. As indicated above, Grotius developed the idea of how the state in a natural state, or in a state of nature (Hobbes first coined the term), shows how an individual is also in a state of nature; thus they have the same rights and characteristics. Hobbes took this further, claiming that the right of self preservation (building on Gentili) in this state of nature leads to the liberty of the individual, and of the state. This concept is essentially the foundation of liberal political theory which formed the subsequent basis of the conceptualisation of relations between states. According to Tuck:

[Gentili’s] state was already Hobbes’s man, acting on the basis of fear and striking at whatever seems to be a threat, whether it had manifested itself as such or not. …Seen in this light, the transition from Gentili to Hobbes was straightforward: it merely needed the single extraordinary idea of Hugo Grotius, that there was no reason why an individual should not be thought of as morally identical to a state.

Hobbes took the humanist view of the state of nature more seriously than Grotius, believing that it meant that individuals were preoccupied with their own protection, willing to use any violence necessary to ensure survival, thus overriding Grotius’ temperamenta. However, Tuck emphasises the common misconception of Hobbes.

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62 Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant. p. 109.
63 Ibid. pp. 227-228.
Men are fundamentally self-protective, and only secondarily aggressive. Fear of attack leads them to perform a pre-emptive strike, not to want to destroy. It is fear, not aggression, that causes us to measure ourselves against another in order to be confident in our power over them, and consequently confident that we are secure from their attacks. Therefore, the conflicts in the state of nature stem from an epistemic challenge, rather than from self-interest, in that judgements are made without referral to any objective standard of truth. Hobbes states, ‘In the state of nature, where every man is his own judge, and differeth from other concerning the names and appellations of things and from those differences arise quarrels, and breach of peace.’ This fear of each other, alongside a minimal sense of mutual respect, is the basis of a ‘right of nature’ to act on one’s own judgement about what will preserve oneself. This universal recognition of the blamelessness of self-preservation is the basis of Hobbes’s moral theory, not dissimilar to Grotius’. Hobbes, however, saw that this minimal natural morality was insufficient to avoid conflict, as there was no objective criterion for deciding what was necessary for protection. The state of nature is thus ended by a social contract to form a state – in other words, to obey a sovereign. Through this single authority, peace and security are secured by its absolute authority and use of force. Real law, as opposed to the law of nature, is the will of the sovereign.

Defenders of royal prerogative during Hobbes’s time insisted that property and personal liberty were held by the king’s subjects by the grace of the crown. Critics argued that while being obliged to look to the sovereign for their self-preservation, they were not free to live according to their own wills but rather lived as slaves bereft of liberty. They linked the freedom of citizens, restricted by dependence, with the constitution of the state, arguing that only self-governing republics would be able to afford individual liberty. Hobbes refuted this by a counter-revolutionary argument defending the need for absolute sovereignty, the Leviathan, but on a completely different understanding of former renditions such as Bodin’s, and of the type of liberty that would ensue. Freedom was not based on dependence or independence, but on freedom from external

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64 Ibid. pp. 130-132.
66 Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant. pp. 130-135.
impediments, and these impediments do not include coercion to obey the law. Hobbes claimed that fear of the consequences of disobedience of the law enables us to acquire the will to obey. Therefore, ‘Fear, and Liberty are consistent.’ However, in accepting the Grotian assimilation of individuals to sovereign states, Hobbes also accepted that all political rights of the magistrate must come from the (sovereign) citizens. Rather than sovereignty resting in a person as a sovereign power in themselves, acting in their own name, the sovereign was to act as a representative of the state of which individuals were freeborn citizens.

Hobbes’s work had deep implications for international relations and the doctrine of international law. In 1642 in *Philosophical Rudiments Concerning Government and Society*, Hobbes claimed the absence of any legal bond between nations. This was further elaborated in *Leviathan* in 1651. The law of nature among states was *jus gentium*, protecting the desire for self-preservation and defence. However, it was clear that no contract existed among states or common sovereign. In fact, if peace existed between states, it was an illusion. Rather ‘brutal rapacity’, characterised by deceit and violence, prevailed. States were likened to gladiators, eyeballing each other, poised for attack. As there was no international Leviathan, or no equivalent to a civil society, there was an absence of coercion and motivation for benevolence or mutual aid. However, in discarding the Suárezian and Grotian division of *jus naturae* and *jus gentium* and amalgamating them, Hobbes demonstrated that although without a sovereign, states are subject to the law of nature. In verbal concession to the dominant powers, Hobbes stated that both *jus naturae* and *jus gentium* were considered divine law because God gave men reason. However, his overall secularism, and the emphasis on equality of subjects of the law of nature and of nations, were significant to the history of international law. Nussbaum reflects:

> While his cool and indiscriminate alignment of aggression and defence flies in the face of scholastic teachings, his argument, taken as a whole, is an almost classical expression of the ever recurrent feeling that international law is no more than an inane phrase. However, his systematic approach and the profundity and

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70 Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. p. 129.
exactness of his reasoning place his work far above Machiavelli’s cynical comments on state affairs.\textsuperscript{72}

Later Enlightenment cosmopolitan thinkers were to discard the notion of an international law subsumed in natural law. The theoretical apparatus deployed for this move derived from within Hobbes’s constructions on the treatment of the individual in the state of nature, and the myth of contractarianism. The profundity of Hobbes’s concept of the state of nature was demonstrated the following century when humanists reappropriated this by arguing that the state, like the individual, in its desire for self-preservation and defence, was therefore able to wage war. The effect of this reappropriation was seen in the separation of the natural society of man (internal civil society) from the external public realm of sovereign states in which there was no longer seen a natural society or natural law (gone were the scholastic and early humanist notions of a human society of humanity and brotherhoods). Rather, international society was an institution of nature as a result of man’s nature. International law had become a law for and by equal sovereigns, based on their tacit consent. Natural law in the realm of states had been dealt a final blow. Modern international law for an unsocial inter-statal society turned its focus towards the self-preservation of moral ‘persons’ in a state of nature. Further, contractarianism provided the public realm of the state with the authority to control the external affairs of states. More significantly, contractarianism was the basis of legitimacy amongst a society of equal sovereigns, which, as we shall see, engendered instability and ultimately conflict.

2.9 Post-Westphalian projects of reconstruction

The period after the Thirty Years War and the Peace of Westphalia in 1648, and the beginnings of the Ancien Régime, brought full recognition of both Catholic and Protestant princes and independence from the authority of the Holy Roman emperor. However, a fear of conflict between absolute independent states and the demise of a unified global vision generated an intensified search for a formula to secure peace. Other theorists, particularly German Aristotelians, criticised both Grotius’ narrow notion of a general human society and human natural sociability, and the priority of

\textsuperscript{72} Ibid. p. 146.
self-interest, and both Grotius’ and Hobbes’s anti-Aristoleanism and apparent atheism.\textsuperscript{73} Johannes Felden argued:

If a state was a perfect society, as Aristotle claimed, it would not need the society of nations to investigate it. Furthermore, as the society of nations is not natural, natural law cannot be found in it. Also disputed is the notion of sovereignty as not being subject to any other power, as according to Aristotle, a despot’s acts can be made void as unjust by the will of his citizens, as can a civil government’s sovereign’s acts if they exceed his legal power. Rather the laws of a state are sovereign.\textsuperscript{74}

Pufendorf’s and his followers’ naturalist views gained more public success than Hobbes’s at the time.\textsuperscript{75} Being midway between Grotius and Hobbes, he accepted the old moralist natural law of the scholastics and Grotius, but not Hobbes’s account of international relations. He refuted Hobbes’s concept of the state of nature, arguing that both nations and individuals do in fact live in peace without the need for a common power. Pufendorf expanded what he understood to be Grotius’ natural sociability but saw that one had to abandon individual autonomy for a rich moral life – now regarded as the modern liberal idea of international relations.\textsuperscript{76} He was also at odds with Grotius’ position of the right to punish as a natural right possessed by all and its implications both in civil society and internationally, allowing states not directly injured by other states nor in alliance with the injured to punish. Pufendorf also had a very limited allowance for pre-emptive strike, reflecting his disapprobation of European expansion and its local wars.\textsuperscript{77} However, he was unsuccessful in combining heterogeneous elements of scholastic and humanist traditions in his conclusion that there was no independent \textit{jus gentium}, rather, jural relations among nations could be found only in natural law. Nor did Pufendorf recognise positive international law based on custom or treaty. Obviously, these ideas did not take hold, but he did contribute his notion of the

\textsuperscript{73} Tuck, \textit{The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant}. pp. 144-145.
\textsuperscript{74} Johannes a Felden, “Annotata in H. Grotium De Iure Belli et Pacis,” (Amsterdam1653). Sig. A2. Translated in Tuck, \textit{The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant}. p. 145.
\textsuperscript{75} Samuel Freiherr von Pufendorf, “The Law of Nature and of Nations: Or, a general system of the most important principles of morality, jurisprudence, and politics,” In \textit{Eighteenth Century Collections Online}. (Gale, 1749), http://find.galegroup.com
\textsuperscript{76} Tuck, \textit{The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant}. p. 142.
\textsuperscript{77} Ibid. pp. 158-161.
natural equality of states, amongst other works on religion and monarchy, which led to his recognition as a pre-Enlightenment figure.\textsuperscript{78}

Abbé de Saint-Pierre shared a Hobbesian view of Europe in a state of nature, where force had to be used to achieve sovereigns’ ends, as neither alliances nor the balance of power were effective in stopping conflict. Considered amongst the better known schemes for perpetual peace, Saint-Pierre’s utopian (and naïve, according to Rousseau) project\textsuperscript{79} envisioned the Christian states forming a federation for the prevention of foreign as well as civil wars. A Senate, a permanent assembly of delegates of the federated sovereigns, would be the supreme authority, deciding disputes and forcing recalcitrant parties into submission through war. Voting was enjoyed by the greater states, while lesser states had voting rights as groups. War as coercion was also to be used to force reluctant states to join the federation. The scheme was respected but met with irony. Frederick the Great wrote to Voltaire that the Abbé ‘honors me by his correspondence’ and that his ‘peace plan is very practical but for the fact that it needs for its success the consent of Europe, and some other bagatelles.’ However, in more modern times, the scheme was recognised as foreshadowing the League of Nations.\textsuperscript{80}

\section*{2.10 The Vattelian worldview: transubstantiation of the state and a new metaphysics of the law of nations}

As we have seen, the question of a universal society law in the natural law tradition had been developed by Vitoria (1528 – a universal law found in natural reason), Suarez (1612 – a moral and political unity of the human race), Molina (1593 – a network of obligations) Gentili (1598 – a moral society of the human race with a secularised natural law of which \textit{jus gentium} is mostly derivative), Grotius (1625 – a law of nations derived from the common will, a law of nature derived from human nature and indirectly of God, and a moral order directed by God); and Hobbes (1642 – natural law and the law of nations combined). Two further noteworthy naturalist projects of reconstruction contributed to the development, and inherent fault lines, of international law. Like Pufendorf, Christian von Woolf (1679-1754) and Emmerich de Vattel (1714-1767) endeavoured to develop a coherent theory of international law based on natural law. According to Nicholas Onuf, of ‘…the great expositors of natural law’, Wolff and

\textsuperscript{78} Nussbaum, \textit{A Concise History of the Law of Nations}. pp. 148-150.
\textsuperscript{79} Claude Irenée Castel de Saint-Pierre, \textit{Projet Pour Rendre La Paix Perpetuelle en Europe}. (Utrecht: Chez A. Schouten. 1713).
\textsuperscript{80} Nussbaum, \textit{A Concise History of the Law of Nations}. pp. 142-143.
Vattel were pre-eminent. Of particular relevance to this inquiry, van Woolf, informed by Roman law and medieval experience, claimed that the society of the whole human race continued to exist after the creation of states otherwise they would be established contrary to the law of nature as the obligation of all toward all would be terminated. Likened to the human body, if certain members join together, they do not cease to belong to the body. Like Pufendorf, Wolff accepted the state of nature for both individuals and states as sociable in character, and rather than based on fear, it is based on the desire for mutual aid. The purpose of the law of nature is the self-preservation, as well as the self-perfection, of each individual and of nations, and, through mutual assistance, the preservation and perfection of the others. From the obligations to preserve and perfect oneself, then to assist others, a corresponding natural right is generated. These rights were the origin of what were later called ‘fundamental rights of states’. Wolff argued that the promotion of the common good required the establishment of a supreme state, a democracy of equal nations in which the will of the majority would prevail, but which also possessed some sovereignty over the individual nations. Wolff stressed the limitations of this state, particularly in regard to intervention, in opposition to Grotius’ theory of international punishment and to his principles of war generally.

Vattel translated von Wolff’s work (which was written in Latin and therefore limited to the learned) then wrote his own book, building on von Wolff’s work, but developed his own sovereignty theory of the state. He agreed there was a universal society of the human race governed by the law of nature, as were states:

Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature, nations,
or sovereign states, are to be considered as of many free persons, living together in the state of nature.  

However, influenced by both Grotius and Hobbes, he used the sovereignty theory of the state to argue against a natural society among states and thus objected to the idea of a supreme state. He likened states to free moral ‘persons’ because they have understanding, will, rights, duties, and power, but they do not yield to a general body, and there is no authority to prescribe or command laws or compel those who refuse to obey. Conversely, individuals form civil society, and submit their rights and wills to the whole body in regard to the common good. As both individuals and states are moral entities in natural law, Vattel transubstantiates, ‘the highest unified order’ (domestic sovereignty) to the international plane and the law of nations.

Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a sovereign State. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together in a society established by nature and subject to the Law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.

For Vattel, a ‘general law’ held that people were not obligated to enter into civil societies because they were free by nature – the same held for nations. At the same time, nations were obligated to contribute to the happiness and advancement of other nations, as far as the nation’s liberty and well-being permitted (the latter was probably a concession to Wolff and republican concern for the common good). However, the law of nations was voluntary, drawn from sources of recognised practices, rather than from nature.

Vattel’s theory moves towards legal positivism, with state practice becoming more important. Nations are identified with states; individuals or families do not

play any significant role in his system. In these respects, he laid the foundation of classical 19th century international legal theory.\textsuperscript{88}

Three divisions of law formed the positive law of nations: ‘...the voluntary law from their presumed consent; the conventional law from an express consent; and the customary law, from a tacit consent.’\textsuperscript{89} This division reflected Vattel’s anticipation of the doctrinal development of a single law of nations with three sources – the writings of commentators (consent), treaties (express), and custom (tacit). Madison extended this sources doctrine further, as did Wheaton in his influential treatise \textit{Elements of International Law} in 1836, and sources doctrine took a recognisably modern form.\textsuperscript{90}

Through the works of Locke, Pufendorf, Wolff and Vattel, Vitoria’s and Grotius’ idea of humankind as a constraint on the activities of states gradually gave way to the state being at the centre of international relations. Formal recognition of the state as the principal moral ‘person’ evolved, facilitated by the Peace of Westphalia, through which the interests of individuals were expressed in the international society of states. The state became the principal subject of the law of nations. This did not sit well with contractarianism given that the latter claimed the superior moral entity was subject to the wills of its constituent parts, and was also indistinguishable from the ruler or monarch. When set free from this constraint, the idea became more powerful and dangerous when Hegelians and post-Hegelian German philosophers conceptualised an organic unity, individuality, and moral autonomy of the state.\textsuperscript{91}

Allott claims that in Vattel’s move in particular, the myth of the state of nature was made into the metaphysics of the law of nations.

These pseudo-persons have what Vattelians call ‘international relations’, pseudo-psychic conditions of amity and enmity, as petulant and whimsical as the personal relations of medieval monarchs or oriental potentates. They play ‘the great game’ of diplomacy, as they call it, a game whose arcane contests must sometimes be decided by what they call ‘the ultimate reason of kings’, that is to

\textsuperscript{90} Onuf, \textit{Civitas Maxima: Wolff, Vattel and the Fate of Republicanism}. pp. 300-301.
say, armed force. The only ‘law’ they recognise is a form of self-regulation, providing minimum conditions of co-existence among neighbouring landowners, the rule[r]s of the game.\footnote{Allott, \textit{The Health of Nations. Society and Law Beyond the State.} p. 58.}

According to Onuf, ‘For the next half century, it seems no one went beyond Vattel in developing sources doctrine as we know it today. Given Vattel’s prestige, we should not find this surprising.’\footnote{Onuf, \textit{“Civitas Maxima: Wolff, Vattel and the Fate of Republicanism.”} p. 300.} Vattel’s book attained a circulation second only to Grotius’ work. Unlike Wolff’s, it was read by everyone who mattered, and was on the desk of every diplomat for over a century. It influenced the minds of those who formed international reality, and is still our reality today.\footnote{Allott, \textit{The Health of Nations. Society and Law Beyond the State.} p. 416.} Nijam argues that by the end of the 18th century, both Kant and Vattel had offered theories for the law of nations. Vattel’s approach was the most successful and commonly practiced. The concept of the state as a moral person with an independent will burgeoned in the 19th century, although some Kantian influence was present, seen in Kelsen’s pure theory of law which reacted against the mystification of the state and the reification of legal personality.\footnote{Janne Elisabeth Nijman, \textit{The Concept of International Legal Personality. An Inquiry Into the History and Theory of International Law} (The Hague: TMC Asser Press, 2004). p. 84.}

\section*{2.11 Kant’s Perpetual Peace: a deontological, positive law of peace}

Kant’s \textit{Toward Perpetual Peace} (1795) has been recognised as a major project of reconstruction, a rich work of moral, legal and political philosophy. It can be described as an analytic theory of deontological and consequentialist international ethics based on a philosophy of transcendental idealism and a politics of liberal internationalism.\footnote{T. Carson, “Perpetual Peace: What Kant Should Have Said,” \textit{Social Theory and Practice} 14 (1988). p. 333.} In typical Kantian formulation, peace is a practical duty because only under peace can all men treat one another as ends. Therefore, peace follows logically from the pursuit of rational self-interest – applicable to both states and individuals. This is not a heuristic, but a teleological enterprise with a guarantee of peace from the fulfilment of the ethical duty. It is also an epistemology through its explanation of how the mechanical course of nature visibly reveals a purposive plan to create harmony through discord among people, even against their own will. Failing the fulfilment of the duty, the promise of peace (the inevitability of history) would still be realised from a hidden plan.\footnote{Michael W. Doyle, “Kant and Liberal Internationalism,” in \textit{Toward Perpetual Peace and other writings on politics, peace, and history: Immanuel Kant}, ed. Pauline Kleingeld (New Haven: Yale University Press, 2006). p. 224.}
Kant was hemmed in by the Hobbesian dilemma about international relations – that autonomy means moral independence, but an authority was obviously needed to control conflict. While Hobbes looked to natural law, Kant looked to a positive law as a coercion which would secure autonomy, acting as an externalised categorical imperative. Kant anticipated that progression towards a perpetual peace would come through law, specifically the law of peace. This was comprised of a combination of prohibitive and affirmative conditions. The former included the abolition of standing armies, and in the making of peace treaties, no mental pretensions to new wars. The latter was comprised of elements of public law and forms of constitution.

The first element was through the development of civil society and municipal law. For peace to be maintained at the international level, states needed to adopt a republican form of civil constitution for their own internal governance. This republican form combined moral autonomy, individualism, and social order, and also preserved legal equality and other fundamental rights on the basis of representative government and the separation of powers. However, there was a moral requirement of unconditional obedience even when the ruler had breached the social contract. The state was owed this obedience because it provided moral legitimacy to actions that were performed under the auspices of positive law. Such liberal republics would progressively and inevitably, after many attempts, establish a global and just peace through pacific federation. Therefore, unlike Vattel who considered the type of government within a state as outside the scope of the law of nations as long as it pursued the common good or public happiness, for Kant domestic peace and international peace were mutually dependent. For international peace to be realised, the internal political structure of the state has to be republican with a constitution based on the supremacy of law.

The second element was a public law of nations to regulate the external relations of a confederation of free states. The law of nations defined states’ rights and obligations necessary to maintain freedom and independence, and recognised their sovereignty and equality. Rights of peace included neutrality and rights to guarantees and defensive alliances. This law had a constitution as its foundation, embodied in a federation of
states, created and maintained by their will and agreement, rather than by external coercion. Kant’s just war theory allowed defensive war and was not unaggressive towards non-liberal states. It allowed conquest for the sake of reforming an unjust enemy state as no peace would violate the rights of the state’s citizens. The vision was for an ever-widening pacification of a liberal pacific union.\textsuperscript{102}

The third element of public law was the cosmopolitan law in regard to the rights of strangers in foreign lands to facilitate trade and commerce, implying the possibility of a global constitutional regime, ultimately establishing the rights of all people and all states on a universal basis.\textsuperscript{103} Kant wrote in \textit{Perpetual Peace}:

\begin{quote}
The growing prevalence of a (narrower or wider) community among the peoples of the earth has now reached a point at which the violation of right at any one place on earth is felt in all places. For this reason the idea of cosmopolitan right is no fantastic or exaggerated conception of right. Rather it is a necessary supplement to the unwritten code of constitutional and international right, for public human right in general, and hence for perpetual peace. Only under this condition can one flatter oneself to be continually progressing toward perpetual peace.\textsuperscript{104}
\end{quote}

No single constitutional, international, or cosmopolitan source alone was sufficient – only if all three elements were present would it be possible for sustained liberal peace.

The origin and binding nature of Kant’s law of nations found no basis in natural law as Grotius, Hobbes, Pufendorf and Vattel claimed, but in the will and agreement of states.\textsuperscript{105} States should not be subject to public laws as individuals are in civil states. This was because of Kant’s aversion to the establishment of international institutions for executive rule or adjudication with the power of coercion to enforce the law of peace. Rather, states would continue in a state of anarchy, but would be tamed and subject to law rather than to fear and the threat of war. They would establish a juridical framework for a perpetual peace, at the same time marking the final abandonment of the

\begin{footnotes}
\item[105] Covell, \textit{Kant and The Law of Peace: A Study in the Philosophy of International Law and International Relations}. pp. 94-95.
\end{footnotes}
natural condition of war. Kant based this principle on the idea that the federation would not acquire any power to coerce states as they were not in a state of nature as individuals were. An institutional framework would exist, however, limited to securing the rights and property of states.

According to Orend, Kant’s work has been variously criticised as a harbinger of world government; as lacking specification of powers for the federation; sacrifices moral principles for political expediency; as naïvely optimistic and hopelessly moralistic; as glorifying a resort to warfare in order to advance culture; and, conversely, as extremely pacifist. Aspects of Kant’s law of peace have been realised: the municipal law and civil constitutions of many states would conform; a horizontal public international law regulates external relations of states; and a complex equivalent to Kant’s cosmopolitan law regulating trade and commerce facilitates global interaction. However, the jury is still out on Kant’s assumption of the historical inevitability of perpetual peace following the establishment of a law of peace. Allott refers to it as the ‘Consoling or Kantian Myth’. Europe’s expectation of its inevitability has been refused until recent decades – four attempts at various forms of Kant’s league of nations have been interspersed with genocide, nationalism, and constitutional disorder. Peace was to be the condition of the relations between states that would result from the voluntary observance of the law which applied to them. As the dominant realist practice is based primarily on state self-interest, it is an inconsistent observance, resulting in ongoing cyclical patterns of conflict and peace.

However, Kant’s prognostications are not completely dismissible – as mentioned, he anticipated wars as part of the purposive order of nature. Perpetual peace was guaranteed by nature herself via a circuitous route of war, rivalries and other misfortunes. States would eventually enter into a cosmopolitan form of union brought

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106 Ibid. pp. 135-137.
107 Ibid. p. 171.
111 Examples include realists such as Morgenthau, Kennan, and Waltz.
about by the means of conflict. This might now be verifiable in Europe’s experience, regardless of its historic failures, in that the saturation of wars in the 20th century may have finally propelled it out of the cycle into a new era of cosmopolitan union. On the international level, a society of states, of sorts, does exist, and globalisation and technology are accelerating the development of a global community. Political and legal reforms facilitating cooperation for the benefit of the international community are evolving. It would seem that the Kantian perspective is becoming a viable interpretation of these contemporary relations at the international level. While human nature does tend towards a natural state of war, practical reason demands a duty of peace, and a republican arrangement of affairs, or pacific federation, at the international level to secure it. And, as further validation, this duty of peace seems to be a logical imperative, as the human capacity for annihilation has become a possibility.

2.12 Liberal anomalies

Although increasingly moderated by a Kantian perspective, today the pendulum of international theory is still weighted towards the 18th century Vattelian synthesis of the liberal notions of states as free and independent agents or ‘persons’ – reified abstractions inhabiting the international state of nature. In 1990, Ian Brownlie stated, ‘The term ‘sovereignty’ may be used as a synonym for independence, an important element in statehood.’ However, Andrew Hurrell observed in 1966:

...for many international lawyers, it is Vattel’s emphasis on the absolute independence of states that was the most significant characteristic of his writing – the “principle of legal individualism”...a characteristic widely applauded in the nineteenth century but increasingly criticised in this century.  

Hurrell argued that an expanding normative agenda of solidarism had opened up a second and different meaning of agency. This was the idea of:

…an agent as someone who acts for, or on behalf of, another. Within the solidarist order, states are no longer to act for themselves as sovereigns; but rather first as agents for the individuals, groups, and national communities that they are supposed to represent; and second, as agents or interpreters of some

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notion of an international public good and some set of core norms against which state behaviour should be judged and evaluated.\textsuperscript{118}

Allott too sees the withering away of the old Vattelian system. Vattel’s independent ‘persons’ existed in a pre-societal reality which was unsocialised and undemocratised, and in which the only ideal was self-preservation. This separation of mind-worlds between national societies and international society created a bifurcation of conceptions of justice, morality, law, public order, and social organisation. Consequently, diplomats and international lawyers sought constantly to reconcile the internal and external realms of state. Now, at the beginning of the 21st century, we are seeing the beginning of a metamorphosis of the metaphysical groundwork of international law – the beginning of the end of the Vattelian worldview and the emergence of a universal legal system.\textsuperscript{119}

Anthony Carty has also observed that the external realm is now constantly challenged with issues of legitimacy of state, and of state action, but is still constrained by a formalist perspective which limits recognition to a supposed unified will of the state (the external public realm) based on the framework of a mythologised contractarianism (experienced by the internal civic realm). Thus, the state is viewed as the primary subject of international law in that representatives of the represented are subsumed into one corporate entity, the state. This is ground enough for international legitimacy, as international law attaches to this sovereignty, which signifies a power to command. It is not until recent decades that international law has judged the internal legitimacy of that sovereignty, but the limits on the ability for inter-subjective dialectic within and between states because of these constructs sometimes lead to violence, or acquiescence to violence, justified by international law.\textsuperscript{120}

It would seem that the metaphysics of international law is its own nemesis. The base unit of the state as a reified ‘person’ representing all of its interests, subject only to positive law through its own consent (18th century), autonomous and driven by fear (17th century), and obsessed with its self-preservation (16th century), has thwarted the quest for stability and security. The appropriation from the international realm of the mythologised, violent state of nature, based on natural law, to the autonomous

individual gave primacy to individual self-preservation, essential in a supposed natural state of war. Self-preservation provided the basis for the creation of domestic political institutions to which all power was granted in order to protect each from the other. The re-appropriation of this primacy of self-preservation to the anarchic international realm has since justified the use of pre-emptive strike and innumerable acts of aggression to protect the autonomous state at the cost of millions of lives.

This theoretical extrapolation of the state of nature from the international to the domestic and back to the international is incomplete. At the international level, the principle of autonomy would retain a community of independent states, although now somewhat qualified, but does not carry forward the domestic analogy of a form of government. Notions of autonomy and government to secure a social life appear to be incompatible at the international level. Consequently, for the past 500 years, any theoretical attempt to propose a universal empire or world government which would compromise state autonomy has been treated with suspicion. To realists, theories alluding to potential precursors to world government are shunned, including those which merely suggest the existence of an international society. Theories of international constitutionalism, such as Allott’s, are similarly suspected as being harbingers of a ‘soulless despotism’ or dystopia.

It is evident that Allott’s contribution faces formidable obstacles of theoretical entrenchment if it is to be embraced as a prescription for a radically different arrangement of an integrated international constitutionalism. Although social and political life has become increasingly interconnected and sophisticated, there is an enduring appeal of the proposition of peoples fighting for independence from rivals or larger entities which would envelop them. The origins of this tradition are rooted in the profound pathology of fear and drive to pre-emptive attack generated by the Hobbesian rejection of classical law and the medieval rendition of natural law. The contemporary realist tradition retains this stance, emphasising the anarchical elements of international politics, denying moral and legal obligations based on natural law,

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121 Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant. pp. 228-231.
122 Kant, “Toward Perpetual Peace and Other Writings on Politics, Peace, and History”. p. 91.
123 See Andrea Paulus’ critique of Allott’s work in Chapter 6, Section 5.
124 Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant. pp. 228-231.
looking rather to expediency, and acquiescing to, and relying on, the inevitable cyclical nature of war and peace.\textsuperscript{126}

The international arena can be seen as a laboratory for liberal ideas. The paradox of political liberalism and international aggression has been illustrated – liberal attitudes to rules of civil society are associated with international aggression. Their interplay and sometimes clash is evident in the wars and fragile truces throughout modern history. Their presence is evident at every UNGA meeting as the body seeks to reconcile differences between perspectives on what constitutes legitimate states and what law is consented to.\textsuperscript{127}

Even if the practical effects of the UN, its peacekeeping, and new legal regimes are wanting, there appears to be an irreversible change of direction in the organisation of human affairs. Shame for the extent of suffering inflicted during World War II has propelled humankind into a new consciousness of the capability for human perversity and, in reaction, a new kind of institutionalised moral commitment to protect against human rights violations. That government is incompatible with autonomy has been evidenced in recent decades by the decline in state autonomy with the ever-extending reach of the UN. Tuck muses that perhaps Kant has been (almost) vindicated – now the civil equals the international, and international relations equals the civil. Both are constructed and need to accept moral constraints. Autonomy, the central virtue in the early days of liberalism, presupposes an agent which today we would not much like to encounter. Similarly, the idea of sovereignty is increasingly and willingly being subjected to moral constraint in order to secure a more peaceful world.\textsuperscript{128}

\textsuperscript{126} Wight. pp. xx-xxi.
\textsuperscript{127} Tuck, \textit{The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant}. p. 229
\textsuperscript{128} Ibid. pp. 233-234.
3 MAPPING THE CONTEMPORARY THEORETICAL LANDSCAPE

3.1 Introduction

The following survey of the contemporary theoretical landscape spanning the sub-fields of the philosophy of international law and international relations continues to address the first two research questions of why international law is ineffective in securing peace, and how this might be remedied. The survey considers the many modern perspectives of the nature and function of law in the international realm which have evolved since the efforts up to the 18th century reviewed in the previous chapter. Each perspective endeavours to explain or justify the international regime, or to moderate swings between excessive adherence to a particular perspective and the subsequent overly corrective response, or to contribute new ways of thinking. However, the limitations imposed on the role of law by these various perspectives are ‘overwritten’ by Allott’s prescription of a field-theory classification, generalised into five distinct explanatory horizons as spheres of expanding influence, encompassing the entire ‘law phenomenon’. Allott’s intention is ‘…to demonstrate the rather extreme proposition that the wonder of law is precisely that law is an integrating of all five levels.’

In embracing efforts of the past and present, Allott anticipates the future unprecedented convergence of social life and law at the international level. An outcome of this convergence would be the integration and transcendence of law as we know it. The integration would see the dissolving of the separation of laws into discrete regimes, and of the bifurcation between the domestic and international realms. It would also make redundant common arguments of legitimacy attached to sovereignty, and the idea of the trans-substantiated entity of the ‘person’ of the autonomous state. These dysfunctionalities will have been transcended, giving way to the democratic rule of law at the international level – an international constitutionalism determining the creation, distribution, and delegation of social power throughout the world. Eunomia, the good order of a self-ordering society, would be realised at the international level through a ‘true’ law which reflects the interests and well-being of all of its members.

International relations typologies are integrated with legal typologies to extend Allott’s integration. Boucher argues that international relations theorists have mistakenly cut

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themselves adrift from the mainstream of political theory in order to develop their own theories, depriving themselves of access to the background theories to their own thought. Likewise, the separation between theories of international law and international relations deprives each of them from a set of tools for deeper understanding of the ineffectiveness of the international system. The remedial proposals in Part III depart from the insulation of international law’s discourse, and also go beyond international relations discourse, delving into ethics and the specialised area of tort law, to search for innovative ways to address international law’s ineffectiveness.

The traditional legal and international relations typologies will first be grouped under Allott’s five explanatory horizons, and briefly explicated. A theoretical spectrum (see Figure 2) will provide a visual rendition of the location of these typologies integrated into Allott’s field-theory classifications. The spectrum will also serve the purpose of locating Allott’s work within this complex landscape (even though he intended to craft a grand integration of all the classifications), and this thesis’s remedial proposals. The more commonly associated constitutive elements of these typologies are presented in a separate table (see Table 1).

### 3.2 Allott’s prescription for the role of law

Allott acknowledges that for most lawyers, law is simply what law does, but for Allott, law plays a primary role in the making of human future. He says, “To talk about law is to talk about the eighth Wonder of the World.” Revolutions have been made, and much blood spilt, in the name of legal theories. This is because law is concerned with the ultimate distribution of social power, and the justification and enforcement of that distribution.

In a constructivist approach, Allott assigns law the role of the anatomy and physiology of the body politic within which reality and ideas interact. It is a society’s conscious self-creating, linking its past, present and future willing. It embodies relations of social power and makes possible the integration of the willing and acting of individuals with

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that of society’s, and vice versa. It is the particularising of the universal and the universalising of the particular; the creator and creature in the total social process of the past and the future; and the intersection of the ideal and the legal constitutions. Allott views law’s system of legal relations as patterns of potentiality in which actual persons, things, events, and places can be fitted, creating a parallel universe beside the complexity of human and natural reality. These are relations of rights, powers, duties, liabilities, and immunities. This level of actual everyday life, the infrastructure of law, is the lowest of three tiers in a model of society-under-law. In the middle is the law, and above it is the superstructure of law including religion, education, philosophy, society’s ideas and ideals, the public realm in general, and the public mind or social consciousness. It also includes politics in which society’s common interest and the struggle for domination of the public realm, particularly its lawmaking and law-executing, is determined. Allott considers this model of infrastructure-structure-superstructure illustrates the embeddedness of law in social and transcendental reality. The same model can be applied to democracy and capitalism, with law in the middle, reconciling public and private interests, reciprocating ceaselessly between the particular to the universal.

This idealist legal vision can appear somewhat ‘unattached’ to everyday life, particularly when viewed from dominant empiricist or rationalist viewpoints such as that of the analytical positivist or realist with their strong defences grounded in self-contained realities, commands, procedures, or action of the here-and-now. However, the outlines of potential transformation into Allott’s proposed new world-under-law begin to emerge when his legal prescription is read in conjunction with his social theory, which he argues, is an essential co-requisite for a new international law. Allott’s social theory is based on the human capacity for dyadic thinking about the actual and ideal, that is, dialectical thought. This is a constant process of becoming, of constitution and re-constitution, occurring as ‘the idea of the ideal’ is contemplated. As the world is made by the human mind, human reality is constructed collectively. So, he argues that when international society is able to form ideas about the common interest of both humanity and of each individual, international law will then be able to disaggregate that common interest through the legal relations it creates. Allott argues that an

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7 Ibid. pp. 402-403.
unprecedented opportunity presents itself for such new thinking, to which he seeks to contribute. He says of his intentions:

**Humanity has the need and the possibility of a New Enlightenment. The author’s Eunomian Project (reconceiving society and law) and his Eutopian Project (reconceiving the human mind [through a new intellectual discipline – international philosophy]) are New Enlightenment projects.**

A revolutionary shift in perception of the nature and role of international law is being suggested here. Allott is claiming that international law has the potential to be no different to the nature and function of law at the domestic level. Throughout the modern period the claim has been that international law is different from domestic law. It has been viewed as law only in a rhetorical, metaphorical, or analogical sense. Allott claims this illegitimacy of international law is explicable due to the absence of a social structure – a sovereign to legislate, to execute, and to adjudicate – because of the Vattelian view of an unsocial international realm. The mythology of states as autonomous ‘persons’, driven by self-preservation and entrapped in a state of nature, has limited the evolution of a social theory for international society. The dysfunctionality of such an ‘unsociety’ has generated continuous theorising to justify its condition as natural and inevitable, or to temper its extremes, or to suggest other ways of being. Much of the theorising has justified an international law which retains the interest of states as the primary subject. The lack of a social structure without a ‘sovereign’ (or at least a ‘fiction’ of one perhaps found in divided sovereignty through a constitution, or a system of rules), as well as the absence of processes of democratisation and socialisation, have until recent decades, prevented the interests of humanity from being integrated into international law’s evolution. Hence, Allott’s integration of law on all five horizons is intended to enable the total social process to participate in its development.

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9. “And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions : by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.” John Austin, *The Province of Jurisprudence Determined*, Lecture VI (London: John Murray, 1832). p. 208.
11. See Chapter 5, Section 5 for a discussion on the limitations of the emerging universal legal system.
3.3 Allott’s five horizons of legal philosophy and Wight’s three international relations typologies

Allott’s five explanatory horizons of legal philosophy are developed as expanding spheres (or extending horizons) of influence (see Figure 1). The first sphere, or horizon, of law is understood as a closed system of rationality, a thought-world unto itself found within the legal positivism, command theory, and pure theory perspectives.

The second, expanded horizon is of law as a systematic actualising of a given society’s values found within legal realism, pragmatism, including modern American liberal-democratic theory.

The third horizon is of law as an expression of the totality of a society’s existence evident in historical jurisprudence and sociology of law perspectives.

The fourth horizon is of the law of a given society in dialectical tension with ideas which transcend it – ideas of morality and justice and rationality as in natural law and rationalism.

The final horizon understands law as inevitably connected with our ideas about the ultimate things – our ultimate ideas about the natural world, and about humanity’s relationship to the supernatural and the spiritual found in idealism.¹²

Somewhat parallel with Allott’s field-theory classification is a dominant typology in the discipline of international relations developed by Martin Wight and later by Hedley Bull, amongst others, of the English School of international relations theory. A comparison of the two approaches shows many shared theoretical elements and prescriptions. The three main theoretical traditions of the English School are identified by theoretical and eponymous descriptors. These are the realist or Machiavellian, the rationalist or Grotian, and the revolutionist, Kantian or cosmopolitan. These traditions will be discussed further below when they are incorporated with Allott’s classifications. Wight summarised the inclinations of each typology as follows:

13 These theories are indicated by yellow font on the spectrum in Figure 2.
To simplify it crudely: if you are apt to think the moral problems of international politics are simple, you are a natural, instinctive Kantian; if you think they are non-existent, bogus, or delusory, you are a natural Machiavellian; and if you are apt to think them infinitely complex, bewildering, and perplexing, you are probably a natural Grotian.14

The English School’s traditions are well recognised and are used interchangeably between both the legal and international relations disciplines. The tripartition of world views, realism-rationalism-revolutionism, particularly as expressed through the practice of the state, and theories of human nature, remain central to the identification of political strategies and goals, as well as in legal theorising and codification. By incorporating them into Allott’s classifications it is hoped to not only clarify the theoretical landscape and Allott’s contribution to it, but also to somewhat amalgamate it. By doing so, it supports Allott’s intention to syncretise all contributions to date, to take what is considered the best of these, and to transcend them.

3.3.1 The legal positivist horizon

For the positivist, law is a closed system, self-sufficient, self-explaining, and in its own realm of significance. Founded by Hobbes, positivism was later known as the command theory of law of the utilitarians Jeremy Bentham, John Stuart Mill, and John Austin, followed by the pure theory of law of Hans Kelsen, and then by the rule theory of law of H.L.A. Hart.15 Positivism is the rejection of natural law views. As a rational science, the question is about what law is, not what it ought to be. Legislation, as intentional law making, is the paradigm law. Legislation is reason made law, an act of command whose validity came from a sovereign’s power and a subject’s obedience. According to Allott, “The idea-complex of sovereignty, command, sanction and obedience was all the lawyer needed to know about the theory of law.”16 To determine law, reference is made to legal texts, state behaviour, and practice, therefore, an international rule does not depend on whether it meets moral criteria. Reflecting positivist views, Goldsmith and Posner argue that international legal obligations are equal part coincidence and rational state self-interest, nothing more, and they caution against the new round of legalism-moralism. They describe international law as an

instrument for advancing national policy, but that it is precarious and delicate, changing constantly due to political influences.\textsuperscript{17}

Positivism’s resistance to the influence of norms or values, and its affirmation of the independence of states, suggests why it has been both the most favoured theory of international law by states, regardless of their political persuasion, but also the target of critical analysis within mainstream discourse and critical theorists. Feminist critique argues that positivism has marginalised many issues that do not easily fall within its categorisations, particularly those which affect women, and those in poverty.\textsuperscript{18} Positivism’s normative lack has also accommodated the politicisation of the designation of, and appeal to, sacrosanct pre-emptive norms of \textit{jus cogens}. For example, the designation in the 1960s and 1970s of the right to self-determination and the prohibition of racial discrimination as \textit{jus cogens} was linked to the decolonisation process, and to the concept of nationhood, and was therefore given mainstream attention. However, gender discrimination, although recognised in the Convention on the Elimination of Discrimination Against Women (CEDAW),\textsuperscript{19} has been confined to the specialised area of human rights. This mainstream focus on racial discrimination and apartheid based on race has often allowed sex discrimination and apartheid based on sex to go unchallenged.

While many useful concepts of international law have been constructed by positivism such as sovereignty, equality, consent, good faith, and self-defence, as well as conceptual structures such as the international constitutional role of the UN Charter, and legal notions such as the powers of the UN Security Council, it is unable to comprehensively and convincingly explain all of the processes, institutions, and agendas for international law.\textsuperscript{20} Benedict Kingsbury describes international law as:

\begin{quote}
…a field of legal study unified by the gravitational pull of a core set of materials and commitments that hold together a diverse group of participants whose
\end{quote}

individual subject-matter interests, interdisciplinary borrowings, theoretical inclinations, and political orientations may not be well reflected in this core.\textsuperscript{21}

As those core materials are structured by a legal positivism which bases obligation on state consent, tension exists where in practice, the formation, application, and changes to rules often occur without the will of the states concerned. Kingsbury advocates that an acknowledgement of a broader base of obligation beyond the state would assist with this explanatory lack as new complexities challenge sovereignty as the sole allocator of competence.\textsuperscript{22}

Similarly, Anne-Marie Slaughter argues that while the state still performs essential functions, it is now seen as just one of many actors in governance joined by trans-national networks of specialised state actors or combinations of public and private actors.\textsuperscript{23} This new understanding sees sovereignty in terms of functionality, rather than protection from Hobbesian anarchy.

Mark Janis argues that the positivist approach is undermined by its ideal of a coherent and consistent body of codified international law, a ‘one size fits all’ approach. He observes:

In more and more circumstances, no one jurisdiction, no one authoritative structure, including any state, has the sort of exclusive legal authority that has traditionally been associated with sovereign states…A search for a decisive “law” needs to be transformed into a weighing or an integration of alternative “laws” which is more reflective of today’s international reality.\textsuperscript{24}

Complexities of today’s international reality include such diverse issues as the search for alternative laws and mechanisms to accommodate Eastern perspectives on human rights; the debates on the imposition of Western notions of freedom and justice for women; the diverse impact of international environmental law; the liberation of world trade on local economic and cultural survival; and the challenges of conflict, intervention, and the responsibility to protect.

\textsuperscript{21} Ibid. p.4.
\textsuperscript{22} Ibid. p. 4.
In addition to its normative deficiency, the positivist approach is weakened by its separation from theory of international relations, depriving it of contemporary analyses of global developments such as the forces of globalisation, and the proliferation of institutionalism, resulting in fragmentation of state sovereignty. Hence, there is a failing short in the establishment or adaptation of satisfactory legal boundaries and remedies, as international law does not reflect the realities of contemporary international politics. However, Goldsmith and Posner do suggest the incorporation of explanations from outside the discipline including choice theory, game theory, and rationalist methodologies. According to Kenneth Anderson’s review of Goldsmith and Posner’s work, they see these methodologies as ‘the coming wave of international law theory as a new generation of scholars arises, and as international relations and political science theory gradually become accepted as systematic methods of explanation in international law.’

Kingsbury describes the dominant positivist view as being ‘...attenuated by the pragmatic needs to ameliorate disputes, ensure international institutions can operate effectively, and respond to demands of global governance’. Although this state-centred system is increasingly stretched and strained, he observes that, surprisingly, neither in theory nor in practice, has it yet been displaced by another. Its resilience has been greater than expected because ‘in international law, practice continues to shape theory, and deeply embedded theory continues to shore up practice’. However, he argues the positivist approach is under attack, encountering considerable external challenge and internal critiques so ‘that its viability is seriously in question, unless it can be deepened and renovated’.

Similarly void of normative content, political realism has been the dominant view in international relations. It emphasises power and conflict among states and evaluates ‘good’ theory by its consistency with practice. It rejects both Hobbesian perpetual conflict and the cosmopolitan ethical vision and regards moral theorising about international law and relations as futile. States are unitary and rational actors, each seeking to maximise their power relative to other states, and the realisation of their

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28 Ibid. p. 2.
29 Ibid. p. 273.
national interests. Their only constraints are the power and interests of other states. Some realists even reject the concept of *jus cogens* because it trumps the will of states. They consider states as the ultimate source of international law because state practice is, for them, the normative foundation of international obligation. But, they also accept that there is an international society, even if it is only a ‘society of states’ in which anarchical tendencies have been merely tempered, not eradicated.

Kratochwil considers the development of the separate discipline of international politics created an implausible conception of politics and law that impoverished both fields.

> [T]he anaemic conception of politics as ‘power politics’ was paralleled to a certain extent by the narrowing of the concerns of jurisprudence to issues of conceptual analysis and the strict demarcation of the legal system conceived as a hierarchy of norms.

As realism cleansed itself of all normative conceptions (except power), law attempted to free itself from social and moral contingencies. By labelling or categorising rules, they could be placed within a ‘system’, and traced to a source or rule of recognition and thus be exempt from contingency. As a result, ‘[l]aw and politics are not one continuum in the realm of praxis, but radically different domains that must be kept separate.’

### 3.3.2 The realist/pragmatist horizon

While Allott affirms that law is as the positivist claims, a closed system of rationality, he argues that it is more than this – it is also a systematic actualising of a given society’s values. The realist/pragmatist view explains law as a subordinate social system, processing a society’s values into particular forms. As a value-processing system, it is analogous to the economic or educational system, taking the form of American and Scandinavian legal realism, including modern American liberal-democratic theory. Its founder was Aristotle, and proponents include Machiavelli, Locke, Rousseau, Bentham (again), and in the liberal democratic theory tradition, Rawls, Nozick, and Dworkin.

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Legal realism developed within the philosophical framework of experimental logic and pragmatism. A pragmatist is defined as one who, when methods of legal positivism fail to yield a resolution, looks to ‘…notions of policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public opinion.’ In addition, analytic methods, empirical techniques, and findings of the social sciences also inform this view. The realist/pragmatist approach looks at law in action, telling it as it is, as opposed to doctrinal analysis. It seeks to locate law as an integral piece of an inescapably complex social world: to tell it as it is, is to tell the truth of social reality.

Both legal realism and positivism are based on empiricist epistemology, a supposedly value-free analysis of an objective object discovered through an appropriate methodology. The goal is a state of transparency enabling confidence in social constructions through which we become fully self-conscious. However, in competing with the self-referential claims of legal positivism, the realist enterprise has been judged as complicating, rather than simplifying, the debates on the real nature of law. It represents one of a plurality of post-positivist perspectives in which the complexity of social phenomenon is integrated, bringing various and multi-faceted interpretations.

Also located within this legal horizon is the US New Haven School. There are realist tendencies in its concern to generate systematic, practically testable responses to policy problems. It claims to reject natural law theories because of their potential manipulability, and their subjective values which cannot be validated by empirical means. However, natural law tendencies do exist in the approach because, through specific processes based on a normative foundation, it assesses international law rules by the capacity to enhance human dignity. Also, jurisprudence is for this approach about making policy choices based upon a prescribed set of values. Kingsbury describes the approach as a repudiation of the positivist notion of law as a body of rules which sought instead to ‘systematize the different tasks of lawyers as decision-

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specialists in a process of authoritative decision aimed at clarifying and implementing the community interest in world public order’.  

The New Haven School approach is an interactive process. Through a variety of public and private fora, law would help translate claims of legal authority into national behaviour. The goal is a world public order of human dignity, designed to serve particular ends and values by establishing regimes of effective control. Judge Roslyn Higgins points out that, like Allott, this approach uses special language with the objective of improving the human condition.

The essential difference is that McDougal, while also attaching critical importance to the use of language in the achievement of social ends, seeks that amelioration of the human condition through the prevalence of those state systems that best represent desirable values. [Allott], however, believes that the state system itself is inherently inimical to the betterment of the human condition…  

Discomfort developed, even amongst those who sympathised with its methodological ambitions, with the School’s overriding focus on value-orientation. Critics were concerned by the connection of process and context with an overriding set of normative values, because a treaty obligation or rule of law could be disregarded if it was considered not in the interests and values of the international community. Another concern was that those interests were dictated by the national interests of a hegemonic United States (US).  

Straddling the legal realist/pragmatist approaches is the international relations rationalist/Grotian/‘society of states’ approach. This maintains that peace cannot be achieved by a purely consent-based constitutional order of free and independent states. It focuses on diplomacy and commerce, institutional and constitutional solutions, respecting moral obligations rooted in natural law and discernible by reason, while acknowledging the tensions in political practice. This perspective assumes that a more just system is attainable through the realisation of Grotian objectives such as the ‘development of a normative language for international politics, and the articulation and

propagation of an international morality’.

It calls for a rebalancing of both theory and practice in the development of international law, challenging the traditional positivist approach. It seeks to expand the agendas of justice and social change, through the input of ideas. A ‘Grotian’ incorporates a normative content by invoking a notion of international society in which nations comply with international law for essentially communitarian reasons, not just because of cost-benefit analysis, as the positivist would. Certain rules ‘are nested within a much broader fabric of ongoing communal relations’.

Compliance arises from a commonality of values and interest, which drives states to agree to honour the agreements into which they enter.

The approach can be subdivided into two sub-groups: the pluralist, which is state-centric, rights borne, duties owed to others perspective; or solidarist, which is primarily concerned with furthering human interests, committed to non-intervention, and bound by a common set of rules. Within the international law community, pluralist Grotian’s lean strongly toward realism. They seek to limit the extension of international law to affairs of interstate politics. Articulation of global values is rejected, stemming from the perceived failure of earlier natural law theories to articulate objective and reliable principles, and their vulnerability to manipulation. Solidarist Grotian international lawyers lean toward the middle Grotian/internationalist Grotian viewpoint. They tend more towards the cosmopolitan end of the spectrum and seek an expansion in international law’s agenda to include justice and social change. They hope for a new world through ideas. They generally reject both extremes of the realist world-view of a Hobbesian anarchy, as well as the Kantian view of a cosmopolitanism which is ‘centered on the ethics and self-realization of individuals and societies in a league of republican states or even a universal state’.

3.3.3 The sociological/historical horizon

The sociological/historical horizon includes views of law as an expression of the totality of a society’s existence. Law and society are coterminous. Law is never closed or subordinate as the positivist, pragmatist, or realist would claim; it is integral to society, expressing the will of the people and the whole ethos or spirit of that society. Such

43 Ibid. p.13.
45 Koh refers here to Verdross’s 1927 Hague Lectures Le Fondement du Droit International cited in Ibid. p. 2613.
theories were influenced by Aristotle (again), Montesquieu, Burke, Hegel, the German Historical School, and Weber. Both Aristotle and Plato were the first to emphasise the social order function of law. Montesquieu viewed law in a dialectical relation, with society and the history of legal development helping to explain the structure of society. This is a classical version of the contemporary mirror thesis, that is, that law is a mirror of society and functions to maintain social order.

### 3.3.4 The natural law/rationalism horizon

This view goes beyond a particular society into an order that transcends all societies. Law is considered to be the social actualisation of reason, the natural self-ordering of human beings applying reason to reconcile the crudeness of life with the ideals of human flourishing. Law of a given society is in dialectical tension with ideas which transcend the given society, ideas of morality, justice and rationality. Founders again include Aristotle and Plato, as well as the Stoics, Cicero, Grotius, Wolff, and Hegel.

Indicating his antipathy to the positivist concept of law, and also unimpressed by the traditional natural law approach, Fuller conceptualised a secular, procedural natural law which he called an ‘inner morality of law’ or theory of eunomics. His attraction to natural law theory was a purely rationalistic one, displacing God entirely. He rejected the idea of law as ‘a brooding omnipresence in the sky’. In a debate with Hart, he argued that there is a certain necessary minimum moral element to law, without which it is ‘not simply bad law, but not law at all’. He defined law as a purposive human activity, in which the distinction between is and ought collapses, because the value element is intrinsic to the facts of a purposive activity. He saw law as a human creation, subject to natural laws like other human crafts such as carpentry. Laws are discovered, drawn from natural sources, rather than from pure will. To look internally to law for procedural compliance to principles such as generality, clarity and intelligibility constitutes observance of the rule of law. Rather than providing stability,

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52 Using the same Greek term as Allott’s eunomia, Fuller defined eunomics as ‘the theory or study of good order and workable arrangements’ in Lon Fuller, Legal Fictions (Stanford: Stanford University Press, 1967). pp. 477-478.
53 An Oliver Wendell Holmes aphorism.
54 Fuller, Legal Fictions, p. 197.
order, and duty, law is seen by Fuller as an expressive medium, based on the liberal notion of communication. Law’s task is the creation of a social order in which communication and free social interaction can take place.  

3.3.5 The idealist/transcendental horizon

Continuing Allott’s field classification of ever-expanding and simultaneous inclusion of all of the perspectives on the nature and function of law, this fifth horizon goes beyond society to the universal order. In contrast to the empiricist epistemology of the positivist, realist, historical, and sociological approaches, and the metaphysical/rationalist epistemology of the natural law-rationalist tradition, idealist epistemology sees the physical phenomena of the world as mere manifestations of a superior order. Law is inevitably connected with our ideas about the ultimate – our ultimate ideas about the natural world, and our ultimate ideas about humanity’s relationship to the supernatural and the spiritual. Many world religions posit that law can only be explained in the context of an explanation of all existence. Plato’s theory of ideas is the most famous exposition of this approach.

The English School’s Kantian revolutionist/cosmopolitan sits closely on the spectrum as it holds a belief in an inevitable and essential convergence towards some form of ideal, whether a utopia, or denouement. These normative theories generally claim that international law exerts a discernible ‘pull’ upon the behaviour of states, as a moral and normative force that is independent of the ‘mere’ interests of states. The perspective emphasises the idea of a fundamental sociability and society of states, or family of nations, and aspires to the convergence of interests and eventual unity of humankind, or ideological uniformity. In the case of hard revolutionists, this can be through intervention, conquest, or coercion. Politics prescribes human goals, but unlike the realist notion of the supremacy of power as self-justifying, revolutionists justify power by reference to some source outside the political category, such as an ideal, through which it is transmuted into authority.

59 Anderson, “Remarks by an Idealist on the Realism of the Limits of International Law [comments].” p. 255.
61 Ibid. pp. 103-105.
The Kantian cosmopolitan emphasises peace and human values, and is committed to the interests of individual human beings seeking to realise a better world. This theory derives from both Protestant and Catholic traditions, giving primacy to the transcendence of the whole over its parts, but expresses this in a passionate belief in the moral unity of the society of states, with an overriding obligation to its realisation. It rejects statism, and focuses on the relationship among individuals, and between individuals and government. It is founded on the idea of the individual as rational and autonomous, possessing inherent dignity and worthy of respect. It disfranchises governments that fail to respect human rights and are unrepresentative, and it assumes that nations generally obey international law out of a sense of moral and ethical obligation derived from natural law. The Kantian claims that international law and domestic justice are fundamentally connected. According to Fernando Teson:

The end of states and governments is to benefit, serve, and protect their components, human beings; and the end of international law must also be to benefit, serve, and protect human beings, and not its component states and governments. Respect for states is merely derivative of respect for persons. In this way, the notion of state sovereignty is redefined: the sovereignty of the state is dependent upon the state's domestic legitimacy; and therefore the principles of international justice must be congruent with the principles of internal justice.

3.3.6 Limitations and extensions of typologies

The English School typologies have been criticised as being limited in their capacity to reflect the complexity of theory, and are now highly contested. Boucher argues that rather than strengthening the heritage of international relations theory, the English School’s typology has averted quality philosophical argument by instead reflecting mere positions. In his book The Twenty Years Crisis 1919-1939, E.H. Carr argued the antithesis between idealism and realism was the cause of a great divide in international relations in the 20th century. The contest between the two perspectives represented the enduring and intractable conflicts between free will and determinism,

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65 Boucher, Political Theories of International Relations. From Thucydides to the Present. p. 4.
theory and practice, and ethics and politics. Similarly, Monteiro and Ruby argue that international relations scholars should adopt an ‘attitude towards’ rather than a ‘position in’ the irresolvable foundational debate. Monterio and Ruby advocate an attitude of ‘foundational prudence’ that is open-minded and precludes imperial foundational projects which attempt to impose a single meta-theoretical framework on the discipline. Similar to Boucher, they suggest:

A prudent attitude towards philosophical foundations encourages theoretical and methodological pluralism, making room for a question-driven [international relations] while de-escalating intra-disciplinary politics.67

The English School also recognised the limitations of the typology and suggested that the ‘truth’ about international relations is found in a conversation between the three traditions. Wight argued that truly great thinkers cannot be pigeonholed. Rather, they straddle categories devised merely for analytical and pedagogical purposes.68 As a precaution against over-simplification, Wight observed:

All individual thinkers transcend typology; and in social studies, generalizations are abstractions, mental conveniences, and to that extent unreal. They must be contrasted with the concrete, historical person in all his richness and possible inconsistency.69

With these limitations in mind, the typologies do, however, provide a basic framework useful for classification purposes. Combined with Allott’s field theory classifications, a theoretical spectrum can be constructed which indicates the relative position of each perspective on the role and function of law and its influence within society. Regardless of the potential for limiting or distorting theoretical scope or nuances, many theorists use these typologies as a springboard to create their own theoretical variant. It is evident that the possible variations are as unlimited as individuals’ interpretations of the nature and function of law and politics. The following examples demonstrate the potential complexity and depth of classification, all in an endeavour to explain, justify, or reform.

Nye uses the pairing of realism and liberalism, and Doyle extends these two by adding socialism; Boucher uses an empirical realism-universal moral order-historical reason organisation; Caney (a cosmopolitan) proposes a communitarianism-cosmopolitanism range with three sub-groups – realism-nationalism-society of states; Beitz (an analytical cosmopolitan) proposes a realism-morality of states-cosmopolitanism range; a pragmatist typology proposed by Buchanan and Golove ranges between legal nihilism–realism (fiduciary and positive)–liberal internationalism; a more complex legal pluralist typology developed by Tamanaha includes the mirror thesis /natural law tradition – legal positivist – legal pluralists (custom/culture tradition)–law and social organisation– law and economics–critical legal studies–critical race theory–critical feminism; and Tamanaha’s own position is that of socio-legal positivism and non-essential legal pluralism which he pulls under the umbrella of ‘a general jurisprudence’.

The post-modern perspective holds disbelief towards these meta-narratives. It rejects modernity as an objective point of view and an account of history determined by continuous progress towards the realisation of liberal ideals. It denies the liberal claim of a separate and distinct sphere of legal truth, and of universality and consensus, by unearthing difference and conflict as reality. It also challenges the view that international law is rational, objective, and principled by exposing its indeterminacy and contradictions. Even though it is hidden under the alleged objectivity of legal analysis, its indeterminacy enables its abuse for political purposes. The post-modernist also argues that the fate of contemporary law reflects the same fate as social development. The two great opposing political and social narratives of modernity, Marxism and liberalism, are discredited or deemed incapable of providing a source of social meaning. Similarly, law has proliferated to the extent that it has lost its identity and authority. It has become a servant of economics, policy and utility, and an instrument of the

72 Boucher, Political Theories of International Relations. From Thucydides to the Present.
75 Buchanan and Golove, “Philosophy of International Law.”
76 Tamanaha, A General Jurisprudence of Law and Society.
dominant politics and ideology of the day, while it is still required to be a moral phenomenon. Wary of attempts to construct coherent narratives, some post-modernists argue that we should rather deconstruct all narratives and refuse to engage in storytelling.\textsuperscript{78}

To counter the post-modernist, it does appear from the plethora of theoretical endeavours that the urge to interpret and reinterpret seems to be an inherent human trait, generating a human condition of continual change.\textsuperscript{79} Boldly, Allott’s meta-narrative attempts to avoid claiming the validity of any particular perspective. Rather, it aims to demonstrate the validity of each perspective and the unending controversy over the nature and function of law. Allott suggests that the notorious confusions and endless debates between different perspectives are caused by category mistakes or confusion between distinct realms of discourse. Allott also observes, ‘Social and legal philosophy, whether framed along positivist, liberal, socialist, idealist, or transcendental lines, mysteriously come to a halt at national frontiers.’\textsuperscript{80} He argues an international system needs to be developed which is capable of processing conflicting interests and ideas (right- and left-wing, liberal, conservative, rationalistic, religious, cultural, or passionate ideas), and to form ideas about the common interest of humanity and each human being, and to disaggregate those interests through legal relations which condition the behaviour of everyone, everywhere.\textsuperscript{81}

3.4 Constructing the spectrum

The five horizons provide the primary criteria for the grouping of traditional theories on the spectrum in Figure 2.

\textsuperscript{78} Ibid. pp. 731-732.
\textsuperscript{79} Morrison, Jurisprudence: From the Greeks to Post-Modernism. pp. 13-14.
\textsuperscript{80} Allott, “The True Function of Law.” p. 405.
\textsuperscript{81} Ibid. p. 409.
Theoretical Spectrum
A theoretical spectrum of international law and international relations

Feasibility | Accessibility | Moral Accessibility

Location of remedial proposals to accommodate non-ideal conditions

Feasibility = compatible with human capabilities/resources
Accessibility = practicality
Moral accessibility = without unacceptable moral cost

Not included:
Neustream/post-modern as it rejects objectivity/rationality/metanarrative
Positioning on a two dimensional format the diverse perspectives within and between the disciplines of international law and international relations proved challenging. The x axis on the spectrum indicates a progression of international law and international relations perspectives moving ‘towards’ some sort of denouement, culmination, or clarification. Depending on one’s theoretical orientation, the progression could be in either direction – culmination might be found in the clarity of the positivist’s rationality, rather than arrival at a utopian golden age. Predictably, convergence of ideas is evident between close neighbours on the x axis, for example, a pluralist Grotian might argue, as the realist does, for the dominance of autonomy over community, and practice over theory. These preferences shift for the middle or solidarist Grotian who might argue for the reverse, or a mild version balancing the two views.

Bundling of interdisciplinary perspectives on the same axis was possible because of a general corollary in the movement of these perspectives’ constitutive elements. Examples of such elements are indicated in Table 1 which generally (but of course not always) progress along this same axis as in the spectrum in Figure 2.
Table 1. Theoretical Elemental Variants

<table>
<thead>
<tr>
<th>Theoretical Elemental Variants</th>
<th>Empiricism</th>
<th>Materialism</th>
<th>Inductionism</th>
<th>Constructivism/Deconstruction</th>
<th>Structuralism</th>
<th>Idealism</th>
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<td>Metaphysics/Naturalism</td>
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<th>History</th>
<th>State</th>
<th>Legal Source</th>
<th>Jurisprudence</th>
<th>Social Practice</th>
<th>Purpose of Law</th>
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<td>Primary Subject of International Law</td>
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<th>Existence of Law</th>
<th>Political Unit</th>
<th>Political Arrangement</th>
<th>Power Distribution</th>
<th>Purpose of State</th>
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<td>Continuous Communication</td>
<td>Non-ideal</td>
<td>Practice</td>
<td>International Society</td>
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<td>Unity of Humanity</td>
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<th>Strategy</th>
<th>Citizenship</th>
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</table>
The elemental variants included in Table 1 are very much generalisations of bases of philosophical, legal and political preferences which often coalesce to create a recognisable theoretical perspective. For example, in Figure 2, progression through Allott’s first horizon of positivism outwards to the fifth horizon of transcendental idealism, and concomitantly, progression through the international relations typologies, tends to reflect a progression from practice to theory; from current non-ideal conditions to the moral optimum of the ideal; from formalism to anti-formalism in regard to recognition of state legitimacy; from legal nihilism (at the ‘outer’ limit of the spectrum) which claims the complete absence of value, and therefore law, to revolutionism which aspires to a universal convergence of values through various means; or from political realism with an emphasis on power, to cosmopolitanism and the ideal of peace and unity in diversity.

The progression along imaginary axes in both the spectrum and the elemental table demonstrate how, in the process of theoretical construction, the theorist might secure a position regarding each element. For example, a theory may be descriptive or prescriptive, or midway between the two. Or, for the source of legality, a theorist may look to positive or natural law, or variant, or combination of the two, or some other sort of moral obligation. A revolutionist from the international relations tradition might argue, as the realist does, that human nature is fundamentally aggressive, but unlike the realist, has hope in the realisation of a resolution of conflict, either through the purposive workings of a natural law, or through reason, or a divine eschatology. The combination of elements is as unlimited as the individual theorists’ interpretations. Also, the list is by no means complete. Much debate could be generated around what is included and excluded, and also the elements themselves. It is merely one way to illustrate the many divergent views in relation to each other and provides a starting point for thinking about theoretical differences and similarities.

The y axis on the spectrum indicates an increasing or decreasing feasibility, accessibility, and moral accessibility of the theoretical perspective. Of course, a theory can be feasible but morally inaccessible, for example, because of too high a violation of human rights in its realisation of political and transcendental ideals, as in the case of revolutionists who, although cosmopolitan in spirit, might impose a particular

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82 The criteria were drawn from Buchanan and Golove’s work in Buchanan and Golove, “Philosophy of International Law.”
eschatology that infringes rights of religious freedom. For the purposes of this exercise the three criteria are assumed to be generally bundled together so that the measure of +ve or –ve, that is, above or below the line which is positioned at zero, indicates a general accessibility and feasibility, or not, respectively.

3.4.1 Locating Allott’s integrated approach and the practical proposals on the spectrum

Locating Allott on the spectrum also proved challenging because the theory is syncretic. As he claims, it integrates all five horizons of the nature and function of law. In accordance with what he identifies to be the requirements of a ‘true’ philosophy, the theory’s scope is world-making: it is ruled by a moral imperative; it is universal; it articulates ideals; and it seeks to contribute to public enlightenment. It is monist in its search for a singular constituent element generating society. It is critical in its shift from the political to the social, or in the international context, from the state to society. It is holist in its totalising of humanity as the centre of our lives, rather than the individual.

Numerous theoretical genetics can be identified. These include an Aristotelian essentialism seen in the idea of an essence shared by all societies, with individual societies expressing a particular manifestation. Changes in society occur to a society’s genetics which contain a potentiality that unfolds and adapts to its environment. Aristotle’s concept of a natural social order forms the basis for an international constitutionalism. Rousseau’s rendition of an organic human nature is seen in the conceptualisation of society as a living thing, an organic process of endless transformation. Kant’s formulation of human consciousness and the political end of a cosmopolitan federation are also evident. Hegel’s concept of the dialectic of self-creating generated by our idealising capacity enables our constant search for thinking truly. This dialectic is also seen in the self-creating of society at the level of spirit through struggle.83 Verdross’ influence is seen in naturalist tendencies in the assumption that humanitarian values are an incontestable basis of law.84 Allott’s generic

constitutional principles are also similar to Fuller’s purposive, secularist, natural law with its discoverable inner morality of constitutional principles.\textsuperscript{85}

Allott suggests that some of his readers may identify features which are Marxist (in the social creation of consciousness and of value), religious (in the integration of the individual and society within a significant universe), and liberal (with the subjection of society to its own transcendental values).\textsuperscript{86} He syncretises ideas from a range of disciplines, including political theory, international relations, philosophy, history, sociology, criminology, and psychology. However, rather than reinterpret previous philosophies, Allott has undertaken an empirical study of the theoretical self-conception and history of a broad range of societies. In addition to those mentioned in the preceding paragraph, thinkers include Plato (the Good as social reality); Confucius (the moral authority of the past); Lao-Tzū (human self-ordering within an ordering universe); Cicero (the right reason of the law); Augustine (the non-autonomy of the morally good); Aquinas (the natural origin of human law); Leibniz (the presence of the whole universe in every part of the universe); Burke (the evolutionary constitution); Mach/Craik (scientific world-modelling); Dilthey/Weber (the social construction of reality); Fustel de Coulanges (the religious roots of organised societies); Wittgenstein (the functional validity of language); Cassirer (the organic rationality of societies); Teilhard de Chardin (the human transcending of evolutions); Tocqueville, Piaget, Smith, Freud, Morgenthau, and Gadamer. Texts include the \textit{Bible}, \textit{Tao te ching}, \textit{Koran}, the \textit{Upanishads}, and \textit{Brihad Aranyak}.\textsuperscript{87}

In reclaiming the role of philosophy to proclaim what is (in opposition to the 20th century’s obsession with the myth of the ‘merely’, resulting in a polymorphous reductionism\textsuperscript{88}) Allott proposes a general theory of society and law, a theory of social idealism, which is potentially universal in the sense that it could be acted upon by all members of an international society.\textsuperscript{89} It incorporates the principles of a ‘true’ philosophy: to think of a better world for all of humanity, to articulate ideals for that world, and contribute to public enlightenment. Rather than reinterpreting previous interpretations of thought about social and legal philosophy, Allott takes what he claims

\textsuperscript{86} Allott, \textit{Eunomia}. p. 1.
\textsuperscript{88} See Chapter 4, Section 5 for further discussion.
\textsuperscript{89} Allott, \textit{Eunomia}. p. xlviii.
are the best of what has been thought to construct an original enterprise. His theory contains a structure of ideas, in the form of hypothesis. He is conscious of the scale of the task and of the challenge in positioning himself as one who dares to consider that, at this point of history, a general social theory might be attainable or feasible. He acknowledges that the challenge of formulating a general theory of society and law is perennial, obliging him to insist categorically on the tentative nature of the proposed theory.

Resembling a Marxian pursuit of identifying the constituent element generating society (in Marx’s case, social relations of production), Allott’s monist approach mirrors Kelsen’s endeavour to locate a hypothetical grundnorm, rule, or point of origin, that underlies a legal system and which legitimises it. Allott seeks out the single element of what underlies and legitimates society and law, the one causal factor in history, the primary determinant of human willing and acting. By doing so, the solution to the current disorder is simple – change that primary determinant and everything else will transform. An ‘unsociety’ can become a society, or a harmful society can become one that seeks the well being of its citizens, simply by changing that determinant. Allott identifies that determinant as our ideas, which construct our theories, which create our societies. So, the extent of Allott’s revolutionary enterprise includes not only the formulation of a new theory for international society, and thus its transformation, but also necessarily entails a transformation of all subordinate social forms and processes – a re-constitution of all human societies. ‘The re-forming of international society is also a re-formation of all social philosophy’.

Allott likens this revolutionary transformation, originating in the form of philosophy, to the paradigm revolution of the modern age – the French Revolution. He refers to Hegel as being one of those who viewed the Revolution, while ostensibly political and manifested on the streets, as the genesis of the conception that existence centres in thought, by which reality is built. Similarly, Burke and de Tocqueville likened the French Revolution to a religious revolution, transforming doctrine and theory along

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90 Ibid. p. 1.
91 Ibid. p. xlix.
with political structure. Allott’s ambition is on a similar scale, endeavouring to reconstitute the self-constitution of international society, and to steer the progress of humanity by reflection and choice rather than accident and force, as it is in the current philosophical vacuum of rational and ethical nihilism.

Allott’s work falls outside the mainstream discourse of international law, displacing the centrality of the state as the major actor of the international system – not to abolish them but ‘to embrace and complete them’. Finding some commonality with work in the critical legal studies stream, it shares the shift in emphasis from the political to the social, and in the international context, from the state to society. However, it moves beyond deconstruction of the mainstream discourse, to propose how things ought to be, although while utopia is constructed, the roadmap is vague.

At first glance, the most obvious ‘omission’ is the notion of the individual. Rather, the centre of our lives is the whole of humanity in the form of the society of the human race. This totalising ‘oneness’ of all human activity is the sum of the innumerable but common activities and experiences of individuals who seek well-being by creating families, communities, tribes, religions, states, and federations. These diverse societies constitute the total human experience unified in the super-structure of common humanity. The sum is greater than the parts, reminiscent of Kelsen’s holist hierarchical structure of human self-organisation.

While the human condition is profoundly social, it is also dynamic and unscripted. There is no pre-written eschatology towards which humanity is inexorably steered. Rather, in Kantian formulation, human consciousness through language and reason, both privately and publicly, projects and reflects the human world in a constant self-creating process of mediation of perennial dilemmas, driven by the dialectic of desire and necessity, conditioned by value. The choices made in this process create a society’s

identity, expressed in its ‘constitution’ in the form of mythologies, histories, theories, and law.  

Amongst these ideational structures, and as discussed above in Section 3.1, Allott claims a primacy for the role of law. This resembles the Kantian kingdom of ends, a systematic whole of diverse rational beings in a system by common laws, and his republican ideal of a legitimatised constitution resulting from rational choice by free agents as co-legislators. Allott looks to Kant as one who might lead us out of a world without ends. In our innate knowledge of our own moral freedom, we can know the duty which conditions that freedom is the duty to make our will into an agent of a hypothetical universal will. And, as organic systems, our life is the unfolding of purpose which we can determine in the light of values and ideals.

Allott admits to offering an unashamedly idealist social philosophy. For him, the philosophy of global revolutionary social transformation is idealism. The social function of philosophy is the self-perfecting of society. Philosophy is the self-perfecting of the human mind. The essence of Allott’s theory is ‘a belief in the capacity of humankind to transcend itself in thought, to take power over the human future, to choose the human future, to make the human future conform to our ideals, to our best ideas of what we are and what we might be.’ He says, ‘Idealism is not the realism of the actual but the realism of the possible. The ideal of a better human future is the possibility of a better human future.’

Allott seeks to speak in ‘is’ language, acknowledging the power and symbolism of ideas and words in the self-creating of human reality, and their transformative capacity to re-create reality.

We make the human world, including human institutions, through the power of the human mind. What we have made by thinking we can make new by new thinking.

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100 Ibid. p. 161.
102 Kant, “Toward Perpetual Peace and Other Writings on Politics, Peace, and History”.
104 Ibid. p. x.
105 Allott, Eunomia. p. xxxi.
106 Ibid. p.xxvii.
The biological function of language is analogous to the biological function of buildings and social institutions... As with our buildings so with our language... As with our social institutions – of government, defence, religion, education, the economy, the law – so with language, we make our word-structures to staunch the flow of the stream of consciousness, to channel it into persisting forms... Language is humanity’s first self-ordering. With language we ward off the fearful spirits of formlessness, aimlessness, and disintegration. Language is a magic to control our minds. Language is a magic to control the worlds made by consciousness. Language is a magic to control the world through consciousness.\textsuperscript{107}

His theory is also an ideal theory, specifying certain ultimate and universal ideals for an imaginary future. These include the ever-evolving international rule of law, an international constitutionalism, and a written international constitution, the actualisation of which is realised in the process of international society’s self-constituting. This optimism is resonant of Hegel’s \textit{aufheben} (or dialectic as referred to above) and is in opposition to the self-doubting and ‘finality’ of scepticism. Allott recognises our ability for reflexive thinking which is able to contemplate our own self-improvement, and self-harm, and to make choices about which to undertake. The idealising capacity of the individual mind and of the public mind, and the instrument of philosophy, enables us as individuals and as a society to choose our future, and to conform to our ideas of the good and the bad. It is the dialectical character of philosophy which enables ideas to encounter and negate each other, correcting and reformulating them in a constant process of searching for thinking truly (not so much the search for truth). To think about the universal idea of society or a particularisation of society is to contribute to the dialectic, thereby modifying our ideas. Allott claims that this is \textit{doing} social philosophy – in so doing, it changes the world and determines the lives and deaths of millions.\textsuperscript{108}

Given this combination of theoretical pedigree, positioning Allott on the spectrum seems almost obtuse, missing the point of his claims of integrating and even transcending traditions. However, there is undoubtedly an orientation to the idealist end of the spectrum and, when perusing the list of constitutive elements Allott’s theory resonates with most of those in the column to the ‘right’ which correlates with the

\textsuperscript{107} Ibid. pp. 11-12.
\textsuperscript{108} Ibid. pp. xxxiii-xxxiv.
idealist horizon. These elements include an idealist epistemology, a metaphysical essentialism, a social and legal prescriptivism, an eschatology of self-actualisation, international constitutionalism, a political universalism inclusive of ‘relocated’ states, a legal instrumentalism, and human sociability.¹⁰⁹

The location of the practical proposals submitted in Part III sits towards the ‘mid-zone’ of the spectrum. This indicates a solidarist Grotian approach, balancing between theory and practice and accommodating current non-ideal conditions. In aiming to balance theory and practice, the proposals seek to retain Allott’s idealism, but construct a strategy to work towards the social and legal ideals from within the current state framework. More specifically, it is argued that the actualisation of Allott’s ‘true’ international law first requires ethical and legal transformations, facilitated by political processes (primarily through fora for inter-subjective dialogue), of the international public realm. Catalysts are needed to facilitate his prescribed transformation of the mind. In line with the tradition of Grotius, the proposals are impelled by the desire to facilitate the development of a normative language for international politics, and the articulation and propagation of an international morality.¹¹⁰

3.5 Homologous theories

The following section surveys theoretically homologous and normative theories of international law and international relations situated in close proximity to Allott on the theoretical spectrum. ‘Theoretically homologous’ is defined as similar in structure and evolutionary origin, though not necessarily in prescription. Apart from a consideration of an empirical analysis of a new trans-nationalism as articulated by Anne Marie Slaughter, the normative theories are grounded in Kantian/cosmopolitan principles of the worth of individuals, their equality, and the existence of obligations binding on all. Like Allott, they seek to offer proposals for legal reform at the international level. The survey will demonstrate how Allott joins a community of international law and international relations theorists and practitioners who call for renewal because of a shared vexation with the current regime of international law due to the dominance of the realist/positivist perspective. He joins a movement originating in the Critical Legal

¹⁰⁹ Further exploration of the theory’s elements will follow in Chapters 4 and 5 where the theory is explicated, and in Chapter 6 where it is evaluated.

¹¹⁰ Kingsbury, “The International Legal Order.” p. 25. See Section 3.2.3 above for more discussion on the solidarist Grotian approach.
Studies movement formed in the mid-late 1990s called the NAIL (New Approaches to International Law).\textsuperscript{111}

This normative literature sits within an extensive body of work on international law and international relations. Recent work in international law has focused on a range of specialisations including the evolution and clarification of sources of law (although this focus is diminishing),\textsuperscript{112} possible new alternatives such as ‘soft law’,\textsuperscript{113} analysis and critique of judicial decisions,\textsuperscript{114} the development of more consistent and effective implementation of current principles and processes;\textsuperscript{115} and the relationship between national and international courts.\textsuperscript{116} Literature on institutional reform is exploring ideas such as the possibility of a Permanent War Damage Compensation Commission,\textsuperscript{117} and a permanent Truth Commission\textsuperscript{118} and the broader role of truth commissions in post-conflict justice, is being considered.\textsuperscript{119} UN institutional reform is of particular interest\textsuperscript{120} and the critique of the efficacy of international tribunals is also prominent.\textsuperscript{121} Much of the most recent work relevant to the development of international law falls within one of the traditional positions in the ‘great debates’ of international law, that is, formalism versus anti-formalism, and realists/rationalists about sovereign autonomy versus

\textsuperscript{112} For example, the Customary International Law Study conducted by the International Committee of the Red Cross has generated much discussion about the role of customary international law as a source of law. Jean-Marie Henckaerts and Louise Doswald-Beck, eds., \textit{Customary International Humanitarian Law: Volume 1: Rules. Volume 2: Practice} (Cambridge: Cambridge University Press, 2005).
\textsuperscript{116} For example, the Journal of International Criminal Justice is devoted to critiquing and engaging with the legal issues arising from existing prosecutions, commissions, editorial comments, and symposia.
idealists about international community. Work at the formalist end of the spectrum focuses on themes such as the clarification of substantive law, critique of the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts, and moving more towards the centre of the spectrum, interdisciplinary possibilities. Some interesting new work is considering new roles for the state, and for law in the transition after conflict, the appropriateness of trials as a response to mass atrocity, and the roles of forgiveness and amnesty.

3.5.1 Global approaches

Antony Anghie’s work focuses on a distinctive way of thinking about what international law is, or should be, called TWAIL (Third World Approaches to International Law). It aspires toward the creation of an international law that reflects the needs and interests of peoples rather than states. The approach continuously questions the foundations and operations of international law, and its methodological premises. It argues that international law only makes sense within the context of the lived history of peoples of the Third World who have been subjected to the experience of colonialism and neo-colonialism. Anghie writes:

By evaluating positivist rules through the lens of the lived experience of Third World peoples, TWAIL scholars seek to transform international law from the language of oppression to a language of emancipation – a body of rules and

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122 For example, Goldsmith and Posner, *The Limits of International Law*; Anderson, "Remarks by an Idealist on the Realism of the Limits of International Law [comments]."


practices that reflect and embody struggles and aspirations of Third World peoples and that, thereby, promote truly global justice.  

The TWAIL approach suggests similar mechanisms of accountability to those suggested in the thesis proposals. It argues that attempts to identify individual criminal responsibility should also inquire beyond individuals and investigate the roles of international institutions which can be partly responsible for creating the context in which atrocities occur. The approach argues alternatives to individual criminal responsibility are also needed for situations were entire communities inflict massive violence on each other. Inquiry should also be made of the way powerful states that played a virtuous role in developing mechanisms of accountability, either promoted or failed to prevent the violence that these mechanisms seek to address. The TWAIL approach argues that accountability of international policies and practices must accompany individual accountability.

William Twining, a general jurisprudence jurist (or legal theorist), is also concerned with advancing the understanding of law from a global perspective and wishes to see a less parochial jurisprudence. He suggests that more attention should be paid to non-Western legal traditions. From a global perspective and long term scale, he discerns some general tendencies and biases in Western academic legal culture which are being challenged by globalisation. These include: assumptions that there are two principal kinds of ordering (municipal state law and public international law); that states, societies, and legal systems are closed, self-contained entities which can be studied in isolation; that modern law and jurisprudence are secular and independent of its historical-cultural roots in the Judeo-Christian traditions; that modern state law is primarily rational-bureaucratic and instrumental to achieving certain social ends; that law is best understood from the ‘top-down’ where the perspectives of rulers, policy makers, officials, legislators, and elites marginalise those of users, consumers, victims, and other subjects; that modern state law is almost exclusively Northern European/Anglo-American centric diffused through various political, economic, and cultural influences; that non-Western legal traditions views are marginal; that the main subject matters of the discipline of law are ideas and norms, and therefore unempirical;

and that modern law is universal in respect to morals but the philosophical foundations are diverse.\textsuperscript{131} These tendencies and biases are well exposed in critical legal studies literature and are gaining mainstream attention.

### 3.5.2 Cosmopolitan prognostications

Vaughan Lowe investigates the manner in which the most significant norms of international law are likely to emerge during the next generation. He considers what changes might be expected in the method and character of norm creation in international law and suggests that future developments in international law will not occur in ‘traditional primary norms, but in other kinds of normativity that are overwhelmingly influenced by the contemporary cultural milieu; and, that international law is beginning a process of migration into areas of ‘private’ life analogous to the secularization of religion.’\textsuperscript{132} Similarly, Ian Ward suggests that legal theory must be able to contribute to the wider debates that surround the idea of a ‘new’ world order and present not just a description of how things are, but ‘an inspiring prescription of how things might become’.\textsuperscript{133}

Richard Falk queries whether the present is a ‘time of deep transition from the statist framework of Westphalia to some differently constituted, emergent, and normatively enhanced world order.’\textsuperscript{134} However, he is also cautious, questioning if there is an illusion of historical climax (amplified by the consciousness shift as we turned into the new millennium), and that perhaps the state system, if somewhat modified in regard to territorial sovereignty, provides an adequate framework for the development of a global community. Amongst others asserting a transformative moment in history, Falk refers to Fukuyama’s triumphalism at the end of the Cold War, Huntington’s prophecy of civilisational clash, Kaplan’s analysis of enveloping and expanding anarchy, and the Club of Rome’s early diagnosis of a ‘global problematique’. However, appeal and explanatory credibility was short-lived by each of these prognosticators, as was Bush’s declaration of a new world order in 1990, with none capturing the entirety of ‘the moment’. Falk argues a post-modern aversion to meta-narrative quashes attempts to


synthesize a grand theory (perhaps he was unaware of Allott’s work at the time), but in
dialectic form, he sees the appeal to fin de siècle explanations continues to massage the
imagination to seek to understand the present and to navigate at least the near future.\textsuperscript{135}
Similar to Allott, Falk does not look to a neo-liberal world order as providing the
normative framework necessary to address gross inequalities.

In more recent literature, Falk has analysed the failure of the US to respond with
appropriate global leadership to the challenges of the collapse of the Soviet Union and
the al Qaeda attacks of September 11, 2001. In its primary focus on security concerns
and the incumbency of the neoconservative and religious right, the US has produced a
militaristic agenda for global governance. This is reinforced by the use of media
manipulation and language to legitimate state-sponsored violence. Falk labels this as
‘imperial globalisation’, made credible in part by the capabilities of the al Qaeda
network (whose agenda is identified as ‘apocalyptic globalisation’) to invoke fear in
Western societies. The prognoses for these globalisations could include a disavowal by
the American electorate, reacting to the costs, burden, and unpopularity generated, and a
weakening of the radical vision of al Qaeda. In recent years, Falk discerns a post-
modern, post-Westphalian perspective destabilising traditional categories of analysis of
the international order, widening the stage beyond states to non-state actors. This is
creating a more tenuous and contested reality, facilitated by information technologies
which are accelerating integration. Falk’s constructivist, analytical, and normative
approach acknowledges the interpretative nature of conceptualising world order and
global governance. He argues such an approach deserves respect in that it seems to
illuminate and clarify the puzzles presented by experience and perception. In analysing
various globalising forces and their apparent wrecking of world order, Falk anticipates
dialectical effects, including the re-evaluation of the spiritual message of the great world
religions, and the possibility of reconstructing human security on a foundation of non-
vioent politics.\textsuperscript{136}

3.5.3 Kantian theories

Fernando Teson has developed a Kantian theory of international law espousing a
normative political liberalism which needs a new liberal international law.\textsuperscript{137} He

\textsuperscript{135} Ibid, pp. 5-19.
critiques the dual paradigm of the domestic and international realms dominated by control rather than representation. As sovereignty depends on domestic legitimacy (the opposite of the Vattelian paradigm), the domestic/international realms must be congruent. Similar to Allott, Teson argues the ends of states and international law must be the well-being of humans. He challenges the foundations of international law as illiberal and authoritarian because they exalt state power. Rather, power must be morally legitimate; therefore, it must have the consent of the people. Respect of states is derivative of respect for persons and states must enforce human rights as a precondition of membership of international community.

Rawls’ influential liberal, Kantian constructivist/contractarian work focused on justice as fairness resulting from a procedural approach, what that requires when we start with an original position of equality, and the value of reciprocity. In The Law of Peoples, he extrapolates his theory of justice for domestic states to the international realm. The norms are less demanding in the international realm because it accommodates comprehensive liberal societies and decent peoples rather than the individual, although there is an inviolable, human dignity. He developed an ideal and non-ideal theory which also includes burdened, outlaw or benevolent absolutist states which cannot offer reciprocity or mutual advantage. Rawls’ theory is deontological, that is, moral duty comes before consequences, or the right over the good, even though the good is the goal. Society, and global society, is based on a bargain for mutual advantage among people or nations who are free, equal and independent. Politics is conducted through representatives of a thin, fairness-based statist society – its claims on its members are based on the moral unacceptability of them accepting benefits without contributing their fair share to their provisions. The international realm is a confederation of peoples, comprised of unitary nation-states with limited sovereignty. The goals of Rawls’ theory include a realist utopia, economic desiderata, and mutual advantage.

Andrew Kuper’s Rawlsian cosmopolitan theory of global justice defends the relevance of an ideal conception of justice for realistic political action in non-ideal conditions. The theory deploys Kantian constructivist procedures based on Rawls’ earlier works on domestic justice in Political Liberalism and A Theory of Justice. He argues for a global

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original position rather than a two-stage domestic/international original position. The primary unit is the individual rather than Rawls’ peoples. Democratic rights are fundamental to global justice including global free speech and democracy. It formulates a moral vision of a cosmopolitan, liberal (more than Rawls) world order, and proposes an institutional programme. In building on the classical doctrine of the division of powers and contemporary reinterpretations of ‘the political’, he investigates what can constitute a regulatory institution. He argues for a functionally plural sovereignty, or plural nesting.

3.5.4 Capabilities approach

Martha Nussbaum argues that there is an alternative to the social contract doctrine in the capabilities approach. Nussbaum considers Rawls’ theory of justice to be the ‘…most sophisticated, morally rich, and theoretically adequate social contract doctrines we have.’ However, the logic of a bargaining process for mutual advantage implies the agents will make equal contribution. Nussbaum argues that this would exclude many people from the process, for example, the young, old, and the physically and mentally disabled. On a global level, Nussbaum considers the developing nations are in a sense the disabled of the world.\textsuperscript{140} Another area of concern is that international relations has been heavily influenced by the social contract doctrine where focus was given only to issues of war and peace, and not issues of economic redistribution or basic human rights. The doctrine assumes self-sufficient, independent societies, where relations between states are analogous to the state of nature, as it is for the individual in the first stage of Rawls’ bargaining process. States are considered the same as the individuals of the first stage, that is, free, equal and independent. It is in the first stage of Rawls’ theory that the bargaining model itself creates single societies, and as Nussbaum is already sceptical about whom that includes, the second stage that generates justice between nations is considered with even more scepticism. Regardless of these concerns, Nussbaum surprisingly claims Rawls’ theory and her capabilities approach generate similar results. She points out that both unite against the social aggregation of utilitarianism because of a shared idea of human dignity and the inviolability of the person. Mutual respect, reciprocity, and self-respect are also central in both.\textsuperscript{141}

\textsuperscript{141} Ibid. p. 36.
Nussbaum’s approach is a normative political theory aimed at securing the social and political environment necessary for a flourishing human life. She presents an Aristotelian teleological structure which holds a view of people, and non-human animals, as ends.

Briefly, it claims that ‘…quality of life should be measured not in terms of satisfactions or even the distribution of resources, but in terms of what people are actually able to do and to be, in certain central areas of human functioning.’ Nussbaum describes her list of capabilities as ‘a plurality of ends, all qualitatively distinct.’ She believes the capabilities approach takes us further than social contract doctrines and that this alternative is needed in an increasingly interdependent world.

Other key contributors to the normative debate include Barry, Beitz, and Singer (analytic cosmopolitans), Caney (who develops a cosmopolitan global political theory), Crawford (who conceptualises a democratic global polity), Held (a Kantian cosmopolitan), and O’Neill and Pogge (liberal cosmopolitans). Gauthier also argues the need for the practice of political philosophy to require an ethical transformation of the public realm.

### 3.5.5 Solidarist Grotian approach

At a more central locus on the theoretical spectrum to these Kantian projects, Kingsbury’s solidarist Grotian analysis of the current international legal order, traces the development of international law from the time of Grotius to the present day, providing his perspective on why international law is under strain today. Noting that the word ‘Controversiae’ (disputes) was the first word in Grotius’ foundational text, *The Law of War and Peace*, Kingsbury argues that ever since there has been an emphasis on

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143 Ibid. p. 84.
dispute settlement, which has tilted focus toward rules, rather than construction of a normative global order; solving of bilateral problems, rather than broader community interests; and a positivist emphasis on materials generated by recognised sources of law such as treaties, custom, judicial decisions, and scholarly opinion. The main counter to this positivist emphasis was found in the US where the New Haven policy science approach was based on the foundational value of human dignity. He identifies these two approaches as representing a recurrent feature in international law’s history – a nexus between practice and theory seeking to engage with each other.\textsuperscript{153}

Although this state-centred system is increasingly stretched and strained, he observes that, surprisingly, neither in theory nor in practice, has it yet been displaced by another. Its resilience has been greater than expected because ‘in international law, practice continues to shape theory, and deeply embedded theory continues to shore up practice’.\textsuperscript{154} However, he argues the positivist approach is under attack, encountering considerable external challenge and internal critiques so ‘that its viability is seriously in question, unless it can be deepened and renovated’.\textsuperscript{155}

Kingsbury’s proposal for remedying international law’s deficiencies is through a Grotian integration of theory and practice, where content and sources-based criteria are better able to face the challenges of ‘moral injustice and lack of legitimacy in an era of deepening international governance’.\textsuperscript{156} He identifies five new systemic concepts which are shaping international law. Very briefly, they are: a loss of confidence in international law’s capacity to address issues of poverty and social violence; the idea of international criminal responsibility which creates tensions in the areas of responsibility/amnesty, and international/domestic jurisdiction; the tension between individual/collective responsibility for atrocities; the pursuit of justice/military action and individual/state action; trans-national civil responsibility, with the developing sense of a unilateral imposition of the US judicial system and its litigious nature on international practice; and the tension between the decline and reclamation of exclusive domestic jurisdiction.\textsuperscript{157}

\textsuperscript{153} Kingsbury, "The International Legal Order." pp. 1-2.
\textsuperscript{154} Ibid. p. 2.
\textsuperscript{155} Ibid. p. 3.
\textsuperscript{156} Ibid. p. 3.
\textsuperscript{157} Ibid. pp. 5-12.
These challenges facing international law are enduring ones, and reengagement is needed, particularly regarding the role of international law in accentuating or alleviating poverty and inequality, social violence and trans-national violence, including arms sales and financing; nuclear obliteration; the legal structures for the movement of people and for political expression through citizenship or self-determination; the marginalisation or (re-)integration of religiosity and religious power structures in the law of the global political order; the roles and responsibilities of corporations and of networks; and the roles of states and the implications of variations in state formations and in national legal cultures.\textsuperscript{158}

Kingsbury anticipates such challenges will shape two broad research agendas likely to be at the centre of Grotian approaches to theory and practice – these are concerning legitimacy and democracy in international governance, and the roles of normativity in the international order. He also notes a decline in the ‘Third World’ as a legal concept and the promotion of neo-liberal economic arrangements ‘has been accompanied by a precipitate diminution in normative international legal scholarship directed specifically toward global distributive justice or curbing global inequality.'\textsuperscript{159}

3.5.6 World constitutionalism

Another area of new interest is world constitutionalism. Historically treated dismissively as a sure recipe for tyranny, it is now recognised as joining the mainstream. Susan Breau suggests it is now one of the ‘hot topics’ in international law research and the central topic of conferences.\textsuperscript{160} In 1958, Jenks’ in \textit{The Common Law of Mankind} offered an insightful prediction of converging normative trends, particularly in regard to the social content of law, enabling a transcendence of ideology and civilisational differences. McDougal and Lasswell in \textit{Ideological Differences}, in \textit{Studies of World Public Order} (1960) critiqued this approach for its lack of account for values and consequences of public order, but in 1998, Falk suggested a re-examination of Jenks’ work was warranted.\textsuperscript{161} Breau argues that there is now an urgent need for

\textsuperscript{158} Ibid. pp. 20-21.
\textsuperscript{159} Ibid. p. 5.
\textsuperscript{161} Falk, \textit{Law in an Emerging Global Village: A Post-Westphalian Perspective}. p. 20-21, ft.25.
scholars to continue to engage in this debate, particularly with reference to the structure of the international system. While citing the norms of *jus cogens* and obligations *erga omnes*, the plethora of international treaties and declarations, the establishment of international tribunals, the new Human Rights Council, the Peacebuilding Commission, and UNSC, which together might provide a type of executive branch, and the UNGA, she acknowledges that the notion of an international constitutionalism is still a radical departure from the traditional positivist view of the sovereign equality of states, and it is not accepted by all international law scholars. Referring to Tomuschat’s vision of a constitutional framework which includes rules which both bind and permit sovereign action, together with the RtoP framework, she asserts a society of states does act in concert through the UN and other international organisations in their own interests and those of the international community as a whole.

Anne Peters argues for a ‘compensatory constitutionalization on the international plane’ to compensate for the ‘globalization-reduced constitutionalist deficits’ which are eroding state sovereignty. She argues that

...a constitutionalist reading of international law can serve as a hermeneutic device, and that the constitutionalist vocabulary uncovers legitimacy deficits of international law and suggests remedies. Global constitutionalism, therefore, has a responsibilizing and much-needed critical potential.

Erika De Wet explores the effect of the concretising of the normative superiority of human rights obligations by the European Court of Human Rights compared with other norms of public international law. She explores the likely effect of the human rights regime on the international value system.

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Ronald MacDonald and Douglas Johnston have together edited a comprehensive book titled, *Towards World Constitutionalism, Issues in Legal Ordering of the World Community*. Contributions explore, amongst many other issues, world constitutionalism in the theory of international law; the rule of law and US hegemony; international democratic constitutionalism; a transcivilisational perspective to overcome West-centric and judiciary-centric deficits; contributions of developing countries to the formation and application of international law; the legislative powers of the UNSC; the contribution of the UNGA to the constitutional development and interpretation of the UN Charter; accountability of international organisations; and solidarity as a constitutional principle.

### 3.5.7 Trans-nationalism

In contrast to the literature on constitutionalism, there is much engagement on the topic of trans-nationalism, an epistemological approach to explaining the shift in relations between states. Anne Marie Slaughter, a leader in the debate, dismisses the idea that multilateralism is weakening the state. She argues that nations will not ‘cede their power and sovereignty to an international institution.’ She also dismisses the ‘new medievalists’ who see a disintegration of the state and the transfer of power to global governance networks including corporations, religions, non-governmental organisations (NGOs), and multi-lateral organizations. Instead, Slaughter sees the emergence of a new ‘trans-governmentalism’. She claims:

> The state is not disappearing; it is disaggregating into its separate, functionally distinct parts. These parts — courts, regulatory agencies, executives, and even legislatures — are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, trans-governmental order.

Slaughter sees the benefits of such developments in the bipartisan nature of arrangements ‘assuaging conservative fears of a loss of sovereignty to international institutions and liberal fears of a loss of regulatory power in a globalised economy’.

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169 Ibid. p. 184.
170 Ibid. p. 185.
These networks are also able to respond, she claims, to international crises and can plan to prevent future problems in more effective ways than international institutions.\textsuperscript{171}

Slaughter’s analysis of the changes occurring within the state provides a useful tool to conceptualise the possible characteristics of state sovereignty in a globalised world. Even though her approach is still state-centric, such trans-governmentalism can offer new opportunities for the input of new actors besides states, and potentially more democratic processes involving citizens on all levels of decision-making. The ‘intricate three-dimensional web of links between disaggregated state institutions…bilateral, plurilateral, regional, or global…’ limit the unilateral options of formerly autonomous states.\textsuperscript{172}

It is evident from the increasingly complex interaction between all levels of government, both within and externally, that the monolithic concept of the ‘state’ is being redefined. Slaughter considers the concept of the unitary state is a fiction, although it has been a useful one to allow analysts of the international realm to reduce its complexities. The concept holds for critical instances such as a decision to go to war, or to engage in trade negotiations, or to establish new international institutions to solve global problems.\textsuperscript{173} As such, Slaughter’s model of trans-governmentalism fits well within Allott’s model of international constitutionalism which includes ‘redeemed’ and ‘rehumanised’ states.\textsuperscript{174} In Eunomia in 1990, Allott also observed that frontiers between the internal and external, the national and international realms of states, are being transformed. He saw an externalising of internal governments of states and an internalising of the external realm, surpassing government control of the domestic realm and its external diplomacy by a more complex reality.\textsuperscript{175} At the same time, social phenomena escaping from the internal social realms to the global realm was accelerating globalisation.\textsuperscript{176} Foreign policy and diplomacy were being replaced by a social process of externalised government or international intergovernment where government functions overlap.\textsuperscript{177} So, in agreement with Slaughter, while the state may not be disintegrating, it is disaggregating and being repositioned both horizontally and

\textsuperscript{171} Ibid. p. 185.
\textsuperscript{172} Slaughter, A New World Order. p. 15.
\textsuperscript{173} Ibid. p. 32.
\textsuperscript{174} Allott, Eunomia. p. 254.
\textsuperscript{175} Ibid. p. xiv.
\textsuperscript{176} Allott, Towards the International Rule of Law: Essays in Integrated Constitutional Theory. p. 466.
\textsuperscript{177} Allott, Eunomia. p. xv.
vertically. Trans-national networks are creating a thick mesh of obligations, in all directions.

Based on empirical descriptive and predictive claims, Slaughter conceptualises a new world order of global governance that ‘…institutionalises cooperation and sufficiently contains conflict such that all nations and their peoples may achieve greater peace and prosperity, improve their stewardship of the earth, and reach minimum standards of human dignity.’ Slaughter proposes five basic principles to ensure an ‘inclusive, tolerant, respectful, and decentralised world order’. These include global deliberative equality (or maximum inclusion, where feasible, by all relevant and affected parties); legitimate difference (a principle of pluralism, negating a feared uniformity); positive comity (affirmative cooperation, replacing unilateral action and non-interference); checks and balances (drawing on the US Constitution, ensuring fluidity in the distribution of power); and subsidiarity (a principle of locating governance at the lowest possible level, closest to those individuals and groups affected by the rules and decisions).

While Slaughter’s work is descriptive and persuades strongly on the existence of a new world order of trans-governmentalism, she also prescribes a way forward. She raises the issue of the informality of networks which have no status in international law. Examples are the relations between the European Court of Justice and the Union’s national courts and the G-20. As sovereignty is possessed by the state as a whole, and not by its component parts, the vast network of trans-governmental relations remains separate from formal rules and foundational principles of international law. To accommodate this, Slaughter proposes a disaggregated sovereignty to empower government institutions to engage with each other globally. This would achieve a number of outcomes. It would assist to rebuild states weakened by such challenges as conflict, poverty, disease, or privatisation, or ‘stalled in a transition from dictatorship to democracy’. Formalising the status of international organisations of, for example, judges and legislators, would create pressure points on wayward states, and incentives for cooperation by those lacking capacity. It would also place public officials directly

178 Slaughter, A New World Order. p. 18.
179 Ibid. p. 15.
180 Ibid. pp. 29-30.
181 This draws on work by Michael Ignatieff. Ibid. p. 29.
183 Ibid. p. 34.
subject to the obligations of international agreements. State compliance of human rights would be transferred to the component parts of the state such as the judiciary and legislature.

In pulling networks into being subjects of international law, Slaughter appears to be heading towards Allott’s vision of an international law containing all legal phenomena (both national and international) which suggests a form of international constitutionalism. However, for international law to afford sovereign status (even though disaggregated) upon networks raises serious concerns first, of diluting the sovereign power of the state without a democratic model of authority to replace it, and second, of diluting the accountability of democratically elected representatives to non-accountable, non-elected officials and functionaries. As Kratochwil argues:

For a “liberal” theory it is then in a way rather surprising that all politics seems to have disappeared, at least at first sight. Thus, “politics,” conceived as the agreement among free members of a society, has been overshadowed, if not replaced, by a form of third-party authoritative decision-making “bound” by law. In other words, we see a notion of law that is closer to Judaic and Muslim traditions than to Greek or republican notions of politics.\(^{184}\)

This is very different from Allott’s goal for the institution of international law to become a system for disaggregating, not of sovereignty (which in his model, is held in a democratically formed international constitution) but the common interest of all-humanity. The common interest would be determined by legislation (of democratically elected legislators) and the judicial process would then interpret that common interest in the application of the legislation. At the same time, politics would draw on the ideal constitution of ideas and values and provide the forum to present conflicting ideas of the common interest which are in competition with the real constitution (the actual power structure).\(^{185}\)

In Slaughter’s scheme, there does not appear to be an ultimate source from which the disaggregation is authorised other than an up-sized UN occupied by state representatives. Neither is there any social or legal theory to guide the distribution of

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\(^{185}\) Allott, The Health of Nations. Society and Law Beyond the State. p. 86.
the disaggregated power. Instead, an ad hoc development of increasingly thick obligations, with no guiding principles or direct democratic process, is all that is suggested. Rather than extending our consciousness to a global perspective, Slaughter’s scheme could disaggregate any cohesion, to the point of factionalising the international arena. The principles of global deliberative equality, legitimate difference, positive comity, checks and balances, and subsidiarity are functional and process-oriented, aimed at facilitating the interaction within and between networks. This is, in Allott’s theoretical structure, the practical theory of constitutionalism where a society’s self-transcending ideas and ideals are made part of the functional real and legal self-constituting. Society enacts as practical theory its pure theory of constitutionalism. In Slaughter’s scheme, there is lack of a pure theory which articulates what a society says to itself and why and what it might choose to be. When an ideal constitution is void of such theory, values, purposes, or ideals, the infrastructure is lacking for a society to be able to construct appropriate institutions and law that enables it to take power over its own future. As Kratochwil concludes:

Thus, by a strange concatenation of circumstances, liberalism has mutated from a political project of the rule of law and a defense of the “old freedoms,” as in the case of the Glorious Revolution, into a tutelary regime that leaves little room for meaningful choice. Instead of the citizens, we see how an international “expertocracy,” allegedly “safeguarding” human dignity, informs the people what they actually ought to want.186

The safeguard of Allott’s all-encompassing transformational agenda is the infiltration of democracy in the international sphere. Contrary to Slaughter’s disaggregation of the state, Allott anticipates disaggregation of the common interest of humanity through all layers of the system of law.

This overview of recent literature situates Allott in an animated community of ideas which endeavours to explain the international realm, or to prescribe or predict its future development. The normative nature of much of the work contributes to a burgeoning discourse, made more necessary in recent years by the global issues of environmental

degradation and terrorism. Allott’s unique contribution to this discourse will now be explicated and then evaluated.
PART 2 – DEFINING THE IDEAL: ALLOTT’S NEW SOCIAL AND LEGAL THEORY

4 WHY DEVELOP A NEW THEORY?

4.1 The current international disorder

Allott claims that the enterprise of developing a new social theory is both necessary and urgent. This is because of the current world disorder, as well as emerging phenomena which indicate transformation is taking place at the international level which will affect the survival of the human race. A new regime of international law is necessary to regulate the transformations, and a new social theory is needed to generate that new law.

The current world disorder and ineffectiveness of international law are mutually dependent, being both reflective and prescriptive of each other. Allott claims that the dysfunctionality of international society and international law is a theoretical problem because international society lacks a theory of itself. It is an unsocial international society. By failing to recognise itself as a society, it has not known it has a constitution, and has therefore ignored the generic principles of a constitution. When a constitution reflects ideals in the interests of the people, it is capable of promoting their well-being. When it does not do this, it is capable of great harm.¹

Emerging phenomena indicate that transformation is taking place at the international level, necessitating an urgent re-examination of the theory of international society and its law. These transformations include (but are not limited to) the following trends.

4.1.1 Interdependence

An emerging global interdependence of human society is self-evident in the military sphere in the development of strategic nuclear weaponry, as well as in the borderless reach and impact of economic and environmental spheres. It is now generally acknowledged that each of these spheres can radically affect, even destroy, our human-made and natural worlds.²

¹ Allott, *Eunomia*, p. 299.
² Ibid. p. lii
4.1.2 Geopolitical metamorphosis

A geopolitical metamorphosis has been evident since the 1990s, so that frontiers between the internal and external, and the national and international realms of states, are being transformed. Former barriers generated by imperialism, as well as relations between dominant powers, created rigid separation. Now we are witnessing the normalisation of the externalising of internal governments of states and the internalising of the external realm. Government control of the domestic realm and its external diplomacy has been surpassed by a more complex reality. Social phenomena analogous to that experienced at the national level are being experienced at the global level. Familiar patterns of social development in the political, economic, and cultural arenas are escaping from the internal social realms of subordinate societies and are interacting in a formless global realm created by the externalising of these patterns. The idea of confinement of relations between states to being conducted by a small group of elite employed in diplomacy ‘seems as comical as it is unreal’. Foreign policy or international relations and diplomacy have been replaced by a social process of ‘externalised government’ or ‘international intergovernment’ where government functions overlap. The foreign policy and diplomatic elite remain, but are viewed more as an old-fashioned and dangerous game played by a marginalised but incorrigible international ruling sub-class of politicians and public officials, who remain addicted to their obsolete practices.

4.1.3 Multiple dialectic of change

There is an emerging human awareness of interdependence of the human spirit in which every human takes moral and social responsibility for the surviving and prospering of the whole of humanity. While there is evidence to suggest otherwise, there is also evident mass-scale recognition of gross inequalities and injustices, and an acknowledgement of accountability for them, even though the start and end point of that accountability is generally undefined. It is feasible to accommodate the idea of these opposing trends, of both gross disregard and pre-emptive and remedial goodwill towards distant human beings. The opposing trends of disintegration and integration,

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3 Ibid. p. xiv.
6 Ibid. pp. xiv-xv.
7 Ibid. p. liii.
obdurate past and a responsive future, and deprivation and prosperity, are the horns of dilemmas experienced in international society’s ever-evolving becoming.\(^8\)

Allott synthesises these forces by conceptualising a multiple dialectic of change, a process of processes. These processes form a set of highly charged psychic force fields creating a dynamic process of permanent revolution. They can be summarised as: the power of the past, which creates the world as it is today, and determines future potentiality; the pull of the future, imposing an unavoidable responsibility on all to create the future, using our seemingly unlimited capacities to create and destroy; the pull of the particular and the pull of the universal – ideas and ideals of great diversity which both transcend and condemn the actual and the emerging order; an emerging universal social consciousness, or public mind, through which a ‘true’ international society is possible, but also through which damage to all subordinate societies could be realised; an emerging universal species consciousness of our relationship to our habitat (both our natural and human worlds); an emerging universal social system and institutionalisation for reconciling the common interest but which also enables the exercise of unconstitutionalised world-wide governmental and economic social power; an emerging universal legal system enacting and enforcing the universal common interest, but exceptional social power by those who determine that interest and control the content of the law; a universal economic system dominated by free-market capitalism, and which is the source of much social injustice; the universalising of social evil through the magnifying of human suffering caused by social systems and holders of public power able to act trans-nationally and globally; and international anarchy as integrating and disintegrating forces overwhelm existing structures and systems.\(^9\)

### 4.1.4 The old regime and its law

Also evident within this multiple dialectic is the bifurcation of international law – one body of law is the old international law of the ‘old regime’, and the other is the new international law of the emerging regime. The old international law is primarily concerned with the self-limiting of potentially conflictual behaviour, and tempering the interacting of the public realms of statal societies. It is also occupied with the recognition of new states, territory, and the resolution of disputes and typically those

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\(^8\) Ibid. p. 56.

\(^9\) Ibid. pp. xxv-xxvi.
matters recognised by governments and adjudicated by the ICJ. The criteria for deployment are power and interest, and rather than seeking an outcome of justice, advantage over another is sought. Allott articulates the limitations of such a regime:

> It has seemed little more than a neutralized diplomacy, international relations half-set in amber, a more or less safe refuge within so much international turbulence, a set of common ground from which to launch flights of rhetoric, the modest voice of common sense in the midst of rampant unreason. It has performed the role of an old servant in a family of ancient lineage, a venerable legal adviser to great landowners whose most treasured possession is now a colourful past, full of glory and shame. International law is the faithful friend of a family overtaken by time.

The old regime is a collection of approximately 190 states and a collection of international organisations. Its international law is made by, and for, the states and international organisations – they are the only legislators and subjects of international law. It organises states’ interaction in the public realm. Internal realms of each state are independent of each other, protected by ‘a formidable series of defensive concepts – sovereignty, the sovereign equality of states, sovereignty over territory, domestic jurisdiction, political independence and territorial integrity, [and] non-intervention.’ As states are free, equal, and independent sovereigns, international law is conceived as an act of sovereignty – states can choose to accept limits on the exercise of their natural freedom – therefore, the only international responsibility of a state is a legal one, called state responsibility, for a breach by one state of another state’s rights in respect of either territory, duty, or treaty. Beyond these obligations there are no international social purposes, morality, moral responsibility, social accountability, systematic economy, or culture. Individuals have a marginal effect on international society. Social progress is incidental, random, and often a by-product of international capitalism.

### 4.2 The theoretical causes of the international disorder

When contemplating the old regime, Allott laments that it appears as if Hobbes has been the only philosopher, that there had never been a Locke, Rousseau, Kant, Hegel, Marx,
Plato, Aristotle, Lao Tzŭ or Confucius, and that the French and Russian revolutions of 1789 and 1917 never occurred. Allott is intrigued by the question of the origins of the consciousness which makes possible, legitimates, and naturalises the way in which we conceive of international society and international law. The establishment in the 18th century of the Vattel tradition, now the dominant theory of international law and international society, grew out of a series of traditions of pure theory of the whole nature in international society, and not merely of international law. Vattel tradition’s pure theory attempted to disprove the theory of a natural society among states, maximising the interests of the ‘persons’ of states occupying a state of nature, with the survival and prospering of individuals and humanity as secondary. As traced in Chapters 2 and 3, a series of dominant traditions and their fault lines have converged to create an international law which is erroneously accepted as natural and inevitable. The Spanish scholastic tradition’s pure theory of a natural human society dominated until the mid-18th century. The Hobbesian tradition’s pure theory of an international state of nature emerged during the 17th century and remains evident today in realist international law and international relations theory. The Grotian tradition’s pure theory of statal nations under natural law emerged in the 18th century, reviving pre-modern and ancient theorising. Its presence is also evident in both international relations and international law, often perceived as a counterbalance to the indifference of the realists’ views. However, the Vattel tradition pervades both the tradition of international law and the pure theory of the whole nature of international society. It affects the entire nature of the human social condition, generating practical theories in every society.

Given this complex legacy, the current international order is a ‘cloudy confusion of atavism and progressivism’ choosing to not conceive of itself as a society, but essentially as different from its member state-societies. It has avoided both revolutions of democratisation and socialisation which have made states' societies what they are today. Instead, humanity has chosen to regard its international world as an unsocial world in which the internal public realms, that is, the governments, of member states (rather than the totality of society) are presented externally, like a glove being turned

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15 See Chapter 5, Section 1.2 for an explanation of Allott’s theoretical hierarchy of a society’s transcendental, pure, and practical theories.
17 Ibid. p. 304.
inside out. The essence of this unsocial, externalised non-society’s social processes is limited to:

- generating so-called international relations, in which so-called states act in the name of so-called national interests, through the exercise of so-called power, carrying out so-called foreign policy conducted by means of so-called diplomacy, punctuated by medieval entertainments called wars or, in the miserable modern euphemism, armed conflict.

Amongst other dire consequences, a discontinuity occurs between the morality within societies and between states, enabling those who will and act internationally to conduct their affairs in ways which they would be morally restrained to do internally. These include:

- murdering human beings by the million in wars, tolerating oppression and starvation and disease and poverty, human cruelty and suffering, human misery and human indignity, of kinds and on a scale that they could not tolerate within their internal societies. Interstatal unsociety is a realm of unmorality.

Such is the effect of theory, made up of merely words, ideas, theory, and values.

Allott identifies obstacles to our reconceiving of this international system. These include the degradation of universal values, the hegemony of economics, the poverty of politics and philosophy, and the tyranny of the actual. As a result of these obstacles, international society is on course to create a globalised, progressive, economic and political system, but with a rudimentary international social system from the past. This mix of atavism and progressivism, but maintenance of the values of the old, that is, the maximisation of the interest of states, with the maximising of the survival and prospering of individuals and humanity as secondary, is a perfect design for the maximisation of social evil.

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18 Ibid. p. 409.
19 Ibid. p. 409.
4.3 The problem of criminalising social evil at the international level

Allott detects flaws in the dialectical process between international society’s ideals, which are focused on state interest and acceptance of its moral responsibility for social evil. Today, the problem of social evil has been transferred to individuals in the rise of the international criminal justice system. Through this law, international society condemns social evil as sin, punishes the individual criminals, and then attempts a process of redemption.\textsuperscript{22} However, given the present state of international society, Allott considers that the introduction of such a jurisdiction ‘is a crude extrapolation of the most primitive, the least efficient, and the most morally dubious of systems for socialising human beings.’\textsuperscript{23} It is ineffective because a theory of criminal law developed within social processes at national level has been transposed to an unsocial international society with an inadequate theoretical and, therefore, legal framework.

The processes of criminalisation, decontextualisation, and selective justice of individuals are incongruent with an international society that both conducts and judges that evil. If society is to be the judge of the evil it conducts, who is to judge the society? This is a perennial question of philosophers, who have recognised the problem of evil and the fact that societies, and not just individuals, know the good and yet do evil. Allott asks, given our defeat by our own personal evil, what the role is of these decrees by society about social evil, sin, and crime? As individuals we deal with the problem of our own evil by either convincing ourselves that there is no problem, or no answer, or no possibility of an answer. We either accept a non-human redemption through religion, or simply accept evil. Yet, Allott observes that somehow we find it possible to take power over the power of society to do, as well as to judge, evil. We believe that society has its own free mind – that it acts independently of human will. To do so is ‘to dream with our eyes open.’\textsuperscript{24} To impart an authority to society’s mind which we do not accord to our own, is a form of human self-dehumanising, condemning the human species to nothing but a by-product of the social systems it has created. By according a moral omnipotence to these social systems, we believe we are unable to transcend them through the power of the mind.

\textsuperscript{22} Ibid. p. 63.
\textsuperscript{23} Ibid. p. 65.
\textsuperscript{24} Quoting Spinoza who denied the idea of moral freedom. He argued that freedom is in overcoming, through the power of the mind, and the decrees of the body. Acting immorally and morally are two aspects of being human – it is in our nature to do both good and evil. Ibid. pp. 62-63.
When the evil in question is a crime against humanity, and the judging of that evil is by and for international society, a number of ‘painful’ problems are raised in the attempt to criminalise it.\(^{25}\)

The first problem is the lack of international society’s justificatory theory to judge evil. As mentioned above, a criminal sanction requires a theory, and the justificatory theory of the criminal law is no better than the theory which justifies the theory of that society. In other words, the social repression of evil which is identified as a social crime is inseparable from the justification of the society which organises the repression. Because international society is devoid of its own theory, Allott asks how it will find its own justificatory theory to justify its power to judge evil, such as crimes against humanity, unless it is through the arbitrary imposition by an elite with exceptional international power?\(^{26}\)

Another problem is caused by the decontextualisation of crime. International criminal justice has itself become a form of injustice. International society is obviously full of disparities and yet we have artificial equality in criminal law in an international society ‘which still is a Many, and not yet a Many-in-One’.\(^{27}\) Criminal law decontextualises an offender and offence from the rest of the social situation, and when applied internationally, or nationally through universal jurisdiction, the decontextualising is at its extreme. That each society is a unique product with a unique history presents a formidable challenge to international law, which abstracts a person and ‘the event’ from their natural world, and imposes its own interpretation of motivation and causation.\(^{28}\) The implications of imposing a uniform law on disparate social milieu are complex – perhaps too complex for analysis – but it is undemanding to recognise that decontextualisation causes an inherent diminution in the effort to realise justice.

Allott claims that criminal justice is itself an admission of failure in socialising. He refers to ancient Chinese philosophy which teaches that the cause of crime is the criminal law itself. If there is no criminal law, there is no crime. Furthermore, to criminalise is a denial of love and a denial of its possibility to redeem. Allott quotes from the ancient Upanishads:

\(^{25}\) Philip Allott, "The Emerging Universal Legal System" (paper presented at the Relationship between International and National Law, Amsterdam Center for International Law, 2002). pp. 63-64.

\(^{26}\) Ibid. p. 64.

\(^{27}\) Ibid. p. 65.

\(^{28}\) Ibid. p. 65.
In love, I am the other, and the other is part of me. The murderer and the torturer, and those who procure murder and torture in the public interest, are part of me. That thou art…  

Exacerbating the failure to socialise, the purpose of criminal law is also exclusion (rather than deterrence or retribution), whereas the purpose of society is inclusion. ‘A society which seeks to increase inclusion to the maximum has the possibility of reducing crime to a minimum.’

Allott is not proposing the abolition of international criminal law as such, but raises fundamental theoretical problems which he attempts to address. He considers international criminal law to be a misdirected cultural movement which could be better labelled ‘corrective history’, seeking to redeem the past by remedying past injustice. He is derisive of the process in which historians are asked to recover a social past and assist in a process of collective confession inquiring into the depths of the public mind of society ‘with a methodological and forensic assurance that cannot even be brought to the exploring of the private mind’, let alone a society’s. The past cannot be recreated or relived – the dead cannot be reborn, the tortured untortured. He concedes that while we cannot suspend our moral sense, to judge using conventional legal process, and to use corrective history to achieve retrospective corrective justice are social evils added to social evils, or injustice masquerading as justice.

Allott also sees irony in retrospective corrective justice in that it involves a betrayal of the victims. Corrective justice supposedly corrects evil – suffering is compensated but also the perpetrator is more or less absolved.

Feeble old men and their seedy subordinates shuffle into the court-room, shrunken figures bearing no physical relationship to the physical scale of the suffering for which they are responsible. The half-theatrical, half-religious rituals of the law are performed. Due process. Verdict and sentence. History has been corrected. The causes and effects of extreme social evil remain, its

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29 Ibid. p. 65.
30 Ibid. p. 65.
31 Ibid. p. 66.
32 Ibid. p. 67.
human price, but our moral outrage is clouded by the charade of judicial retribution.33

The introduction of international criminal law also has the ironic effect of legitimating the social evil that it does not condemn because it will only be able to deal with a minute portion of the social evil in the world. ‘The false innocence of legal impunity will encourage the evil-doers in their arrogance.’34 Self-justification by governments and public officials will become more sophisticated as ‘legalism breeds legalism. [But,] legalism does not, and cannot, redeem.’35

Allott argues that social evil can only be overcome by a higher moral and social order (generated by theory) that negates disorder and transcends the apparent necessity of the actual. This is realised by our moral awareness, which allows us to will a better world by forming an idea of a better world in contrast to the disorder. Allott concedes that, although the current governments of states are at an infantile stage of moral development, the rush to introduce international criminal law might be a sign of the maturation of a moral awareness of the public mind. Although an inappropriate form of social ordering, ‘they have exposed themselves to the possibility of a maturer moral consciousness, to an understanding, centuries overdue, that moral heteronomy is indivisible.’36

4.4 The problem of bureaucratisation of international society

Allott claims the void of a theory-of-itself prevents international society from launching into a future that is any different from its past. This thwarting of any ‘renaissance’ is illustrated in recent developments in another nascent legal regime, state responsibility. The adoption of the government-dominated ILC’s Articles of State Responsibility in 2001 has been hailed as a key development in international law, but Allott considers the Articles a threat to the development of a ‘true’ international legal system. Rather than limiting the power of governments, they have instead established the limits of their powers, thereby affirming them. Rather than fulfilling the purpose of law, which is to realise the values and interests of the people and to direct the holders of delegated power to respect those values and interests, the Articles are concerned with the

33 Ibid. p. 67.
34 Ibid. p. 68.
35 Ibid. p. 68.
36 Meaning that we are all subject to the same moral order. Ibid. p. 68.
confirmation of government power. In this regard, Allott likens the Articles to pieces of law, chopped into small pieces, blended ‘…into a bland gruel, not likely to upset the most dyspeptic government official.’

Allott assesses the work of the ILC on state responsibility as an example of the anti-democratic effect of bureaucratisation, indicated in Weber’s scheme as the domination by specialists of both a social group and a mentality. While paralleling national societies, the bureaucratisation of the international level has not required the corresponding evolution of democratic accountability. The elite composition of those involved in decision-making at the international level remains closed, esoteric, and remote.

A study of the history of the bureaucratic spirit reveals its potentially positive world-changing effects when ‘illumination by shafts of world historical charisma from a handful of statesmen’. Examples include the League of Nations, the UN, the UN Law of the Sea Convention, and the European Communities. But when ‘unalloyed by charisma’, bureaucracy has subsequently managed to destroy or stunt the development of these organisations. Allott argues the development of international law has been hijacked by bureaucrats from states (and previous to states, aristocrats) to state officials and their mentality. The working method of the ILC is a model of the underdeveloped public life of international society. Although neither autocratic nor oppressive (like the old regimes), the bureaucrats’ processes of efficiency and personal professional development override their desire to contribute original and transformative ideas for the common interest of the world.

Allott argues that the cumulative effect of the work of bureaucrats exceeds their own will and purposes. This is a particularly grave prospect when considering the role of

38 Ibid. p. 266.
39 Ibid. p. 267.
40 Ibid. p. 267.
41 Ibid. p. 267.

Charlesworth similarly discusses the dispassionate, analytical differentiation by international lawyers between which atrocities will be of more political and legal relevance, and which warrant attention for the contribution they will make towards the ongoing development of principles such as intervention, universal jurisdiction and complementarity within the discipline of international law. Charlesworth argues that international law’s focus on crises shackles it to a static and unproductive rhetoric. She uses the case study of Kosovo as an example of a paradigm of a meaty international law crisis, a real-life Jessup moot problem. The intense debate and production of volumes of conference papers, articles and books have since abated revealing various camps of opinion at both ends, and in between them, on the legality spectrum. She reflects: ‘Kosovo offered questions about sovereignty and self-determination, grave human rights abuses and expulsions, condemnation by international institutions, failed peace negotiations, military intervention by a regional alliance, international peace keeping and the role of international criminal tribunals. It was a contemporary Cuban missile crisis. Kosovo gave international lawyers a sense of relevance, of being exhilaratingly close to the heart of grand and important issues of our time.’

state officials and the Articles’ structural concept ‘responsibility-arising-from-wrongfulness’. Such a responsibility is distinct from the wrongful act and from the consequences of it. Allott considers this concept to be an unnecessary intrusion into the systematic structure of a legal system. In brief, it postulates that all obligations and all breaches give rise to a single kind of consequence called ‘responsibility’. Usually, liability would be the direct consequence of a wrongful act, not via an intervening concept of responsibility, unless (as in municipal law) there is a break in the connection between will and act in the mind of the wrongdoer, or between the wrongdoer and the wrongful act.

To be effective, responsibility as a legal category must have legal substance. Rights and duties must be assigned – without them there is no deterrent effect. Rather, in this instance it is notionalised and leaves room for argument, which leaves room for injustice. Therefore, Allott sees the idea of state responsibility as nefarious in that it shields those humans responsible for the actions they cause states to perform. It consecrates the idea that wrongdoing is the behaviour of a general category known as ‘states’ and not the behaviour of morally responsible human beings who determine the behaviour of states. Thus, the effect of interposing responsibility between a wrongful act and liability for its consequences is more than conceptual or structural. Its substantive consequence is that those human beings who implement the law’s rights and duties are able to perceive themselves, on the one hand, as entitled to implement the state’s rights and duties and, on the other hand, as bringing about responsibility in the state if they implement them unlawfully. In such circumstances, Allott reflects that it is not surprising that states behave badly. He says, ‘The moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility it entails.’

The blandness of the Articles and their shielding of officials are illustrated further in a chapter titled ‘Circumstances Precluding Wrongfulness’. It lists circumstances which justify otherwise unlawful behaviour in all circumstances. Allott recalls how Confucius

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43 Ibid. pp. 268-269.
44 Ibid. pp. 271-272. Lauterpacht also wrote, ‘Moreover, there is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.’ Lauterpacht, “The Grotian Tradition in International Law.” p. 40.
considered the question of whether one single phrase could destroy a whole country. Allott considers that the title of this chapter could destroy the possibility of a future.\textsuperscript{45}

The implications of the moral discontinuities between the personal obligations of the government official and the obligations of the government are profound. They are the cause and effect of the legal discontinuity between international law and municipal law. These discontinuities sustain each other. They explain the otherwise mysterious fact that governments behave externally in ways which would be inconceivable internally, bringing about human deaths by the million as a matter of policy, and contriving and condoning social injustice on a vast scale because of considerations of sovereignty, independence, sovereign equality, and domestic jurisdiction. Allott suggests the ILC would be better advised to focus on an international law of obligations on the assumption that the purpose of international law is to make actual the values and to serve the interests of the peoples of the world. This might be in the form of a Bill of Rights with regard to a state’s behaviour, not to its own citizens, but to the rest of the community of states and its peoples.\textsuperscript{46}

Further evidence which illustrates the urgent need for a new theory is the emergence of an international aristocracy, an oligarchy of oligarchies. Allott claims this is made possible by the fact that liberal democracy has never actually been realised.\textsuperscript{47} Rather, the republican form has been exposed as a form of oligarchy, with international society being an oligarchy of oligarchies. The social reality of liberal democracy has been the dialectical tension between the power of the people and the power of the oligarchies, and at the international level, the competition of power between the oligarchies. The lack of democracy and accountability by this bureaucratised aristocracy absolved of responsibility leaves room for abuse of power.\textsuperscript{48}

Formalising this oligarchical hierarchy on the international level is the institutionalisation of a self-appointed international civil society. An orthodox view of liberal democracy would consider such an idea as heresy, because in a well-ordered society it is the people who govern themselves through representative institutions. In national society the separation of government from a self-appointed and self-

\textsuperscript{46} Ibid. p. 279.
\textsuperscript{47} For a discussion on the idea of the end of democracy and it contradictions, see Ibid. pp. 287-294.
legitimating institutionalised civil society that supposedly represented individual, special, and public interests would likewise be considered heresy. Such an arrangement in national society has invoked revolutions through which people took over public power. Government is supposed to be representative of all the people, and abuse of power is supposedly controlled by the rule of law. Therefore, Allott considers the current international institutional framework is pre-revolutionary or counter-revolutionary. However, it is only through an international constitutionalism generated by an international consciousness, containing the idea of the ideal that a dialectical negation of this international anarchy is possible, and the actual can be transcended.49

Thus, an analysis of the idea of post-democracy, something beyond the actual, is urgent and necessary. This brings the challenge of realising a new idea of the body politic, hence the urgent need for a new theory. Basing his claim on history, Allott states that the feasibility of this is not beyond our imagination to conceptualise or our capabilities to actualise. Many states’ recent histories have seen a transformation of government for the state (or aristocrats), to government for the people, often in the form of revolution. Similarly, Allott claims that if international society is to survive and progress, it will need to transform, in the form of a revolution of the mind, to create a constitutionalism in which the interests of the people take primacy over the interest of states. Allott considers that international lawyers are in a unique position to exert vigilance over the development of international law on behalf of the people. He looks to them to ‘…redeem governments in the name of justice, which is a sort of love, in the name of humanity, whose interests transcend the interests of states and governments.’50

4.5 Transcending the ‘unphilosophy’ of the 20th century

Allott questions whether his enterprise is within the context of philosophy generally, or international law. He claims to do social philosophy, at the same time acknowledging that such a claim is controversial. As social phenomena are creations of the human mind, so the social philosophy itself becomes part of the phenomena studied. The claim to do philosophy generally is a claim about the nature of philosophy – whether it is a conventional form of discourse with values and effects conforming to the current

Allott acknowledges that in setting out to develop a new theory there is a danger of being overwhelmed by the volume of ideas available, their diversity, uncertainty, and their contradictions. The mere task of assimilating all that has already been thought presents a formidable obstacle to producing a summation of human wisdom and knowledge. Allott identifies the following philosophical puzzles which need to be somehow transcended in the formulation of a new social theory. These are raised by:

- Plato and Rousseau: How can the social order be reconciled with the moral order, if the social order is an aspect of knowing and the moral order is an aspect of being?
- St Paul, St Augustine, Nietzsche, Freud (and aspects of Eastern religions and philosophies). To change humanity you must change human nature, but how can human nature change human nature?
- Marx (and social anthropology and structuralism). How can we transcend society in consciousness when our consciousness is created by the society which we create?
- Locke, Hume, Kant: We make the world in thinking it. How can we think about our thinking about the world of which we form part?
- Aristotle, Wittgenstein (and hermeneutics, phenomenology, and linguistics). Leaving to one side mathematics, how can language (and, therefore, an idea expressed in language) make of itself something more than a form of human behaviour? 

Theories of society and law must address these problems. Allott endeavours to do so, although indirectly, throughout his work. He laments what he perceives to be the demise of philosophy in the 20th century and the deprivation of its transformative potentiality. ‘Is’ questions have been deemed impossible to ask, and the myth of the ‘merely’ has created a polymorphous reductionism. A is merely B; X is merely Y; philosophy is merely a problem of language (Wittgenstein); society is merely produced by a collective communication as a form of action (Habermas, American pragmatism);

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52 Allott, Eunomia. p. xlix.
consciousness is merely a matter of physiology (behaviourism); apparent reality is merely an ordering of phenomena in the mind (phenomenology); humanity/essence is merely a product of attempting to exist (existentialism/Heidegger); society is merely a matter of biology (socio-biology/Darwinism); ideas about society are merely a product of pursuit of power (realism/Hobbes/Marx); and ideas are merely an effect of unconscious desire (Freud).  

Each of the 20th century nominalist propositions listed above endeavours to negate the philosophical essentialist tradition, attributable to Plato and Aristotle, which contains the idea of form/essence/substance/is, and not merely. As a result, Allott claims philosophy has gone into hiding, limiting itself to the world of academia. It has become a ‘ferment of forms of its own self-denying, a litany of philosophical despair, a philosophy of unphilosophy.” This ‘unphilosophy’ has produced in the public realm a Marxian interpretation of ideas which have taken on the form of ideologies linked with power. It has become ‘tendentiously associated with the ideology of freedom, egalitarianism, and populism in a spurious democratising of the social activity of the human mind.” It has abandoned ideals of truth and value to the processes of public power, allowing those with power over the public mind to appropriate an absolutism (in the form of democracy-capitalism) by becoming its own philosopher. The practice of this ‘unphilosophy’ has been seen in countless revolutions and wars over the past two centuries.

Bad philosophy is a form of human evil. It is one of the worst forms of human evil, because it can corrupt and destroy human beings, and could now be on the point of corrupting and destroying all-humanity.

Allott attributes the evolution of this ‘unphilosophy’ to shifts in the self-consciousness of the human mind in the 19th century. By analysing those shifts, he hopes to identify the nature of the changes and thereby extrapolate to the 21st century the possible developments of human consciousness at the global level. Five main social factors reflecting the state of social self-consciousness arose in the 19th century leading to the supposed ‘defeat’ of philosophy. These include: the rise of intellectual activities,

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54 Ibid. p. 470.
55 Ibid. p. 471.
56 Ibid. p. 471.
especially the human sciences and their offer of a form of ‘truth’ analogous to the
natural sciences; the assertion of the natural sciences as the final word on ‘truth’ and the
marginalisation of philosophy to ‘the academic grove or [philosophers] acting as
lackeys of the currently dominant social class’; the religious crisis overshadowed by
confidence in scepticism, atheism, and agnosticism; the mental crisis caused by the
Industrial Revolution and popular democracy, the newly dominant bourgeois class, and
education of the masses; and the inevitable negation of Christianity’s and philosophy’s
own absolutism, leading to the idea of philosophy’s truth being untruth, or at least its
claim to truth, as being spurious.57

This state of social self-consciousness was produced by a particular process of
revolutionary social transformation. Drawing on the tools of historicism, Allott
extrapolates generalisations of that process, allowing us to predict the future with
relative certainty. These generalisations are that world-historical individuals have
played a major role; social forms and changes are closely linked with economic
conditions; the history of ideas is as significant as the history of events; and chance and
accident have played major roles in the making of human history. Patterns of epochal
changes are also evident. These include cycles of ‘bearing and barrenness’ (Plato);
‘organic and critical’ periods (Saint Simon); and ‘belief and unbelief’ (Carlyle).58

4.6 A ‘true’ philosophy

Allott identifies the current challenge to be a critical epoch-changing moment,
rebounding from the self-doubt and self-destruction of the past two centuries. The
dialectic of ‘true’ philosophy, a negation of negation, in the great tradition needs to be
resumed. A ‘true’ philosophy, a perennial ideal philosophy, has five principles. The
first is that is world-making – ideas make the human world which is the second habitat
(the first being the natural habitat). New ideas make new worlds, which make new
powers. By thinking about what ‘is’, by doing philosophy, we create the real. The
second principle is that ‘true’ philosophy is ruled by a moral imperative – pure reason is
practical reason. Rationality is a form of Aristotelian virtue in both disposition and
behaviour. ‘True’ philosophy is to think well of what has been thought, and then to try
to think better. It is a moral activity, seeking self-perfection, a dialectic of self-
redemption. Philosophy’s own self-doubt can be seen as the generator of its negation

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57 Ibid. pp. 472-476.
but this is ‘in order to rediscover fullness and hope and, in due course, the joy of thinking better, the joy of becoming something better.’ The third principle is that it is universal – filling the intellectual territory situated between other universalising territories of mythology and religion, and scientific enquiry. The fourth is it contains the idea of the ideal – the transcendent, the existential target, usually offered by religion, and is offered in philosophy as a form of human self-transcending. The actual is judged in terms of the possible, the good in terms of the better. Both the individual and the public mind can think of a better world and have the capacity to will it. Ideals are targets aimed for but never reached ‘since their function is to judge the actual and to inspire the possible’, for example, justice, truth, beauty, goodness. The task of philosophy in the Platonic tradition is to speak truly, not to discover truth. Like Taoism, Buddhism and early Christianity, Platonism is a path and a destination, not a truth. Philosophy’s task is to perfect the human mind’s ideal potentiality with a view to perfecting society’s ideal potentiality. Finally, a ‘true’ philosophy contributes to public enlightenment – it is a communicated, collective, co-operative enterprise, a social activity. The collective consciousness of the public mind is something we receive and contribute to. We are what we think. Societies are what they think. However, the essential social value of philosophy necessarily co-exists with the possibility of its abuse. On a social level we can think badly – we can be corrupted, disordered, and confused, and rationalise the pursuit of evil. We can think, enact and enforce bad thinking in social practice. But ‘[t]rue philosophy in the post-Socratic tradition is humanity’s collective self-educating’.60

4.7 The challenge of democracy-capitalism

Allott claims that never has good philosophy been so needed. An epochal moment is upon us – a process of revolutionary social transformation in which democracy-capitalism could become the philosophy of globalisation. He summarises globalisation as a fundamental social transformation affecting the flow of trans-national social effects, generating new social structures and systems at the global level, and converging national structures and systems, each linked through the social phenomenon of democracy-capitalism. Social, political and economic actors from democratic-capitalist states are dominating this globalisation, or constitutionalising of international society.

60 Ibid. p. 484.
Allott considers democracy-capitalism as both an institutional system as well as actualised philosophy. It is embedded with the philosophical genetics of every great philosophical tradition, the historical circumstances inhabited by all its progenitors, and the social circumstances of its successes and failures. It contains the dialectic of history, including totalitarianism and absolutism: totalitarian, in that nothing is beyond the control of public power, including power enacted by law, and absolute, in that it contains within itself the whole explanation and justification of public power.  

Both democracy and capitalism are based on naturalist theories.

The General Will and the Market are God and King depersonalised, omniscient and omnipotent. Their activity is meta-rational and meta-ethical and hence meta-cultural. By this means their social systems are de-transcendentalised, isolated from religion or philosophy. The General Will produces the law that society needs. The Market produces the things that people desire; together they produce the Good Life.

These systems are seen as being beyond good and evil, therefore, they are readily exportable, and universal in application. As the General Will and The Market are seen as systems of processing consciousness, democracy-capitalism contains its own negation within its own structure and systems. Therefore, it negates the possibility of its own negation. In its own terms, it is not denied or disproved by the fact that it is capable of producing both the Good and the Bad Life. Some aspects of this Bad Life include:

…social oppression and exploitation, legally enforced inequality of every kind, crime, corruption, violence, cultural and moral degeneration, the cult of collective irrationality and collective fantasy, public and private pathologies, social and personal evil of every kind familiar from the darker side of human history.

Democracy-capitalism is compatible with human misery and the depression of the human spirit, explained by its naturalistic theory as being unfortunate incidents on the

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61 Ibid. p. 486.
62 Ibid. pp. 486-487.
63 Ibid. p. 487.
way to the Good Life. It is its own religion, and its own philosophy. 64 Furthermore, the current advanced formula of democracy-capitalism is flawed with inherent diseases. These include the tyranny of the majority and minorities; the corruption of politics; the devaluation of high values (liberty, equality, fraternity); the devaluation of cultural and spiritual values; and the depersonalising of the human person. Adding to the bleak analysis, as democracy is organic, taking on characteristics of the societies in which it is planted, there is the possibility that various democratic-capitalist orthodoxies may eventually recognise themselves as enemies, and their imposition on societies has and will lead to gross forms of social evil. 65

However, with increased insight and understanding and self-knowledge, there is a possibility also of a new Enlightenment. New political freedom and prosperity, a wealth of nations, is enjoyed by the masses, in former ages exploited and excluded from full society-membership. Of course, vast numbers in a global proletariat remain exploited and excluded. The challenge for the coming century is to ensure that wealth (in the widest possible definition) is enjoyed by all humanity and that the benefits exceed the costs. This requires a response of self-surpassing – going beyond our current human consciousness as individuals and as societies. 66 At the global level it requires the self-transforming power of law, together with a ‘…re-imagining of our ideas and our ideals of human self-socialising (society), and our human self-contemplating (mind) requires the self-transforming power of philosophy.’ 67 It is through philosophy that a new law can be generated. While philosophy is currently suffering a self-inflicted impoverishment because of an anti-philosophy of terminal pragmatism, it is through contemplating the ideal we will be able to overcome the tyranny of the actual, to overcome the belief that it is necessary and inevitable. 68 Allott’s Eunomian Project is to reconceive human society and to show that international society need not be the archaism which led in the last century to more than 100 million unnecessary deaths and unspeakable human suffering. His Eutopian Project concerns the reconceiving the human mind, including the way in which we form our ideas, values and purposes. This requires the overcoming of the self-imposed poverty of philosophy and developing of an international philosophy in which minds from all traditions and cultures contribute,

64 Ibid. p. 487.
66 Ibid. pp. 143-144.
67 Ibid. p. 144.
exploring the connection between the self-constituting of the individual and the public mind, and forming ideals for the human future. Through those ideals, ideas can concretise in the form of truth and value, affecting our action (both personal and social), empowering us to overcome social evil.  

4.8 Summary

Transformations are taking place at the international level which necessitate an urgent re-examination of the theory of international society and its law. These transformations include increasing interdependence, interaction between subordinate societies, and trends of disintegration and integration creating conditions of permanent revolution. Theoretical challenges hinder international law’s effectiveness as the old Vattelian international social order is limited to externalised governments. International society’s displacement of criminal accountability to the individual in the event of social evil, and to the legal category called ‘state responsibility’ in the event of state misconduct, empowers a non-representative, unaccountable, bureaucratised, international aristocracy to perpetuate the old regime of international law. A transformation is necessary, in the form of a revolution of the mind, to create a constitutionalism in which the interests of the people take primacy over the interest of states. Philosophy is needed to generate that transformation. The dialectic of ‘true’ philosophy, a negation of the negation of the 20th century, in the great tradition needs to be resumed. Democracy-capitalism as both an institutional system as well as actualised philosophy is a flawed system bringing both freedom and prosperity, but also human misery and suffering. Philosophy needs to generate a new law through new ideas and ideals.

The gravity of injustice inherent and justified in the current system thus instigates Allott’s endeavour (discussed in the proceeding chapter) to dissect society, and to discover the various components and contributing forces that animate human willing and acting. In particular, he seeks to identify the causes of harmful willing and acting, and thereby propose how it could be otherwise. Using the same forces, namely the generation of ideas, but inspired by ideals transcendent of the actual, all that subsequently occurs will be revolutionised to reflect those ideals, and ensure the survival and prospering of the human race.

5 EXPLICATION OF ALLOTT'S SOCIAL IDEALISM

This chapter summarises Allott’s dense treatises, using his parlance, but also simplifying the language, where possible. However, in conformity with his theory that the fusion of collections of words in a particular structure and their energy is multiplied by a factor with a result greater than their arithmetical addition, at times it seemed that to rephrase or translate his work would dilute the potency of the idea. For example, the use of direct quotations in the section on the abolition of war seemed more appropriate than paraphrasing Allott’s erudite, poignant, and raw analysis of the insanity of the rationalisation of war. Much of the text used in the section on the dilemmas of a society’s self-creating is truncated, as Allott’s sentence structure is an integral part of the ideas he is presenting. The power of words, the foundational element of his theory of an individual’s and society’s reality-forming, is powerfully demonstrated in Allott’s use of them. The syntax, and sometimes paratactical style, is challenging, but effective, aiding the reader to perceive possibilities, layer upon layer, of a new reality. For example:

We will be what we are by not being what we are. A society is what it was by not being what it was. A society will be what it is by not being what it is.¹

An evaluation of the theory follows in the next chapter; hence no critique interjects the ideas developed in this chapter. The point of undertaking this explication is more than just for the sake of coming to grips with it and providing the reader with an overview of Allott’s theory. In addition to positioning the theory in the centuries-long endeavour to formulate an international theory and thus showcase it as a unique and extraordinary contribution, it is also to be able to deploy its components and rationale in the construction of the proposals developed in the third part of the thesis.

The building blocks of the theory are dealt with sequentially (as much as is possible) in order to proceed from the ‘smallest’ (but no less powerful) elements to the grand vision. Much of Allott’s eloquent synthesising of previous thought and theorising of the theory could not be included due to space limitation. Instead, the key elements, processes, and the theoretical framework have been distilled. The structure of the explication first

¹ Allott, Eunomia. pp. 91-92.
deals with the elements, and the processes and theoretical frameworks are dealt with in an order that assists with building conceptual layers of the theory.

5.1 Theory: the theory of social theory

5.1.1 Elements: words, ideas, idea structures, theories

Allott claims that language is humanity’s first self-ordering. He sees words as having fabulous power as they determine our lives and reality. We express our world and our lives in words. Words have parallel lives to our own and society’s consciousness. To choose our words is to choose a form of life and a world. To change or oppose words is to change or oppose a form of life and a world. We can create new forms of social life by the creation of new words, or by giving new meaning to old words.

We live and die for words; we create and kill for words; we build and destroy for words; wars and revolutions are made for words. Sovereignty, the people, the faith, the law, the father-land, self-determination, nationality, independence, security, land, freedom, slave, infidel, tyranny, imperialism, justice, right, rights, crime, equality, democracy.

We have unlimited capacity to create new words, and yet the words and meanings we have available to use are finite. They are limited in their ability to express all that we feel or wish to be. Words can delimit us within the worlds we were born into, which we can choose to overcome, but usually at a cost. To change our words, or their meanings, is to change our minds. We can change our worlds by changing our words and our meanings, such as society and law.

Words are a concentration of mental energy, capable of releasing energy to great effect within consciousness. Ideas are a fusion of collections of words in a particular structure and their energy is multiplied by a factor with a result greater than their arithmetical addition. ‘As we conceive what we perceive, so we speak, and so we become.’

Society is made up of, energised, and sustained by an attractive energy of many ideas. Through reason, idea-structures have been constructed to explain individual and social existence. The construction of great idea-structures has been accompanied by unceasing

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2 Ibid. p. 6.
3 Ibid. p. 5. Emphasis in original.
construction of other idea-structures which question their validity, the possibility of certainty, and of self-ordering.\textsuperscript{6}

Societies constitute themselves in the form of ideas. \textit{Nation, state, government, family, war, peace, justice, law, health, happiness}. These, and countless others like them, are structures of ideas. Each human society is an infinitely complex and dynamic structure of ideas. The health of a society, its degree of well-being, is determined by the ideas which take actual effect in the process of its day-to-day self-constituting as a society. To reform or redeem a society is to change those determining ideas. Our quality of life is a function of the quality of our ideas.\textsuperscript{7}

At this point in history, there is such a profusion of ideas and philosophies that there is a danger of despair. Allott has formulated a hypothesis of the necessary system of reason by which consciousness orders itself to form and control ideas generally, and large integrated idea structures or theories.\textsuperscript{8} Reason is the self-ordering of consciousness. Reasoning is a process of integration of ideas in relation to three coordinates analogous to time – the genetic (past), the actual (present), and the potential (future). The genetic coordinate is hypothetically necessary because ideas are not formed out of nothing. Its origin is found in other ideas or events within consciousness. It is a mechanism of analysis enabling the mind to consider an idea as a totality and as an aggregation of its components. It is also a mechanism of synthesis, enabling the mind to see the idea’s structure and how the components are brought into relationship in integration.\textsuperscript{9}

The actual coordinate is hypothetically necessary because ideas must interact with other ideas in consciousness. To deal with this, the mind has a tendency to reduce the noise of the conflict of ideas generated by the unconscious. It is possible to accept some tension as it can be productive by choosing to surpass it and generate new ideas which are more than the sum of the conflicting ideas. The endless pattern of conflict and equilibrium leads to the hypothetical necessity of the third coordinate, the potential. Every idea is a possible component of countless possible ideas.\textsuperscript{10}

\textsuperscript{7} Allott, \textit{The Health of Nations. Society and Law Beyond the State}. p. x.
\textsuperscript{8} Allott, \textit{Eunomia}. p.19.
\textsuperscript{9} Ibid. pp. 24-25.
\textsuperscript{10} Ibid. pp. 26-28.
Such reasoning, the ordering of consciousness, or integration of ideas in relation to the three coordinates (their origin, their coherence, and their possibilities), can be done individually, and socially. Great idea-structures such as religion, art, philosophy, history, science, morality, and law are creations of collective ordering of consciousness. This process of consciousness-ordering-consciousness can be extended to include any number of people, over any length of time, increasing thereby the potential energy of human consciousness, and hence the potential of the human species.¹¹

The making and use of words are likened to the mechanics of self-ordering consciousness. The making and use of ideas are likened to the engineering of self-ordering consciousness. The making and use of theories is the architecture of self-ordering of consciousness.¹² “Theories are the great public buildings, designed by consciousness for humanity’s orderly, comfortable, and prosperous living.”¹³ They are a structure of ideas, designed to serve as the explanation for other ideas and as a structure for pre-determining the generation of further ideas.¹⁴

Theories provide an explanation, or equilibrium, against a constant dialectic of uncertainty and certainty for the self-creating of a society’s theory-of-itself, the way it sees the world. A history of uncertainty in the reflexive activity of consciousness – a dialectical process of certainty and uncertainty – has been evident over the past 5,000 years. The consequences are seen in history where force has been used to compensate for the apparent limits on the power of reason. Force is used to claim certainties, for example, religious, racial, social, and moral. Force has also been used to resist to the death if necessary, those who deny such certainties. Most of the time, there is relative uncertainty, or dialectic, causing recourse to other forms of judgement besides reason, for example, intuition, empiricism, pragmatism. The flux of certainty/uncertainty has resulted in mainly spontaneous, rather than reasoned responses accompanied by rudimentary calculation at both individual and societal levels.¹⁵ Yet, the power of human consciousness does, at times, overcome uncertainty, “As reason doubts reason, reason reasons.”¹⁶

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¹² Ibid. p. 30.
¹³ Ibid. p. 30.
¹⁴ Ibid. p. 31.
¹⁵ Ibid. p. 31.
¹⁶ Ibid. p. 19.
Like ideas, theories are a pre-set programme of operation of the three coordinates of rational self-ordering – genetic, actual, and potential. This results in the ideas that have been generated in accordance with the theory minimising tension or noise within consciousness. They appear reliable, coherent, and fruitful. The practical consequences of theories in societies are extensive. They provide a settled structure of a society’s reality-for-itself. All of a society’s willing and acting, including legal relations, are shaped by its theories.\(^{17}\)

New ideas have a prevenient effect on the self-constituting of society. New social theory cannot, by and in itself, cause fundamental change as there are a multitude of factors which cause change in a society. What theory can do is provide a framework into which social change flows, enabling us to understand, to control and to shape social change. New social theory does not dictate the form of new social institutions; instead they arise as theory interacts with actual and potential social realities. ‘New social philosophy is an organism waiting for life to be breathed into it by new social practice.’\(^{18}\)

5.1.2 Three levels of theory – transcendental, pure, practical

The construction of a social theory is realised through the interaction on three levels of theory – practical, pure, and transcendental.

- **Practical theory**, is the set of ideas on the basis of which actions are willed.
- **Pure theory** is the set of ideas which are used to explain practical theory.
- **Transcendental theory** is the set of ideas which are used to explain pure theory.\(^{19}\)

Transcendental theory is theory about theory – a way of explaining the nature of explanation, the nature of ideas, and the nature of the mind.\(^{20}\) It is a society’s epistemology, its understanding of the source of its truth and value.\(^{21}\) Transcendental theory can provide a point of reference, justification, or explanation in debates regarding the validity and content of pure and practical theories.\(^{22}\)

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\(^{17}\) Ibid. p. 31.

\(^{18}\) Ibid. p. xxxiii.

\(^{19}\) Ibid. pp. 31-32.


\(^{21}\) Ibid. ft.2, p. 344.

\(^{22}\) Allott, *Eunomia*. p. 34.
Pure theory is a society’s way of explaining its practical theory to itself, for example, a democracy can explain itself in terms of a particular theory of social contract and a capitalist society can explain itself in terms of a particular theory of human behaviour. The elements of social theory affect a society’s pure theory – words, ideas, dialectic, doubt, the use of reasoning coordinates from the past, present and future. The cumulative affect influences the ideal constituting of a society which is where Allott’s revolution of the mind is suggested.\(^\text{23}\)

Human rights are a model of pure theory. They are evidence of the possibility of values which transcend the values of given societies. Therefore, they are able to transcend the differences between national societies. Human rights reconcile the willing of human societies with the willing of all human beings. They assert the unity of human nature, but without transcending the plurality of human values. By their inclusion in a society’s constitution, this pure theory becomes part of the practical theory, and thus affect all willing and acting under that constitution.\(^\text{24}\)

The human rights model provides a pattern for all law making – for the reconciling of the good of each member of society and the good of that society within a good that transcends society.\(^\text{25}\) However, human rights are paradoxical in their application – governments continue to violate them and the vocabulary of emancipation has become the vocabulary of regulation. The game of human rights is played in the traditional setting and ethos of international relations. As long as states’ willing and acting are, through lawyerly skill, within the wording of a particular formula then they are considered as doing well enough. It appears that unless the idea of human rights intimidates governments, they are ineffective. Allott is consoled in that they have at least been thought of and cannot be unthought. Also, non-statal societies are now contributing to human rights’ international reality-forming.\(^\text{26}\)

Practical theory bridges the gap between willing and action. It can generate a range of possible courses of willed action, conditioning the action, but not determining the outcome. Practical theory is the taking effect of ideas in the process of day-to-day social self-constituting, a way for a society to explain itself to itself, explicitly or


\(^{25}\) Ibid. p. 287

\(^{26}\) Ibid. p. 288.
implicitly, in the course of everyday activities. Practical theory is the theory of willed action, that is, it is an explanation of willed action in the context of choices made when one has full capacity to articulate them. It develops dialectically with its own implementation. Practical theory provides a point of reference in debates about its implementation; it justifies social arrangements and actions; and it explains what happens in society.\(^{27}\) Drawing on Aristotle’s distinction between speculative reason and practical reason, Allott compares pure and practical theory to the difference between the thinking of a geometer and that of a carpenter who applies practical theory to construct a table.\(^{28}\) Similarly, a society applies practical theory to the making of its own social reality.\(^{29}\) Allott applies this to the ‘half-revolution’ of the EU which lacks an idea of itself (the carpenter has no plans) and so is doomed for failure in practice if it fails to generate ideals both in the public mind of its institutions and the private mind of its citizens.\(^{30}\)

### 5.1.3 The half-revolution of the European Union

In *The Health of Nations*, Allott examines what he considers to be the EU’s unsuccessful attempt to transcend nation state society to form an integrated Europe because the EU’s pure theory (its values, purposes, and ideals) has not been developed. He predicts that the lack of institutional legitimacy and of a European public mind prefigures what will beset the self-constituting of international society. The experience of the EU will be mirrored and greatly magnified on the international level as the dominance of economics alienates the peoples of the world from a sense of identity and purpose with an international society.

Allott criticises the EU as a purpose-built economic-political society. He considers it (cynically) as an ‘eloquent precedent’\(^{31}\) for the re-forming of national societies as economic-political ones and the subsequent forming of an international society dominated by the economic aspect and the malformation of its politics.\(^{32}\) This gap between idealism and reality provides an illustration of Allott’s theoretical framework, in particular, the effect of the failure of a dialectical process between a society’s ideal and real constitutions.

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\(^{27}\) Ibid. pp. 32-33.


\(^{29}\) Ibid. p. 345.

\(^{30}\) Ibid. p. 229.

\(^{31}\) Ibid. p. 174.

\(^{32}\) Ibid. pp. 174-175.
In spite of the EU’s apparent good intentions, he sees no benefit of the piece-meal approach of its Principles of Good Governance developed for the establishment of more democratic governance and to increase the legitimacy of its institutions. Rather than principles or other reforms, Allott believes that radical remedies will be needed to engage the people of Europe’s hearts to support, even tolerate, the institutions of integration. He quotes Adam Ferguson’s warning, ‘The more government perfects itself, the more it tends to alienate itself from the people.’ Radical remedies are called for because the EU’s failure is not institutional – it has more ‘ingeniously devised institutions than any sane society could possibly tolerate’ – so it cannot be redeemed simply by more sophisticated formulas to improve the interrelationships between those institutions. Similarly, Allott considers the ‘new scholasticism’ of treaties (rather than treatises) as a ‘tragi-comic psychodrama of the public sphere’. And, of enlargement, he likens this to ‘bulimia plus bureaucracy [as] a reliable recipe for the decline and fall of empires’.

Allott considers the failure of European integration is due to a failure of its ideal self-constituting due to fear. Fears of federalism (where states would be reduced to a status likened to German Länder or Spanish autonomous regions) and of supra-constitutionality (where the Union system is a superior order to national constitutional orders) have ‘distorted the mind-world of European integration into a diseased form of social psychology.’ Such fears lead to assertions that the Union’s constitutional system is subordinate to the constitutional systems of its member states; that its authority is derived from its member states, either individually or collectively; that the terms of that delegation can be changed at any time; that the Union’s constitutional order is external to its members’ constitutional systems; and that the sovereignty of member states is unaffected by their participation in the Union. Allott proclaims, ‘This fantasy of an inviolable and inviolate national constitutionalism is a lie, an ignoble lie, and a fraud on the people of Europe.’

33 Ibid. p. 175.
36 Ibid. p. 175.
37 Ibid. ft.48. p. 175. Allott’s use of the term ‘bulimia’ makes reference to Hobbes’ list of diseases in Leviathan, Chapter 29 which are suffered by commonwealths – ‘the insatiable appetite, or Bulimia, of enlarging Dominion’.
38 Ibid. p. 176.
39 Ibid. p. 177.
Allott announces that the sharing of sovereign power is now a reality within the Union. This major structural feature is evident in its members’ sharing of legislative, executive and judicial authority, their treaty-making power and rights of diplomatic representation, their regulation of external trade, citizenship and control of movement, their sharing of sea areas and currency, and eventually of fiscal and economic policies, and a defence system and its deployment of armed forces. Allott considers the idea of sovereignty “an anachronism and an illusion, inappropriate as a theoretical explanation of the totalising structure of society.” If it is to be used, sovereignty is to be understood as a collective noun identifying bundles of internal and external powers of a society’s constitutional organs. The true social reality of the EU is that it is a union of European societies whose legal constitutions are integrated in the legal constitution of the Union. If it was to acknowledge this, Allott identifies profound implications including, but not limited to, the following: that the EU is a society of the societies of the member states (because where there is law, there is a society); the constitutional system of the Union is both internal and external – it is not hierarchically superior but a lateral co-ordination of the national systems; the general will and the common interest of the Union is distinct from and not an aggregation of its members will or interest, but they are an integral part of the common interest of each of its members; it is an international legal person, alongside its members; and its ideal future includes accepting its unique responsibility for the future of the world by choosing to be the instrument of the actualising of the ideal.

By viewing itself as a new and unique form of legal integration within a new and unique form of European society, Allott sees Europe being able to overcome its darkest history and to surpass its best. However, as mentioned, he counts the Union in its current form as a half-revolution and he is concerned that half-revolutions tend to be followed by counter-revolution. Allott argues it is possible to redeem and perfect what has been achieved so far and for the EU to become a ‘true’ society through ideas, events, and law, that is, by imagining what it might be (its ideal constitution), and struggling to decide what it shall be (its real constitution), it can become what it has chosen to become (its legal constitution).

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40 Ibid. p. 177.
41 Ibid. p. 178.
43 Ibid. p. 208.
In addition to fear, preventing this constitutionalism is a self-induced constitutional depression over the people of Europe. Allott believes the peoples of Europe need to find a new idea of themselves and a new ideal of their self re-constituting. He suggests Europe can do this by bringing together two great streams of European consciousness – the idea in the form of the spirit of the constitutions of the peoples of Europe, and the ideal in the form of the transcendental unity of European society. By a dialectical process of negation between Europe’s superordinate social totality and its subordinate social totalities it can become a society of societies, a nation of nations, and a state of states. Using the language of Michelet, the soul and person of Europe would be brought to consciousness, which for centuries have been repressed and suppressed.44 Allott argues a theory of European society needs to be proposed to help it ‘choose to become what it already is’.45 In addition, for integration to be democratically legitimated, the social forms of European society need to be internalised in the consciousness of the people as being necessary for their survival and prospering, and not just legitimated by Articles in treaties. Fundamentally, Allott considers the Union lacks a coherent idea of its actuality, and an ideal of its potentiality, because the process of reunification is not integrated with Europe’s historical consciousness – it needs to be understood in the light of thirty centuries of self-constituting. Instead, Europe is the product of the ideals and ambitions of the controllers of the public realm, a trans-national social class of public officials with its own class-interests.46 Allott declares:

[T]he social hegemony of statism has passed its apogee, and all the totalising social concepts are undergoing radical reconceiving. We will be obliged to conclude that the European Union, in its present and potential state, is an exotic relic of a fading social order, like the late-medieval Church of Rome or the latter-day Holy Roman Empire.47

46 This view was echoed by Gisela Stuart, a Blairite, pro-European British MP who was chosen to be the Labour Party’s parliamentary representative on the committee drawing up the European Constitution. She argued that the government should be wary of a constitution drawn up by ‘a self-selected…European political elite’ who are engaged in a politically motivated attempt to transfer power to Brussels irrevocably. ‘Not once in the 16 months I spent on the convention did representatives question whether deeper integration is what the people of Europe want, whether it serves their best interests or whether it provides the best basis for a sustainable structure for an expanding union.’ “The European Constitution. Gisela’s Epiphany,” The Economist 13 December, 2003.
Further diagnosis by Allott reveals that the Union lacks coherency because it lacks a collective consciousness of a public mind in which it can process its own ideals, values, policies, priorities, hopes and fears – processes which should come prior to the process of politics which determines the public interest, and in particular the making of law.\textsuperscript{48} The EU needs a transcendental debate in the public mind about the idea and the ideal of integration, and how they relate to other ideas and ideals that animate loyalties to nations and sub-nations. Allott argues that without such emotional investment the Union will not be able to ‘engage anything approaching the passionate mutuality of society, the profound self-identifying of nation, or the rational self-perfecting of state.’\textsuperscript{49} He laments that what could have been the greatest of revolutions has inspired little jubilation in the public mind, especially in the minds of the young. He quotes Burke who said, ‘To make us love our country, our country ought to be lovely’.\textsuperscript{50} Somehow, Allott ponders, Europeans must use the power of ideas to actualise the unique potentiality of Europe so it can play its proper part in the making of a new and better human world.\textsuperscript{51} Steps need to be taken to create something to which the people can identify, attach their loyalty, serve a common purpose, and define their opportunities and responsibilities in relation to the human world in general.\textsuperscript{52}

Theory is an intermediary between consciousness and action. It also bridges the gap between particular ideas and the nature of consciousness itself. It is from consciousness (or mind) that all ideas derive, therefore, theories depend ultimately on a transcendental theory, whether articulated or not, to explain the working of consciousness.\textsuperscript{53} The three levels of theory are mutually interdependent, none being prior to another. However, the inference between each of the levels is not unequivocal or necessary. A practical theory can be supported by a number of pure theories. Uniformity or dissent on a society’s practical or pure theory can vary according to the particular society.\textsuperscript{54}

Similarly, pure theory is likely to be shared as it seeks to transcend the actual and practical social arrangements in providing a non-contingent basis for a society’s existence or institutions. For example, a liberal democracy and communism share a

\textsuperscript{48} Ibid. pp. 226-227.
\textsuperscript{49} Ibid. p. 227.
\textsuperscript{51} Allott, The Health of Nations. Society and Law Beyond the State. p. 228.
\textsuperscript{52} Ibid. pp. 226-227.
\textsuperscript{53} Allott, Eunomia. pp. 35-36.
\textsuperscript{54} Ibid. pp. 36-37.
transcendental theory of rationalism, and could also share aspects of pure theory. A pure theory can be exclusive or particularist if membership is an instance of the pure theory, for example, societies based on religion such as Judaism.\(^{55}\)

A society’s transcendental theory is likely to be shared with other societies. For example, the transcendental theory of logical and ethical rationalism can be shared between pure theories such as: social contract/idealism/natural law/utilitarianism, or historical determinism/materialism/socialism, or constitutionalism/theory of adjudication, giving rise, respectively, to practical theories of liberal democracy, communism, and common-law.\(^{56}\)

5.2 Society: a process of self-creating – pure theory

A society is a process of energetic, dense, complex, and continuous self-creating. It is a self-creating structure-system for the socialising of will and action, and desire and obligation, through the mediation of value. The process of self-creating is the struggle between what is, what is not, and what could be.\(^{57}\) This is a work of consciousness, using imagination and reason to create words, ideas, theories and values. A society is able to organise its words, ideas, theories and values through law. Law moves in a ceaseless reciprocating motion between the particular, to the general, to the universal, and back again. This dialectical character of law reflects the dialectical character of society.\(^{58}\) At the level of pure theory these dialectics of change, or dilemmas, can hypothetically explain the whole of human experience, in which the ambiguous duality of the human condition is lived socially. This duality is evident in the capacity to find opportunities for unlimited self-fulfilment and self-giving in society, as well as the reverse – unlimited opportunities for selfishness, cruelty, and oppression.\(^{59}\) This duality is manifested in a set of creative dilemmas. These are: dilemmas of identity and power; dilemmas of will and order; and the dilemma of becoming

5.2.1 The dilemma of identity: the self and the other

"The dilemma of the self and the other is the dilemma of identity. We are what we are not. We make our identity in relation to all that which is not us."\(^{60}\)
The struggle for survival is not only physical, but also a struggle for identity. Parts of our identity are obtained from the societies to which we belong, and vice versa. Societies do likewise with other societies. The high energy levels of social life are caused by the human search for identity, from the individual to the highest level of the myriad societies that are formed. Through the control of those who control the public willing of a society, the self-preservation of society can take precedence over that of its members, and the members’ lives sacrificed in order to preserve the life of society. Members’ lives can also be sacrificed to preserve the life of another society. For some, the nation-state has become the apotheosis of the self. These societies can order consciousness in the form of theory in such a way as to cause their citizens to accept value-forming theories which have them identify others, not by their humanity, but by their national identity. Sacrifices of human life by the million have been made in the name of such theories. The struggle for identity is represented in words, ideals, theories, and values. Words used as weapons in the struggle include: aboriginal, apartheid, caste, fatherland, imperialism, indigenous, intervention, liberation, marginal, the nation, native, prejudice, self-determination, sovereignty.

5.2.2 The dilemma of power: the one and the many

The struggle between the one and the many is the struggle for power. Power transforms desire, through willing, into action. Society organises that energy in the form of social power. A constant and necessary struggle exists as the individual and society each empowers the other by disempowering itself, and each empowers itself by disempowering the other. A person (who is a collection of systems and structures) and a society (similarly formed) are both one and many. Both are also a multiple unity, integrating subordinate systems. An individual comes to have two identities, generating two kinds of willing and acting – that of the individual, and of the society-member. Society determines the extent and form of the willing and acting of its members. Theories and values act upon these two identities in different ways, creating ethical disparities, often involving a disjunction of theory and value. In the different societies which we belong, or enter, we will and act differently according to the socionomy (or

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61 Ibid. pp. 56-60.
62 Ibid. p. 60.
mode of obligation) of that society. For example, a family or a religion has its own socionomy.  

Society can come to be seen as having its own needs, interests, rights and duties. Reason, imagination, love, and fear can be harnessed in the service of a society. So it is that societies can have relations with each other – seducing, cheating, conspiring, caring, sharing and protecting. In the struggle in the dilemma of the one and the many, powerful words are used as weapons. These include: absolutism, bourgeois, capitalist, collective, constitution, divine right (of kings), due process, free market, general will, human rights.

5.2.3 The dilemma of will: unity of nature, plurality of value

This is the struggle to organise the willing of individual consciousness and the will of the shared consciousness of societies. This involves the formation of values, both individual and social. Throughout history there appears to be an extraordinary uniformity in human experience and subjectivity, and yet there is also an extraordinary division reflected in disputes, conflict, hatred, aggression, murder and devastation. Through the endless process of self-ordering reason, ideas are caught up in an endless process of comparison, modification, and surpassing, integrated in the three coordinates of reason. Consciousness is able to accommodate conflicting ideas as well as generate possibilities. It is by surpassing that human consciousness develops, by opposing itself it creates itself, by affirming, it must be able to deny. New ideas and theories are generated, producing conflicting values, creating conflicting willing and action, varying in degree from disappointing a friend to a world war. In the incorporation of ideas into their identity, societies come to involve acceptance of, and unquestioning allegiance to, certain ideas, which need to be preserved. In not being subject to the coordinates of reason, and therefore not subject to surpassing or negation, they become objects, ceasing to be a reconciliation of desire and obligation, but rather a necessity. The struggle is to determine how much unity of value must be purchased at the expense of how much plurality. Powerful words used in this struggle include: abnormal,
Justice makes a society intrinsically progressive. It fuels society’s engine of progress. Like love, it draws society towards what it could be. All the struggles of society, the perennial dilemmas, are systems of socialising, which means movement in the direction of a society’s possibilities. Justice, as the order of the order of that system, invites society to be constantly better, to become itself, to fulfil itself.

As love, in all its forms, holds out to us the possibility that we might, for a while or forever, become more ourselves in becoming more than ourselves, so justice holds out the permanent possibility to society that it might become more than itself, [that it] might continually surpass its successive selves.67

Social justice is justice taking effect within a society. As humans, our wants exceed our biological needs. Individuals and societies seek to not only survive, but to prosper. By seeking this, human consciousness transforms the whole universe into a realm of value, a realm of justice, the value of values.68

Social justice is all that society is seeking to become…Justice is a permanent revolution. But it is the permanent revolution without which nothing can be permanent.69

Through imagination and reason, consciousness can conceive of both the impossible and the unjust. But to have the power of reason and imagination, it is impossible to escape justice. Justice is unequivocal (it imposes coherence), irreducible (because it is a form of ordering, rather than principles or ideas, hence it needs no explanation), and irrepressible (regardless of acts of injustice, it is impossible to extinguish justice – to be human is to know justice).70

The dilemma of justice and social justice is about words, ideas, theories, and values.

Words used as weapons in the struggle include: balance, commonwealth, cost,
distribution, economy, exchange, exploitation, injustice, just, power, poverty, privilege, punishment, responsibility, revolutionary, security, unequal, unjust, value, wrong.\textsuperscript{71}

5.2.5 The dilemma of becoming: new citizens, old laws

The dilemma of new citizens, old laws is a dilemma of becoming. Regardless of constant change, something persists. There is a stability in change, change in stability. The dilemma is one of conserving and creating, combining the past and the future in the present. Through its struggle with the dilemma of identity, society forms the changing pattern of its identity. Through its struggle with the dilemma of power, society forms the changing pattern of its systematic structure. Through the dilemma of will – its values. Through the dilemma of order – its relationship to the order of all-that-is. Through the dilemma of becoming, society forms the reality-for-itself of all its changing patterns. They are changing because of the combination of all the social processes that a society is subject to, both internal and external. It seeks stability-in-change/change-in-stability by embodying its reality in its structure. It forms the structure it needs to survive.\textsuperscript{72}

Words, ideas, and theories are a by-product of the whole social process. Since they are reality-forming, affecting consciousness in the way they see the whole of reality, they affect the whole social process. An endless cycle of reciprocal action affects society’s work on the perennial dilemmas in identity-forming, power-structuring, value-forming, and self-ordering. These reality structures are relatively permanent, gaining authority, often surrounded by mind-flooding signs, symbols, rituals, and ceremonies, acquiring a power within consciousness through their reaffirmation. They concentrate social energy, including impulsive feelings such as love, loyalty, joy, exaltation, self-preservation, self-abnegation, terror, anxiety, and submission. Transcendence can become possession. This can be imperceptible, depending on the theories, and the self-formed realities of a society, which can be perceived as pathological by other societies.\textsuperscript{73} Allott asks, ‘what if the reality-forming of the international society of the whole human race were to become pathologically possessed by unreality?’\textsuperscript{74} There is no human society beyond international society. Given mass media communications, it is now

\textsuperscript{71} Ibid. p. 88.
\textsuperscript{72} Ibid. pp. 89-90.
\textsuperscript{73} Ibid. pp. 92-93.
\textsuperscript{74} Ibid. p. 93.
possible to unite humanity in a single process of reality-forming – the dangers are as great as the opportunities.

Throughout human history, it has been religion which has had the most powerful effect upon individual and social consciousness. It seeks to integrate all value, to connect an order of the universe with the willing and acting of the individual. Religion is inevitable. It seeks to transcend itself, to provide for consciousness a theory of consciousness. Imagination can do this, but reason cannot. The result is religions, rather than a religion. They can lead to a world of fantasy, and a sort of madness. They can generate the highest social energy possible which can lead to the greatest violence. Religion is likely to dominate all the willing and acting of individuals and whole societies. Humanity could dispense with its many religions only if a single transcendent religion, a religion-of-religion, whose effects were beneficial, were to exist. Allott considers the possibility that such a religion may exist already, but there is little prospect in the likelihood of its actualisation as a universal religion of international society in the foreseeable future. In the meantime, it is for individuals and societies to monitor and improve religions to moderate their effects.\(^{75}\)

Of all the structures created by a society’s struggle with the dilemma of new citizens, old laws, law has the privileged function of mediation of stability and change. Amongst other things such as art, mythology, history, and natural science, religion can affect the content of legal relations, its forms, procedures, and rituals. Morality is law’s privileged co-worker inspiring it to attribute freedom, purpose, and responsibility to persons (both individual and societies) to think in terms of redress and punishment. It shares with law its social energy, concentrating impulsive human feelings into the creating and actualisation of legal relations. In seeking to survive as a structure and a system, law carries a society’s past willing into its future willing. In its struggle with the dilemma of becoming, powerful words are used such as: binding, commandment, constitution, custom, decree, duty, establishment, evidence, faith, justice, law, legislation, moral, obligation, precedent, property responsibility, tradition, true, will.\(^{76}\)

In its struggles with the perennial dilemmas, a society becomes, forming its own unique structure system through this endless activity. International society is the social

\(^{75}\) Ibid. pp. 93-96.

\(^{76}\) Ibid. pp. 114-115.
becoming of five billion human beings and of uncounted subordinate societies. In the non-social, undemocratised, unsocialised international society, self-ordering has taken aberrant forms, with force and threat used as substitutes. A stunted process of interaction between the public realms of states-societies (so-called international relations) conducted through a vestigial will-forming system called diplomacy.  

5.3 Constitutionalism: a process of self-constituting – practical theory

Constitutionalism is law about law, law above law, law before law. The idea of constitutionalism is that all public power is subject to the law, that all public power is delegated by the law, that the exercise of public power is accountable before the law. The revolutionary transformation of international society requires the inclusion of constitutionalism into its theoretical structure, in its pure and practical theories. As international society is becoming more complex, the idea of constitutionalism is a necessary and natural control of the increasing accumulation of public power. The misconceiving of democracy has created a vast international public realm, an unaccountable concentration of social power co-existing with a vast unaccountable concentration of economic power. There is an urgent need for a reconceiving of democracy as a nomocracy, that is, rather than merely the rule of the dēmos or representers, but the rule of nomos, the law. Such a nomocratic democracy would ensure the core-paradoxes of the democratic ideal, freedom under law and self-government, are realised. It would use law to restrain law. In distributing social power, law also sets legal limits of social power.

5.3.1 The interlocking of the ideal, real and legal constitutions.

Constitutionalism is a theory, a mental ordering of the reality within which a society constitutes itself. The constitution of a society is that society’s idea of itself as a structure and system in time and space. A constitution is one and three at the same time. It is simultaneously in three dimensions, three moments, in the form of ideas, practice and law, or the ideal, the real and the legal. All three forms develop in dialectical relation to each other.

77 Ibid. pp. 414-415.
79 Ibid. pp. 342-344.
80 Ibid. p. 150.
In a society’s ideal constitution it constitutes itself in the form of ideas – theory, values, purposes, and ideals. This is where pure theory dominates as society contemplates and articulates what it is, and why, and what it might choose to be. When an ideal constitution is void of theory, values, purposes, or ideals, (or lacks an idea of itself as the EU and international society does) the infrastructure is lacking for a society to be able to construct appropriate institutions and law that enables it to take power over its own future.  

In a society’s real constitution, a society constitutes itself through the actual day-to-day social struggle of actual human beings. It is an interactive exercise of social power – political, social and economic. Since the 15th century, a duality of social self-constituting between the international and national realms has been reflected in practice, in ideas, and in law. The individualising of the individual was accompanied by the individualising of society. The perennial dilemma of the One and the Many is evident in the histories of many societies in the dialectic between individualism and collectivism, with the development of international society as a side process. The latter’s lack of an ideal constitution has resulted in its real constitution producing a ‘diseased social reality, a psychopathic condition which threatens the survival of the human species’. 

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81 Ibid. pp. 344-345.
82 Ibid. p. 88.
A society’s legal constitution attempts to reconcile its ideal and real self-constituting in
the form of law. Society transforms into the specific form of law the endless series of
outcomes which come from the interaction between its ideal and real self-constituting,
and so takes power over its future. This is where practical theory takes a society’s
ideals and makes them into an integral and functional part of day-to-day processes. The
ideal becomes present in the actual.  

Legal reality is a language reality, made from words. Certain words have their own
self-contained life process. Legal relations substantialise abstract generalisations such
as rights, duties, freedoms, powers, liabilities, immunities, disabilities. A legal relation
is an abstracted pattern of potentiality, a matrix, into which persons or situations can be
fitted. It is also a heuristic, connecting aspects of the persons or situations together, for
example, shareholders, contracting parties, government of a state. It is also an
algorithm, a mini-programme of action, which triggers a series of consequences when
people, situations or things fit into a pattern of potentiality. Legal relations, when
activated, modify social reality as behaviour conforms, actualising a potential future,
predetermined by the common interest. The common interest is determined by
legislation; the judicial process interprets the common interest when law is applied to
particular situations. Drawing on the ideal constitution of ideas and values, politics
provides the forum to present conflicting ideas of the common interest which are in
competition with the real constitution.  

For international society, law plays a primary role in the actualising of legal potentiality
in the provision of a legal structure for the economy, public realm legal powers, and
constitutionalism. The question is, what is the legal basis of these structures, in whose
interests are powers attributed, and what is the ultimate source of the authority of law?
The history of societies reveals a common practice of placing the ultimate source of the
authority of law outside the will of the person or persons making the law, for example,
in divine order, sovereignty of law, or natural social order.  

83 Ibid. p. 345.  
84 Ibid. p. 86.  
85 Ibid. p. 87.
The constitution of a society is a permanent process, not a thing. An idea of a society’s self-constituting is projected from the actual and made an ideal, which is incorporated into its theory of itself. This in turn is reintroduced into the actual.\textsuperscript{86}

Constitutionalism is a theory of explanation and justification of a society’s self-constituting. It has taken countless forms in the pure and practical theory of countless different societies.

The idea of constitutionalism is a golden thread running through the better history of the human race, a perennial and universal possibility in humanity’s social self-constituting, a meta-cultural and meta-temporal theoretical potentiality.\textsuperscript{87}

It offers a practically effective idea of the order of a society’s own self-ordering, the dialectic development of social consciousness. It reconciles the ideal with the actual by negating and incorporating its idea of the transcendental. The practice of constitutionalism by a society enables and requires it to self-constitute in conformity with its transcendental idea of itself. Much of a society’s political debate and struggle is in regard to the interpretation and application of its own theory of constitutionalism. During periods of exceptional change and social disorder, societies have been challenged to reconsider the foundations of their social order and transcendental parameters. An integral part of social struggle has been the imposition of competing versions of transcendental ideas of a better society.\textsuperscript{88}

Within the pure theory of a society, constitutionalism articulates what a society says to itself and why and what it might choose to be. It dominates the ideal constituting, being formed by and forming social consciousness, or the public mind. In practical theory, constitutionalism means that a society’s self-transcending ideas and ideals are made part of the functional real and legal self-constituting. Society enacts as practical theory its pure theory of constitutionalism.\textsuperscript{89}

\textsuperscript{86} Ibid. pp. 344-345.
\textsuperscript{87} Ibid. p. 342.
\textsuperscript{88} Ibid. pp. 344-345.
\textsuperscript{89} Ibid. p. 345.
5.3.2 Seven generic constitutional principles

A constitution is a structure-system shared by all societies and yet each society’s constitution is unique. The generic principles are operating principles which make possible a society’s self-creating, socialising, survival, and transformation of ‘its future into its past by its willing and acting in its present-here-and-now.’ The principles integrate social processes into a whole (from the society of the family to the international society of the whole human race), and they systematise the interaction of sub-systems of the constitutional structure. They are essential, as without them, there would be no structure. They are the principles of:

- **integration** – law is part of the total social process. As a consequence, law is integral to the whole activity of consciousness, individual and social. It is part creator and creature of the words, ideas, theories and values of society, and it is a product of the struggles with the perennial dilemmas, and all the other reality-forming processes of society.

- **transformation** – law is dynamic. Legal relations are the product and source of social transformations. Society is a ceaseless becoming which is inherently self-ordering, of which law is an inherent part.

- **delegation** – all legal power is delegated power. Society as delegator acts under the real constitution in application of the legal constitution and in the light of the ideal constitution. The delegator in delegating is also a delegate.

- **the intrinsic limitation of power** – all legal power is limited. To claim legal power is to accept its limits. All legal relations are liable to modify the willing and acting of at least two members of society.

- **the supremacy of law** – all social power is under the law, since the function of law is to transform social power into the particular form of law.

- **the supremacy of the social interest** – all legal power is delegated by society in the social interest and is therefore to be exercised to serve the social interest.
• social responsibility – all social power is accountable. The exercise of all social power, including legal power, is accountable to society which conferred the power.\(^9\)

These are analytical generalisations made necessary by the actual co-ordinate of human reason. And, they are synthetic generalisations intended to make sense of human social experience, judged by the potential coordinate of reason. They are intended as ultimate equations of the constitution of constitutions, the laws of law. The level of international society, where the oppositions of transcendental, pure and practical theories meet, presents a limiting case to the perennial problem of human social self-constituting. A new idea of the idea and ideal of law is needed.\(^9\)

5.3.3 The super-socialisation of sovereignty and democracy’s response

A society integrates the willing and acting of its members. Its words, ideas, theories, values are expressed in its willing and acting. A society is created from its consciousness of its future. As it actualises its self-conceived and self-willed future possibilities in the present through acting, it modifies its consciousness of itself and the consciousness of other societies, and the physical world. By choosing its future in the present, a society is able to do both good and harm. However, there are no safety mechanisms to prevent harmful outcomes of its choosing. Some society’s structure systems fail, or destroy themselves, or oppress and exploit, dehumanise and degrade its members.\(^9\)

There is a constant in the self-constituting of societies which is the practice of practical theories being super-socialised. This enables society to have a theoretical view of itself which transcends the actual. It throws back the theoretical explanation of what is to be explained onto something which is not itself subject to explanation. This allows unlimited acts of inference, deduction, implication, and individualisation. An example of the commonest and oldest form of super-social theory is religion. It allows everything in social life, all the willing and acting, to be connected with the universe in a single structure system which both transcends and subtends. Everything in the here-and-now is integrated and transcends time and space. Religion integrates individual and social consciousness as pure theory which subtends the practical theory of society. The

super-social is the supernatural, and the supernatural is social. All that happens in society becomes an image or shadow or witness of that which is beyond society.93

In the past 500 years, there has been an intense development in the super-socialisation of the theory of society. Religious theory was superseded by super-social theories based on philosophy, evident in intense social, political, and economic development. Lacking a reliable, if imperfect, self-conception, social consciousness had to reconceive itself. It was left to find again its own self-transcendence in the form of theory, to reconstruct its words, theories, and values for all levels of society, including international society, in the midst of real world events. The consciousness legacy of pre-ancient and ancient societies was revived and theoretical materials on constitutions of earlier societies drawn on.94

The essence of what was adopted in the early modern period had remnants of the religious mythological idea of the genesis of society and therefore the origin of authority, or law in society.

The problem of understanding the becoming of a society would be posed as if it were a problem of how its being determines its becoming. To understand the being of a society would be posed as if it were a problem of how a society comes into being. As a consequence, the being of a society came to be seen as super-social in relation to its becoming. To explain the willing of society expressed in its law, it was necessary only to explain the willing of that willing.95

So, how did a society’s will will itself? The will by which society’s will is itself willed came to be known as sovereignty. Sovereignty was conceived as a source of unwilled willing, resulting in the public realm of state society being under the authority of government, rather than the people. The result was that all society was essentially a system of authority, and that authority became the most significant form of society at the expense of all others, including international society. Sovereignty aided the self-creating of the state from nations, empowering government to conduct the social willing and acting of society with the authority of the whole society. Sovereignty enabled the conceptualisation of a systematic social unity, a locus of social authority, and the

93 Ibid. pp. 189-191.
95 Ibid.
separation of individual willing and acting from society’s. Monarchs became the embodiment of the unity of society. Also, republics and city-states institutionalised social willing and acting, again independent from society’s members. Government, whatever form, dominated the struggle of the perennial dilemmas of society in its self-creating. Detrimental effects of that control included alienation, corruption, and tyranny.\textsuperscript{96}

In defence against these threats and monopolisation of power, in the struggles of the perennial dilemmas of identity, power, will, becoming and order, social consciousness generated within itself the pure theory of democracy. Democracy is essentially the surpassing of the idea of sovereignty. It is its dialectical successor. The basis for social power and the idea and fact of authority was transferred to the constitution of society, its very structure system.

The struggle within social consciousness to surpass the idea of sovereignty was the long struggle of constitutionalism. It was the struggle to conceive of society not merely as a structure of actual power (real constitution), but as a reality-forming consciousness of what it is (legal constitution) and of what it might be (ideal constitution).\textsuperscript{97}

In mutual self-creation, in their assertion against the state, the people as citizens embodied themselves as society, and the government embodied itself as the state. The citizens surrendered to government, as government surrendered to the citizens. Democracy, revived from ancient times, took hold in the theory and constitution of societies, including their legal and ideal constitutions. However, its actualisation in the real constitution of societies has historically shown democracy to facilitate the work of corruption and tyranny of the power holders. The exceptional energy and potentialities within a state-society has allowed the power-holders to do exceptional good for themselves, and exceptional harm to others.\textsuperscript{98}

Pulling on ancient ideas, the response by citizens of these societies was the generation of constitutional sovereignty, tempering the supersocialising-through-philosophy of sovereignty. At the level of theory, the idea of the social power of authority was

\textsuperscript{96} Ibid. pp. 199-204.
\textsuperscript{97} Ibid. p. 208.
\textsuperscript{98} Ibid. pp. 208-213.
exchanged for the idea of the social purpose of constitutional sovereignty. Still to be reconciled was how sovereignty subject to a constitution (its generic principles) was compatible with a statally organising society. This was resolved through the exchange of constitutional sovereignty for the paradoxical idea of limited sovereignty through natural law, supersocial to the law of a given society, and natural legal relations (natural equality, natural freedom, and natural rights) which were supersocial to the actual regulations of society. The constitution of constitutions which contained law about law was placed within the ideal constitution. The question remained – sovereignty implied a sovereign – who was that? A supersocial embodiment was sought. The rising economic power of the people required stability in legal relations and commerce and fairer distribution of society’s burdens. Through countless conflicts and bloodshed, the people gradually asserted their social existence, organising themselves internally as a state, against the state-society.99

[Eventually, a] statally organising democracy came to conceive of itself as not merely a social structure-system in which the public realm is subject to the authority of the government, willing and acting under the constitution, deriving its authority from the sovereignty of the people. A democracy recognized itself as, first and foremost, a society, a socializing, a creating of itself through the total social process.100

Over hundreds of years of struggle, democracy has been intimately involved in the struggles of societies in establishing their identity externally with other societies and internally amongst their own members; organising the relationship of power between the one of society and its many members, organising the will and values of each into the will and values of all and vice versa, and has brought stability-in-change by finding ways of reconciling the endless struggle of becoming while maintaining social structure using the constitution, particularly the legal constitution, to carry the will of society from its past to its future and vice versa.101

It has taken much longer for societies to integrate the idea of democracy within the struggle of order (justice and social justice). In the 19th and 20th centuries, it was realised that the pursuit of justice was inherent in democracy. Democracy seeks to

100 Ibid. p. 215.
101 Ibid. pp. 213-216.
make society seek well-being in seeking the well-being of each individual member. Well-being requires a relationship of order, a right relationship of each to all. Social consciousness took another leap in the supersocialising of democracy in the name of social justice. This has integrated the public and private realms into a single universal value. The same justice for all. The same law, the same morality unified in a single order stemming from a single ordering of desire and obligation and physical necessity. Democracy has reached its most complete form of supernaturalisation available to philosophy. Democracy as self-government can be democracy as self-creating; authority as simply the ordering of the social process; government as a way of organising participation of all members of society in the will-forming of society; and sovereignty as authority has evolved into sovereignty as self-willed order in the name of justice with a view to the well-being of society and all its members.

5.4 The alternative route of international society

However, international society chose its own pure theory. It was tempted for a while to conceive of itself as a society but chose instead to regard itself as the state externalised, undemocratised and unsocialised. It has remained an unsocial society, separate from its subordinate societies, denying the idea and ideal of democratisation to actualise, through legal relations, the self-willing of the peoples to bring about the survival and prospering of the whole human race. It struggled with the insoluble dilemmas of all societies – itself as one in relation to the other (the new vast and complex world); as one (a total system of social power) in relation to the many of the disintegrating world; as a unity of nature in the face of an uncontrollable plurality of value; as justice in a physical world being supernaturalised by science; as social justice in a social world containing levels of energy and forms of social power which overwhelmed the possibilities of existing legal relations and ideas. These struggles were faced in circumstances of exceptional urgency, intricacy, and danger. The pure theoretical options included a natural human society (until the mid 18th century, referred to mostly as the Spanish tradition – Victoria, Suarez); an international state of nature (pre-eminent in the 16th and 17th centuries until this day, referred to as the Hobbesian tradition); statal nations under natural law (a resumption of pre-modern traditions, in the 18th century through the writing of Grotius, referred to as the Grotian tradition); and statal

103 Ibid. p. 240.
nations under customary law (established in the 18th century, derivative of Grotius, referred to as the Vattel tradition. As a pure theory, the Vattel tradition offers an explanation of the whole nature of international society and the human social condition. It also generates practical theories for the whole human race. It is mere words, ideas, theory, and values. Yet, war, peace, human happiness and misery, wealth and want, lives and life have depended on them for more than two centuries. The theory’s elements include: the state turned inside out; externalised sovereignty; interstatal society as interacting public realms; diplomacy and war as the total social process; the external public arena in the internal public realm; internal society and interstatal ‘unsociety’s’ separate worlds; internal social processes not part of an international social process; a non-societal international private realm; separate development of the interstate social process; differential internal social development; undeveloped interstatal sovereignty; sovereignty undemocratised; sovereignty unsocialised; interstatal ‘unsociety’ as a realm of freedom; interstatal law as the willing of states; and the amoralisation of interstatal ‘unsociety’. This Vattel tradition and reality was welcomed by the ruling classes of Europe and the political and administrative sections of those ruling classes who could speak, compete, conflict with each, safe in their own self-contained state systems.

It is a speculation of the most profound human interest to consider what the human world would have become if international society, in the eighteenth century, had not chosen the Vattel tradition but, instead, had forged a Rousseau-Kant tradition, and, in the nineteenth and twentieth centuries, had joined in the revolutionary development of national societies, if international society had had its 1789 and its 1917. It is a speculation which is not merely of intellectual and historical interest. It is actual and urgent.

5.5 The emerging universal legal system for a society of international intergovernment

The two separate mind-worlds of society and international ‘pre-society’, the internal and the external, have generated two conceptions of morality, law, justice, public order, public administration, social organisation. Diplomats and international lawyers have

106 Ibid. p. 249.
been tasked to build bridges between these two worlds drawing on what Allott calls a range of ‘ragbag’ ideas to redress the ideological poverty of the Vattelian worldview. These ideas have included naïve constitutional extrapolism (institutions which are effective nationally have been assumed to be effective internationally); ‘enlightened’ economic self-interest (we will probably profit, perhaps disproportionately, from maximising the general wealth of nations); and semiotic pragmatism (talk about international law or international morality is a good thing if it causes other people to modify their behaviour in useful ways).\textsuperscript{107}

In recent decades, the burgeoning of trans-national transactions (economic, social, and cultural) has necessitated the interaction of national legal systems. These systems now overlap in a complex network of national-law legal relations. National constitutional systems have become internationalised with national executive branches of governments regulating collectively every area of interaction. The intensification of international intergovernment has created two forms of international law. The old international law system, with its focus on the conflictual behaviour between governments, territorial limits, and dispute resolution, now sits beside a new international law focused on universal legislation.\textsuperscript{108}

A driver of this ‘universalisation’ has been the rapid spread of democracy-capitalism. The constitutional dyad of democracy-capitalism is one of mutual dependency, providing law and legitimacy (essentially through the efficiency it affords), respectively. Despite their mutual and ultimate high value of freedom, both democracy and capitalism require enormous volumes of law and public administration. This has the dual effect of facilitating and abridging private freedom. This is also the case at the international level. In the triumphalism of the 1990s after the end of the Cold War, it appeared that an intensified international economic, capitalist order would generate possible harbingers of normative principles of democracy (facilitating and abridging international public realm freedom) embodied in rules of general international law. Issues formerly only of national concern, such as human rights and environmental issues, became of international concern. However, it was hardly noticed that advanced capitalism’s rhetoric of freedom and its naturalistic self-understanding is a wholly


\textsuperscript{108} Ibid. pp. 60-61.
artificial form of social system. The expansion of democracy-capitalism has made human rights a strictly practical matter.\textsuperscript{109}

It is also becoming apparent that democracy does not provide a satisfactory globalisable political model. Transfer of age-old class patterns from national society are being transposed to form an emerging international aristocracy, focused on its own self-interests and self-preservation. The WTO is perceived as collective economic imperialism, and the EU and OECD as secretive self-interested oligarchy. The issue of legitimacy of these and other international institutions and the system of international intergovernment presents a fundamental challenge to world social order.\textsuperscript{110}

Governmental oligarchy has reproduced an international oligarchy of oligarchies, unbounded by the usual post-revolutionary constraints, including the rule of law.\textsuperscript{111} The co-existence of governments and intergovernmental organisations, and institutionalised self-appointed, self-legitimating representations of individual interests (a supposed civil society), condemns international society to a pre-revolutionary or counter-revolutionary system. Revolutionary transformation has historically involved the taking of public power by the people, not just institutionally, but also in a conscious form. Power became regarded as a delegation from the people, granted and controlled by the rule of law. Realising a similar transformation at the international level is the most formidable of challenges for the 21st century.\textsuperscript{112}

5.6 A ‘true’ international society and law

Allott argues the old regime (and the current emerging universal system) is remedied by the power of ideas rather than the power of arms. The remedy is conceptual. Allott’s views the current international system as nothing other than a structure of ideas which has been made nowhere else than in the human mind. It is therefore possible to remake the international system by changing our ideas. He argues that if our consciousness becomes free from its self-subjection, self-disabling, and self-destroying we will be able to remake human society – one which does not abolish national societies, but embraces and completes them. In a ‘true’ international society, our consciousness, sympathy, and


\textsuperscript{110} Allott, \textit{Eunomia}. pp. xix-xx.

\textsuperscript{111} Allott, \textit{Towards the International Rule of Law: Essays in Integrated Constitutional Theory}. p. 16.

\textsuperscript{112} Allott, \textit{Eunomia}. pp. xxi-xxii.
moral and social responsibility will be toward the whole of humanity, and the physical world. There will be no political or physical boundaries.  

This new paradigm has three fundamental characteristics: rather than a system of aggregation of state interest, it is a system for disaggregating the common interest of all humanity; it contains all legal phenomena, national and international, and non-governmental trans-national events and transactions; and it implies and requires an idea of society with its own self-consciousness, with its own theories, values, and purposes, able to choose its future, including its own politics.

Allott’s view of a ‘true’ international society and its law is summarised by the following principles which are in stark contrast to the old regime:

- It is the society of the whole human race and the society of all societies. It, and international law, embody the social purposes humanity chooses for itself. People, as well as all subordinate societies, organisations and state-societies, are members of it.

- It has a constitution determining the creation and distribution of social power throughout the world. It is dynamic, being constantly reformed by ideas and aspirations of humanity.

- State-societies and intergovernmental organisations are organs of the constitution with functions and powers delegated by international society under the international constitution and international law.

- In this ‘true’ society, international law is like all law – inherently dynamic ‘developing structurally and systematically, developing substantively, flowing into new areas, embodying and responding to the social development of the world’. This is already evident in new areas include the law of human rights, environment, natural resources, the sea, space, telecommunications, intellectual property, economic, and international public law.

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114 Ibid. p. 315.
115 Ibid. p. 421.
The responsibility of state-societies goes beyond legal matters – their primary responsibility is to ensure power is not abused. All governments are socially and legally responsible for the way in which they exercise the powers delegated to them by international society. This responsibility is also true for all individuals, societies, and organisations which exercise social power affecting human survival and prospering. Every international wrong becomes a wrong against the whole of international society. Willing and acting especially of states and international organisations become the concern of every subordinate society and human being.

5.7 An integrated constitutional theory

Integrated constitutional theory is the social philosophy of the human future. It is a necessary part of the constituting of humanity as a society. It is the social philosophy of society as a universal idea and of particular societies as instances of the universal idea.

5.8 Four dimensions of integration

An integrated constitutional theory is integrated on four dimensions:

5.8.1 Horizontal:
- the human world is many worlds. An integrated constitutionalism sees a universal society as being actualised in an infinite number of societies, from the family through to the society of humanity. Therefore, integrated constitutional theory’s task is to seek to reconcile conceptually the universal idea of society with the infinite particularity of societies.

5.8.2 Vertical:
- the human world is a law world. The co-existence of societies requires regulation. This implies subjection to an ordering system which supersedes the self-determining of particular societies and individuals. Therefore, the task is to uncover the forms and the functions of human self-regulating.

5.8.3 Intellectual:
- the human world is one world. It reflects the unity of the human mind that makes it, and the unity of the public minds of the societies that makes it. Fields

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117 Allott, Eunomia. p. 337.
of study have disaggregated this unity and isolated areas of knowledge, for example, the physical sciences, philosophy, psychology, historiography, anthropology, economics, and sociology. The task is to seek to uncover the mental unity of the human world.

5.8.4 Temporal:

- the human world is a changing world, a constant becoming, not merely a being. As a living organism, it shares the essential character of all living organisms. The task is to find the universal self-constituting potentiality of all human societies in order to understand the self-constituting potentiality of any particular human society. Integrated constitutional theory is rooted in the history of the human world, and the histories of human worlds, because the past of living organisms determines the possibilities of their future.\textsuperscript{118}

Without these processes of integration the globalising of social phenomena will take place in a philosophical vacuum ‘…left to develop, if at all, in a waste land of rational and ethical nihilism.’\textsuperscript{119} This is most evident in the development of international law, particularly in regard to the rationalisation of war.

5.9 The abolition of war as a legal category

Traditional international law is perceived as a product of conflicting state interests. As states inhabit a supposed pre-societal state of nature, the resolution of that conflict is resolved first by ‘the great game’ of diplomacy, and if that fails, by ‘the ultimate reason of kings’, armed force. It was Grotius who developed the idea that war is a law-defined and law-regulated institution, and that there can be a law of war, the law of mass murder and mass destruction in the public interest. He also conflated the war-makers and the law-makers, enabling the international jurist, ‘like a crooked lawyer ministering to the masters of organised crime, [to be] paid to cover with a cloak of legality the crime of war which is always a crime against humanity’\textsuperscript{120}

In the philosophical vacuum of a ‘true’ theory of international society, war has continued to flourish regardless of the mass-production of treaties and international security systems, and the law of war (now called international humanitarian law).


\textsuperscript{119} Ibid. p. 468.

\textsuperscript{120} Ibid. p. 437.
Every negation is an affirmation. If we may reverse Spinoza’s famous formula in this way, we may see that every legal rule and system apparently constraining the making and conduct of war is an affirmation of the legality of war.  

Allott asks how it is possible to find the common interest of the people in behaviour that is nothing other than mass murder and mass destruction of property. Law is not only a form of evil; it is a form of madness. In the lead up to war, ‘the ritual agonistic dialogue which immediately precedes the descent into the mass murder and mass destruction known as war – the atmosphere is thick with the sickly smell of obligation-talk’.

A miasma of obligation, of morality, legality and honour, is accepted by both sides, knowing it will sit in judgement of their actions. However, they also know that each side makes contradicting judgements of the situation. They also know that war will not resolve their obligations. The only judge will be [or used to be] history, never final or binding. Such rationalisation could not be possible in a world of integrated constitutionalism with the idea of a universal society, and the recognition of all societies and their members as forming the whole of humanity; or the regulation of those societies as being subject to a hierarchy of laws; or the recognition of the unity of the human mind and its aspirations and cumulative knowledge; or the recognition of the validity of all each society’s past, present and potential future.

Void of such philosophy, Allott suggests that in the final analysis, the formal cause of war is the idea of war contained within an infinitely complex, seamless web of significance which creates assumptions, expectations, understandings and conventions.

[In] the immediate ritualistic prelude to the moment of war, we have seen that the final cause of war is unknowable (motiveless motivations), and that the efficient cause of war is infinite (causeless causation). We may add that the material cause of war is the weapons of war – no weapons of war, no war.

Allott looks for a connection between a madness in the flow of consciousness between a society and its members, mediated through those who perform part of war’s efficient

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121 Ibid. p. 437.
122 Ibid. p. 426.
123 Ibid. p. 426.
124 Allott borrows the term formal cause from the Aristotelian analysis of causation and the way in which we conceive of the potentiality of a situation or thing. Ibid. p. 440.
125 Again, an Aristotelian analysis of causation, referring to the process of change. Ibid. p. 441.
126 Ibid. pp. 441-442.
cause. In the psychosis of war, a diseased reality can become rational and the only option, disguised in the superficial rationality of the general who calculates the best way to kill and destroy.

The psychosis of war is a chronic disturbance of mental integration, as the Other becomes an ‘enemy’, and the Self and the Other mutually recognise each other in the deep-structural category of sacrifice. The potential becomes actual in self-surrender to a chaotic frenzy of self-sacrifice. The life-force becomes a death-force, wild and indiscriminate. We are always free to choose not to surrender to the worst products of unconscious cerebration, to resist the entropic temptation of the irrational. The problem is that, in war, the irrational is actual and the actual seems rational. The sleep of reason produces the nightmare of war.\textsuperscript{127}

The urge to war of the war-makers does not appear to be diminished by the forces of globalisation. But we, the people of the world, the spectators of the game of war-making, are now moving centre stage with ideals of justice and social justice. Allott declares that we, as the source of all public-realm power, should feel as entitled as any government to determine the legal basis of a future without war. He submits a people’s treaty titled Treaty on the Elimination of War. Also submitted are a Treaty on the Constituting of International Society and a Treaty on the Elimination of Force in International Society.\textsuperscript{128}

As issues of global resources begin to dominate the international agenda, it is possible that the human common interest will begin to transcend traditional games of diplomatic self-interest. The ultimate challenge is to have accepted the idea that war, as a negation of the human common interest, cannot continue as a legal category.\textsuperscript{129}

The time has come for humanity to begin to cure itself of its addiction to the wickedness of war, as it cured itself from other seemingly natural and inevitable social evils.\textsuperscript{130}

\begin{flushright}
\textsuperscript{127} Ibid. pp. 445-446.
\textsuperscript{128} Ibid. pp. 447-448. See Appendices 1, 2, and 3.
\textsuperscript{129} Ibid. p. 16.
\textsuperscript{130} Ibid. p. 17.
\end{flushright}
5.10 The tool of actualisation – a revolution of the mind

Allott’s behest is, in order to actualise an integrated constitutionalism, we, the people, have to take power over our self-constituting. We have to break the mould and take power off the people who have dominated the formation of social reality. We must use the ordering power of the human mind to reorder the disorder. We have a permanent revolutionary possibility to revolutionise the mind. We can choose the human future.

There could have been another concept of international law. There could be another concept of international law. There can be a conception of law which transcends the frontiers between national legal systems, which sees all legal systems as participating in an international legal system, and which allows international law, as so reconceived, to play the wonderfully creative functions of law in the self-constituting of all forms of society from the society of the family to the society of the whole human race, serving the common interest of all-humanity.\(^\text{131}\)

The treaties drafted by Allott articulate that international society is the society of all societies of which all human beings and subordinate societies are members; international law embodies the common interest of all-humanity; it confers all public power; the ideals of justice and social justice are applicable to everyone; international law respects and protects individuals, cultural diversity and bio-diversity, the natural world, and promotes mutual respect and affection; the practice of war, the mass murder and maiming of human beings and the mass destruction of property is eliminated; the practices of foreign policy and diplomacy has ceased, placing holders of public power subject to an overriding obligation under international law to do everything possible to reconcile the particular with the common interest of international society; the costs of war are not borne by the people; and the use of military, political or economic power by a government against another government is eliminated. Surprisingly, Allott admits that these treaties are both serious and a joke. While there is a possibility that humanity could conclude such treaties and solve the problem of war, he challenges the reader to experience the disconnect after considering the problem of war, the response offered in the treaties, and our present reality. The concluding of treaties is current standard

practice in the face of the problem of war – it is left to the reader to decide on their efficacy.\textsuperscript{132}

To surmount these practices, Allott argues that our capacity to have reflexive thought (to think about our thinking) means we can go beyond thinking-as-behaviour. We can form ideas about human self-improving and also of human self-harming. As both individuals and societies, we can choose to do good or evil by choosing to behave in accordance with our ideas. By reflecting on the past, a society can choose the course of its future. The idealising capacity of the human mind allows us to make a better future than our past. Through our capacity of abstraction and generalisation, we are also able to imagine a metaphysics of the human world. We can consider ‘society’ and ‘law’ as generalisations and as particulars. We can say that all societies are the same, and at the same time that each society is unique. We can say all legal systems are the same and at the same time, all are unique. We are able to distinguish between the ideal and real, essence and existence, form and substance, the universal and particular, potential and actual, mind and matter, body and soul. The common thread is that we are able to imagine a second reality, a metaphysical universal reality behind the infinite particularities of the world. Allott claims philosophy is the ultimate reflexive and universalising activity of the human mind. Philosophy is the history of the human mind’s self-evolving through self-contemplation. In being able to think of itself as something separate from its thinking, the mind is able to transcend itself. It is an instrument of the mind’s idealising capacity, assisting in the choice of a better human future or in its self-harming.\textsuperscript{133}

The routine moral compromise to injustice in our own societies has been extrapolated to the international world. A lazy naturalism reassures us that the social evil by which millions suffer is natural and inevitable. And a lazy individualism transfers the primary responsibility for improving society on to the holders of public power – the same people who have been responsible for causing so much of the social evil suffered by the peoples of the world. This pragmatic moral compromise burdens us with a tension between the actual and the ineradicable idea of the ideal. This, Allott argues, is the first


challenge of the 21st century – the reduction of the world wide social evil and the first step is the universalising of the idea of the ideal.\(^{134}\)

5.11 Summary

Allott’s social idealism is radical. If actualised, it would transform the world as we know it. It is a grand scheme on a grand scale and for its actualisation requires transformation of our minds. History shows many examples of revolutionary change, in societies’ real constitutions, as well as in their ideal self-constituting.\(^{135}\) These have been revolutions of the mind, moments of human enlightenment when the actuality and potentiality of societies have been transformed. Allott claims there is no reason why this should not happen again, and every reason why it should.\(^{136}\)

The geometer has done his work. The transcendental and pure theory for a new international society and law has been developed in *Eunomia* and provide the framework for the practical theory developed in *The Health of Nations*. But, a ‘working set’ must now go on the drawing board. More detailed carpenters’ plans are needed – a roadmap on how to revolutionise the mind. Ideas are needed to contribute to the development of the social philosophy of an integrated constitutionalism; ideas that facilitate the conceptualisation of a universal society, yet recognise and sustain the infinite sub-societies; ideas that regulate co-existence through law that recognises all the members of the societies that constitute universal society; ideas that draw on the vast knowledge which has been acquired but limited by its disaggregation; ideas that integrate the experience of humanity’s past and uses it as a stimulus for change to develop the human species’ full potentiality. This would include the potential to choose to eliminate war and cruelties and mindless destruction of the human and natural world.

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\(^{134}\) Allott, *Eunomia*. p. xxiii.

\(^{135}\) These include the Meiji revolution in Japan (1868-9), the October Revolution Russia (1917), and the Chinese Revolution (1949). Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory*. p. 479.

6 EVALUATION OF ALLOTT’S THEORY

6.1 The evaluation: Does Allott’s theory provide an adequate explanation of and solution for international law’s ineffectiveness?

This evaluation will be guided by the use of criteria developed by Buchanan and Golove which endeavours to ascertain if Allott’s theory has the necessary elements of a normative theory of international law.\(^1\) According to Buchanan and Golove, the fundamental structure of a normative theory of international law, as ideal theory, ought to:

- establish the goal of the institution of international law and the fundamental moral values it ought to serve;
- articulate the moral reasons for supporting the institution of international law as a means of achieving the goals or serving those values;
- provide a specification of the conditions under which the international legal system would be legitimate/justified;
- provide a statement of and justification for fundamental substantive principles; and
- specify fundamental principles of transnational justice – that is, rights and duties between members of a state, or the government and its members, that ought to be recognised by international law as being universal or applicable to all states, as well as international justice principles.

For the latter, these principles include, in addition to states, the rights and obligations of global corporations, non-governmental organisations such as environmental and human rights groups, international financial institutions, and trade regimes, as well as the permissibility and/or obligatoriness of intervention across state borders in support of principles of transnational justice.\(^2\)

The predominant view of normative theories of international law as ideal theory has been the goal of peace among states (although this goal can still be compatible with violence within states). Alternative goals for theories have been aimed at justice as a

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\(^1\) Buchanan and Golove, "Philosophy of International Law."
\(^2\) Ibid. pp. 881-882.
legitimate aim, as long as it does not undermine peace. More ambitious moral theories, such as Allott’s, aim at the goal of peace *between* and *within* states, *and* justice.\(^3\) As an ideal theory, Allott’s social idealism specifies the goal of the institution of international law as a system for disaggregating the common interest of all-humanity. It would contain all legal phenomena, national and international, and non-governmental, transnational events and transactions. This requires an idea of a society with its own self-consciousness, with its own theories, values, and purposes, able to choose its future, including its own politics. There is no reason why the social past of all-humanity should also be its future. There is the possibility of creating a different future to the past.\(^4\) There is no prescription of a utopia or denouement, but while aspiring towards goals of peace and justice, a ‘true’ international society also accommodates pluralities and a state of constant flux as tensions between ideals, law and reality are resolved, revised and re-resolved. The theory does claim certain ultimate and universal ideals for an imaginary future. These include the ever-evolving international rule of law, an international constitutionalism, and a written international constitution.

The moral reasons for supporting the institution of international law are for the actualisation of the social purposes which humanity chooses for itself. These social purposes are realised in the legal and non-legal social power which would be exercised with a view to human survival and prospering. According to Allott, our current social ideals and possibilities are trapped and stifled by mental structures which divide and disable the human world. In the ‘new world’, our consciousness would extend throughout the whole world, beyond political frontiers, and our sympathy would extend to the whole of humanity, and our moral and social responsibility to the whole of humanity, and the physical world.\(^5\)

A common objection against such universalist theories is that they do not accommodate diversity. Allott assumes that some form of consensus would be reached at the international level. However, it is quite probable that some states or groups will not agree on the level of transcendental or pure theory, let alone practical theory. In Rawls’ view, it is not morally justifiable to force others to comply if they have their own conception of justice. In fact, in Rawls’ theory, non-liberal societies are able to reject

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\(^3\) Ibid. p. 882.
substantive liberal principles and even include principles that liberal societies would reject. The lack of a globally shared core conception of justice implies that the content of international law must be minimal, contrary to Allott’s integrated international constitutionalism. Such an argument could be countered by claiming that while it is evident there are differences, there does appear to be a growing global consensus on the recognition of equality and freedom, as articulated in the Universal Declaration of Human Rights (UDHR), as well as other principles, practices, and institutions which are developing the content and reach of human rights norms. Allott’s principles espouse a cosmopolitan ethos, acknowledging the diversity of the world’s multifarious societies’ practical theories. Allott’s aspiration is that his work would initiate a cooperative effort, bringing together many different traditions and perspectives from every part of the world to create a society of the whole human race, a society of societies, and an international law that embodies the social purposes which humanity chooses for itself.

The conditions under which the international legal system would be considered legitimate would see the presence of a social structure which includes a ‘sovereign’ in the form of an integrated constitutionalism, to legislate, to execute, and to adjudicate, and processes of democratisation and socialisation to ensure the interests of humanity are integrated into international law. By the integration of law on all horizons, the total social process would be able to contribute to its development. The delegation of power would flow from the international to the national, through the process of democracy.

The fundamental substantive principles of Allott’s social idealism and international constitutionalism are explicated in Chapter 5. They are summarised in three treaties: the Treaty on the Constituting of International Society, the Treaty on the Elimination of War, and the Treaty on the Elimination of Force in International Society.

Principles of transnational justice would permeate the entire system of both international and transnational laws. All governments, entities, and individuals who exercise social power affecting human survival and prospering would be socially and legally responsible for the way they exercise the powers delegated to them by international society. In regard to guidelines on the permissibility of intervention, Allott is (predictably) not specific. However, the prohibition on the use of force would require

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7 See Chapter 3, Section 3.2
8 See Appendices 1, 2, and 3.
a total reconstruction of the idea of what constitutes intervention. In a world where all legal authority is delegated from international society, a reconstruction of the concept could be feasible. The range of mechanisms to enforce conformity with international standards could be comprehensive, consistent, and potentially more effective than the current threat or use of force.

6.2 Does Allott’s theory provide practical guidance: is it a feasible, accessible and morally accessible theory?

According to Buchanan and Golove, the task of ideal theory is to also set moral targets for the future that provide practical guidance for action here and now, as well as to provide standards for morally evaluating current international law and legal processes. They have defined three measurements by which to evaluate if an ideal theory provides practical guidance. These are feasibility, accessibility, and moral accessibility.

An ideal theory is feasible if, and only if, the effective implementation of its principles is compatible with human psychology, the laws of nature, and the limits of natural resources available to human beings. Clearly, a theory that failed to meet the requirement of feasibility would be of little or no practical value.

A theory is accessible if it is not only feasible but also if there is a practicable route from where we are now to at least a reasonable approximation of the state of affairs that satisfies its principles.

In terms of moral accessibility, other things being equal, a theory should not only specify an ideal state of affairs that can be reached from where we are (though perhaps only after a laborious and extended process of change), but also the transition from where we are to the ideal state of affairs should be achievable without unacceptable moral costs.

6.3 Feasibility

In terms of compatibility with human psychology, laws of nature, and the limits of natural resources, Allott offers an unashamedly idealist social philosophy in the primary

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9 Buchanan and Golove, "Philosophy of International Law." p. 883. Buchanan and Golove acknowledge the distinction between feasibility and accessibility is owed to Joshua Cohen in ft. 33, p. 884.
10 Ibid. p. 883.
11 Ibid. p. 883.
12 Ibid. p. 884.
philosophical sense that it assumes the capacity of the human mind to find within itself universal ideas about the self-constituting of human society; in a secondary philosophical sense in that it supposes the capacity of the human mind to create a universe-for-itself in the form of ideas stored in social consciousness; and in a third sense, in that it supposes that the human mind can find within itself the idea of a better human future and can choose to make a better human future actual. 13

In response to this idealism, in his review of Health of Nations, David Fidler expresses frustration with Allott’s ‘philosophical punditry and his unrelenting idealism’ arguing that what the philosopher-mechanic (lawyer) needs is substance and process.14 Similarly, Carty comments in his review of Eunomia:

Allott’s model of idealist subjectivism dwarfs the ethical significance of the actual striving of the State governments of international society. There is a need to escape from the idealist trap of ethical perfectionism into the concrete struggle for ethical achievement. 15

Allott would argue that the ideas he proposes have already been proven in national societies. The challenge is to imagine them at the international level, to contemplate that what currently exists in the international realm is not natural and inevitable, and that it can be transcended through new ideas and ideals. This, he says, demands new thinking at the level of the whole human species, and of a society of all human beings.16

A criticism of Allott’s work has been that this form of philosophising that is no longer possible at the end of the 20th century.17 This was discussed in Chapter 4, Section 5, where Allott claims that, in the 20th century, philosophy’s own self-doubting came to be its dominant truth-claim. As philosophy makes the universe in a form that reflects its own functioning, its self-doubting made it no longer able to claim to reveal the ‘real’ reality of the universe. Thus, philosophy proved its own impossibility. Allott finds it ironic that it was the 20th century which spawned this idea of ‘the end of philosophy’, claiming the triumph of pragmatism. It was also the century of big social ideas, at the

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13 Allott, Eunomia. p. xxxi.
16 Allott, The Health of Nations. Society and Law Beyond the State. p. 61, p. 89.
cost of unspeakable human suffering, including the Somme, Verdun, Auschwitz, Hiroshima, the Gulag, and Rwanda. Allott laments that never was the power to rise above the self-destructive power of the human mind needed so much.\textsuperscript{18}

However, there may evidence that the process of transformation has already begun. The past decade has seen increasing ‘infiltration’ of democracy in the international public realm, exposing greed, corruption, fraud, cronyism, fundamentalism, incompetence, injustice, and immorality. ‘The people’ are demanding a structure of order in the global public realm. They seek the same justice for all; that all states and public officials are subject to the same law; and that the same morality holds in the international realm as it does in domestic systems (as imperfect as that is). Democracy as self-government at the national level is infiltrating areas formerly confined to external statal relations conducted through diplomacy. There is no reason to think these trends will not continue to increasingly reign in imbalances in public power and to shift the international realm towards a democratised international society.

This optimism that change is possible from within non-ideal conditions is an assumption stated at the beginning of this thesis, that is, that the process for changing minds can be incremental rather than on a revolutionary basis. In regard to the primacy of ideas and their actualisation, Allott claims, that international criminal law cannot come prior to the idea of the international rule of law and, the international rule of law cannot precede, ‘the coming-to-consciousness of the idea of human sociality, the species-consciousness of the human species.’\textsuperscript{19} He argues that social evil can only be overcome by a higher moral and social order that negates disorder and transcends the apparent necessity of the actual. This is realised by our moral awareness. This allows us to will a better world by forming an idea of a better world in contrast to the disorder.\textsuperscript{20} The idea of first having to realise the international rule of law and a universal consciousness of human sociality, before introducing a system of international criminal law, is contestable. While crude, and located within an inchoate social structure with frequent evidence of the lack of the rule of law, the recent developments in international criminal law suggest that progress is being made toward ideals of international justice. Using Allott’s own theory which suggests the real, ideal and legal

\textsuperscript{18} Allott, \textit{Eunomia}. pp. xxviii-xxix
\textsuperscript{19} Allott, \textit{The Health of Nations. Society and Law Beyond the State}. p. 66.
\textsuperscript{20} Ibid. p. 68.
dimensions of a society’s self-constituting are interlocking, the practice of international
criminal law at this point in history is critical to enabling a progression towards the
ideals. The reconciling of international society’s ideal constitution which, although
rudimentary in their development in Allott’s view, includes values of peace, justice,
ending of impunity, deterrence, and complementarity, and its real constitution (the
interactive exercise of political, social and economic power, for example, in the
formation of the ICC, its purpose, jurisdiction, and funding), is evident in the current
form of its legal constitution (the actual legal codification in the Rome Statute of the
ICC). This idea of progressive development towards Allott’s ideals, rather than
revolution, will be taken up further below. This incrementalism is taken up further
below in Section 6.6.

Briefly returning to the evaluative criteria, in terms of the requirement of compatibility
with the limits of natural resources, the theory advocates respect of the natural world.
The proposed Treaty on the Constituting of International Society specifies the
protection and enhancement of the natural world which shall be regarded as a common
interest of international society.  

6.4 Accessibility

In regard to the theory’s accessibility and its provision for a practicable route from
where we are now to at least a reasonable approximation of the state of affairs that
satisfies its principles, Allott has deliberately not provided a roadmap. He says: ‘I am
not concerned about how we get from here to there because that will happen anyway.
In 1789 law and society were reconceived, and it can happen again.’ Rather, he only
specifies new ideals. His claim that theory is itself a form of practice makes it
(unashamedly) fall short of offering practical ways to realise the ideals. Allott believes
that people who talk theory are the most practical people in the world. The human
future is always an imaginary potentiality.

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21 Drawn from the overview of the Rome Statute of the International Criminal Court on the website of the
22 See Appendix 2, Article 9, Treaty on the Constituting of International Society.
Another World: 'This Cannot Be How the World Was Meant to Be'." p. 269.
24 Ibid. p. 277.
The road from the ideal to the actual lies, not merely in institutional novelties, or programmes and blue-prints of social change, but also, and primarily, in a change of mind. A revolution in society is also and, above all, a revolution in the mind. Allott predicts that institutions will inevitably take over ideals and corrupt them to the point where reform is no longer an option. He argues:

[This] is why revolutions occur, when all *ancien régimes* come to seem systems for preserving injustice, above all social injustice. Then a break occurs and people find they just cannot tinker any longer. That is why I keep using the word ‘revolution.’

This strategy has engendered much criticism of Allott’s work. The April, 2005, issue of the *European Journal of International Law* featured Allott’s work in the form of abridged transcripts of a symposium held in honour of his retirement. These revealed the highest regard, and frustration, with Allott’s work. Of particular resonance is James Cameron’s vexation with Allott’s work. Cameron asks:

What do you do about it? What acts do you perform when consciousness is being changed and you can re-imagine the world? How do you act upon the vision you might have of a better world, of its becoming? The becoming requires a series of actions. When you try to make a difference, you find yourself working within the very systems that create this paradox which you have identified, which is the good life that contains the bad as well…International law in the *Eunomian* mode cannot be left to the few. You need to find movement or action to attach to the consciousness that ideas may form.

At the same symposium, John Tasioulas pointed out that ‘...*The Republic* contains a great deal of high theory, metaphysics, value theory, but it also contains specific proposals for institutions and practices.

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26 Ibid. p. xxxiii.  
28 Ibid. p. 263.  
29 Ibid. p. 290.
Allott’s resistance to institutional considerations, and to fora for inter-subjective dialogue, are puzzling and frustrating, particularly given his emphasis on the power of ideas and words, reflexive thinking, and the desire for the inclusion of all people and social processes in the self-constituting of international society. At first, it is unclear how his project for the regeneration of philosophy, or international philosophy, as he calls it, would be implemented without these processes as he seeks to bring together minds from all traditions and cultures to explore the connection between the self-constituting of the individual and the public mind, and to form new ideals for the future which empowers us to overcome social evil.  

Andrew Hurrell enquired of Allott:

‘…accepting that because we have conversations we have voices, how and who are those conversations and voices? You do not like a Habermasian idea of reasonably free-floating voices, but you certainly do not like the idea of hollow people in hollow institutions either. And if you do not like either of those things, where does the process actually lead? That takes us back to the idea that process is contaminated by power, which is self-evidently right. But if you cannot try and solve that contamination through either of those established roads, where are we to go?’

Allott’s response reveals what could be interpreted as an elitist position. He appeals to the idea of a level of ‘thinking on behalf of the human race’ by a select few:

A.N. Whitehead said that all philosophy is footnotes on Plato, and I added a small sentence to his footnote to the effect that ‘some footnotes are better than others’. That is really my point. The idea of the conversation that produces truth is disastrous. It depends on who is taking part in the conversation and the American view, which I regard Habermas as having sold out to, is the view that truth emerges from reasonable discussion. Well, that is the end of the world for me…

Another comment by Allott suggests that he looks to a particular class of thinkers (philosophers) to do the high level thinking, reminiscent of Aristotle’s argument that a good upbringing was necessary for a truth-productive dialogue.

32 Ibid. p. 273.
I would not like Plato to be regarded as contingent to a specific cultural origin. Confucius also came from a very particular cultural setting, at a particular time of Chinese society. But I believe he was also thinking on behalf of the human race, and he took thinking from that setting to a certain limit, which has been very influential and has survived. Similarly, I see the philosophical religions, Buddhism and Taoism, as the human mind thinking. On that basis we should say that Plato was speaking for the human race at the limits of the capacity of the human mind.33

Allott goes on to compare pure and practical theory to the difference between the thinking of a geometer and that of a carpenter who applies practical theory to construct a table.34 Geometers are needed to generate pure theory. Allott summarises Kant, arguing that pure reason is practical reason, that is, rationality is a moral category in itself. In the Kantian universalisation of morality, there is good thinking and bad thinking.

At the same symposium, Martti Koskenniemi conceded that most international lawyers would agree with much of Allott’s analysis of the present system. This would include the critique of the bureaucratisation, state egoism, the absence of a historical consciousness, of capitalism’s alienating effects, and the end of philosophy and replacement by the professional vocabulary and credo of liberal legal cosmopolitanism. As with the others’ concerns, Koskenniemi see the challenge is what to do with the analysis and the lack of policy implications. He also has difficulty with the sense that the solution is all too easy. He argues that politics must be more than simply imagining a better future, and history teaches us a revolution of the mind is usually accompanied by revolution in the streets. Allott’s revolution would inevitably result in winners and losers. He also argues that defining the democratisation of states in terms of the health and happiness of the people is not a useful call to action. Such notions are no less immune to ‘illusion, corruption, exploitation and decadence’ than other contemporary slogans.35

Koskenniemi summarises Allott’s analysis of how the world became such a disaster as reducible to the madness of some well-positioned people, succumbing to greed, egoism,

33 Ibid. p. 275.
and evil – hence the need for a revolution of the mind. He argues that this type of aesthetics is connected to a politics of conservative revolution (in the European sense) characterised by the appeal to self-evidence; the imputation of the problems of the world to the ruling elites; corruption and the end of philosophy; the use of the first person plural ‘we’; and the disaster of the present.\textsuperscript{36}

The corrective – ‘revolution in the mind’ – then becomes its therapeutic treatment aimed at re-spiritualization and at curing the collective schizophrenia of the Vattelian error, the division of the world into the domestic and the international.\textsuperscript{37}

In its optimism of the process of constituting, Koskenniemi views Allott’s work as reminiscent of Alejandro Alvarez in the early part of the 20th century and sociological jurisprudence of solidarists such as Scelle in the inter-war period. The omnipresence of law is reminiscent of Hans Kelsen and Hersch Lauterpacht’s view of the absence of gaps in law, with law as language constructing the world as a whole, transforming human relations into legal relations. But the weakness is in the aestheticisation of social problems and the downplaying of actual disagreement.\textsuperscript{38}

Koskenniemi points out that attempts to overcome the Vattelian division have been on the international lawyer agenda for the past 130 years. Thus, he sees Allott as a continuer, rather than a challenger of a tradition that always seeks new ways to articulate the basis of a universal law. He also argues that Allott’s juxtaposition of ideas versus power is wrong. Ideas and institutional power cannot be detached from each other. A revolution in the mind calls for a revolution in the streets and the latter only takes place if the former is under way.\textsuperscript{39}

Allott responded to Koskenniemi’s critique stating first, in response to the problem of aestheticisation, that (quite astonishingly) he cannot really see the point of academic writing. Rather, he is trying to write literature which is performative in character in that the act of doing it is its content. He argued that the influential books in the world have not been concerned with academic debates but have been performative events invoking the imagination. This is congruent with his theory that words have parallel lives to our

\textsuperscript{36} Ibid. pp. 335-338.
\textsuperscript{37} Ibid. p. 338.
\textsuperscript{38} Ibid. pp. 338-339.
\textsuperscript{39} Ibid. pp. 340-341.

In regard to the Marxian connection of ideas and power, Allott responded that if that view is adopted, the alternative is despair. Unless it is possible to generate ideas that can modify power at its roots, we are doomed to the actual – and this tends to get worse as people get more powerful. Progress depends on the idea that we can judge things transcendentally and not simply contingently based on existing social fact or power. If this is abandoned, then everything is in the hands of the powerful who have no interest in the transcendental, except as rhetoric. Allott argues that there must always be something beyond politics. Society must be the place where the transcendental is present, beyond the actuality of institutions and politics. He acknowledges the most daring assertion is that such rationality might be possible at the international level, but that the whole point of the Stoics and natural law traditions is that, at the level of humanity, there is the capacity for good.\footnote{"Review Essay Symposium: Philip Allott's \textit{Eunomia} and \textit{The Health of Nations} – Thinking Another World: 'This Cannot Be How the World Was Meant to Be:'," pp. 273-274.}

To the claim that Allott’s approach was one of conservatism he responded that all revolutions are in some sense restorations. But the newness comes from the response to new situations and there has never been a global social situation as we have now.\footnote{Ibid. p. 271.}

6.5 Moral accessibility

In regard to the moral accessibility of the theory and the concern of the consequences of revolution, Allott argues in \textit{The Health of Nations}:

The history of human societies contains many examples of revolutionary change not only in the real constitutions of societies but also in their ideal self-constituting, revolutions in the mind. Such events are moments of human self-enlightenment which transform the potentiality and the actuality of those societies.\footnote{Allott, \textit{The Health of Nations. Society and Law Beyond the State}, p. 81.}
In *Towards the International Rule of Law* he gives examples of revolutions in the dimension of ideas including:

[T]he movement of Buddhism from India to China and Japan, the extension of Christianity into the Roman Empire, the development of science in ancient China and ancient Greece, the development of mathematics and astronomy in the countries of the Middle East, the impact of Greek culture within the Roman Republic and Empire, European contact with Arab culture in the European ‘Middle Ages’, the movement of Greek-speaking scholars into Italy from Constantinople after the fall of that city in 1453, the scientific revolution in Europe (from the 13th century, but especially in the 17th century), the diffusion of the idea of representative democracy from Britain after 1689, the various ‘enlightenments’ which spread from one European country to another, the technological revolutions in agriculture and manufacturing (especially in the later 18th century), the diffusion of the idea of republican constitutionalism from France after 1789, the diffusion of various strains of ‘socialism’ from about 1800 …[etc.]

Allott acknowledges that changes in the real constitution can cause revolutionary change. This is already occurring in the evolution of human rights regimes and other legal, social, and economic reforms, recently given further impetus by the imperatives of ecological concerns. However, Allott’s ideals for democratisation and socialisation of the international realm are for a globalisation from ‘above’ which he defines as:

[T]he application of every self-creating potentiality of human consciousness to the self-constituting of international society. It is to set the human-world-transforming attraction of the ideal in dialectical opposition to the human-world-affirming force of the actual, the universal in dialectical opposition to the particular.

Of course, such a shift in human consciousness would translate into extraordinary transformations to the global balance of power with repercussions in the political, military, economic, social and ecological spheres, and all subordinate societies. Each of these spheres is now intricately interwoven within and between states and civil

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societies. Entrenched regimes are unlikely to yield readily to calls for relinquishment of their power. In his review of *The Health of Nations*, Andreas Paulus expressed concern that such idealism could end up in either paradise or hell.\(^{46}\) The conditioned reflex is to object in defence of diversity and individualist rights, and retreat to, and even celebrate, the politically correct postmodern notions of ‘the incomplete, the relative, and the imperfect, and the lack of foundations for any comprehensive theory’.\(^{47}\)

The actualisation of democracy at the international level also presents conceptual challenges. Such an arrangement would place the interests of the individual over the interests of states. The implications of such an inversion of the hierarchy of the subjects of international law are indeterminable given the extent and perplexity of legal, political, social, economic and cultural variables to be considered. The immediate sense is that such transformations could cause extensive instability, questioning the moral accessibility of Allott’s ideals. Paulus observed that Allott perhaps underestimates the resistance to a globalisation of consciousness.\(^{48}\) This type of difficulty perhaps provides rationale for why Allott limits his (already vast) enterprise to developing the legal formula of such a democratic arrangement, leaving the development of practical strategies for how to ‘get there’ and institutional prescriptions to others.

History reveals the human mind has the bizarre capability of rationalising aggression in order to achieve the goal of peace. Revolutionised minds, using words, ideas, theories, imagination, and values, can justify terror. However, Allott seems to have accounted for the human capability of such behaviour and regardless of this potential, plays the role of a forefather to future generations of young scholars and intellectuals whom he exhorts to, ‘Dare to think! Dare to know! Dare to speak! Dare to hope!’\(^{49}\) and to reconnect with their intellectual inheritance, to explore new and better lines of thought and connections between ideas, and cross the arbitrary and artificial mental boundaries which have limited the potentiality of the mind.\(^{50}\) He mentions in particular that international lawyers are in a unique position to exert vigilance over the development of international law on behalf of the people. He looks to them to ‘…redeem governments

\(^{47}\) Ibid. p. 158.  
\(^{48}\) Ibid. p. 158.  
\(^{50}\) Allott, *Eunomia*. p. xiii.
in the name of justice, which is a sort of love, in the name of humanity, whose interests transcend the interests of states and governments."\(^{51}\)

In addition to exhorting others to think, his strategy imitates the Hegelian idea of entrusting advancement to a dialectical process of unfolding. He claims an unprecedented opportunity presents itself for a New Enlightenment for the new century culminating in a final reconciliation between idealism and empiricism, or the mind and the non-mind world – ‘the march of the Universal Spirit towards freedom.’\(^{52}\)

As an ideal theory, Allott’s theory specifies the ultimate moral optimum, under the assumption that the principles it articulates will enjoy full compliance.\(^{53}\) It provides a comprehensive explanation for international law’s ineffectiveness and a prescription of fundamental principles for a ‘true’ international law. Given the ‘grandness’ of Allott’s scheme, it is difficult to assess if the theory is feasible. The ideals are feasible in the sense that the principles’ implementation would appear to offer an unlimited opportunity for the well-being and prospering of humanity but the costs (human and otherwise) of the necessary changes are indeterminable. In terms of accessibility, the theory unabashedly falls short of providing practical guidance for improving the system of international law. Allott looks to (certain) others to explore new and better lines of thought and connections between ideas. Its moral accessibility is highly contingent on the embracing or resistance to a relocation of the power and function of states in an international democratised society. Also critical is the ‘timing’ of alignment between the thinking, articulation, and adoption of ideals, and the integration of them in the legal and real constitutions of international society, and all subordinate societies. Incongruency between these, or lags in cohesion between societies’ assimilation of the ideals, could cause disruption of unknowable magnitude.

6.6 A non-ideal theory: a solidarist Grotian bridge to balance theory with practice.

These findings led the thesis from ideal to non-ideal theory which articulates principles for conditions in which there is serious non-compliance, including principles designed to help bring about the transition to circumstances in which the principles of ideal

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theory can be fully implemented.\textsuperscript{54} Developing a non-ideal theory to realise the principles of Allott’s ideal theory begins with the institutions we have now, in particular the state system, and looks for mechanisms that do not involve unacceptable moral wrongs in the process of transition. Buchanan and Golove argue:

Non-ideal theory must steer a course between a futile utopianism that is oblivious to the limitations of current international institutions and to the nature of international law as it now exists, on the one hand, and a craven capitulation to existing injustices that offers no direction for significant reform, on the other.\textsuperscript{55}

An essential element of non-ideal theory is the morality of transition. Given the very limited resources and few mechanisms for legal reform at the international level, such as constitutional amendment, there may be a dilemma between achieving reform and supporting the rule of law.\textsuperscript{56} It will be demonstrated that the route the proposals take endeavours to minimise the costs of transition towards Allott’s ideals, and to work from within domestic societies’ current systems, and challenges. This move would make Allott’s theory more accessible – not only in providing a practical route, but also in the inclusion of civil society in the process of ‘thinking on behalf of the human race’ rather than claiming the role exclusively for philosophers, and in implementing incremental changes.

Kingsbury’s theoretical approach leads the thesis in this next phase. A solidarist Grotian strategy, integrating theory and practice, is adopted. This retains Allott’s idealist goals but combines them with practice within the current international framework. Drawing on Allott’s theory of constitutionalism and the reconciling of the interlocking elements of society – the ideal, legal, and the real – it is proposed that the actualisation of Allott’s theory first requires ethical and legal transformations. Thus, each proposal is anticipated to positively affect the other proposals’ actualisation. The goal is to formulate a collective legal remedy for atrocity based on a thickening of obligation and responsibility between all members of humanity, generated by political mechanisms to help move international society towards Allott’s ideals.

\textsuperscript{54} Ibid. p. 880.
\textsuperscript{55} Ibid. p. 883.
\textsuperscript{56} Ibid. pp. 884-885.
In a late interview given to the French newspaper *Le Monde*, Michel Foucault discussed his dreams for a different style of criticism. ‘I can't help but dream about a kind of criticism’, remarked Foucault, in which one would ‘not try to judge, but to bring an oeuvre, a book, a sentence, an idea to life; it would light fires, watch the grass grow, listen to the wind, and catch the sea-foam in the breeze and scatter it.’ This somewhat wistful, poetic thought resonates with more familiar Foucauldian notions regarding the use of theory as a ‘toolkit’ or ‘toolbox’. Common to both these tropes – critique as affirmation and theory as functional – is the desire for thought to be put to work rather than put on trial, for sentences to be brought to life rather than delivered. 

7 PROLOGUE: COMBINING THEORY AND PRACTICE

The three proposals presented in this section work in a similar fashion to a troika, acting as a team of three, proceeding together, bearing equal burden, each dependent on the other to enable progress. This conceptual framework parallels Allott’s theory of a society’s self-constituting in which the ideal, legal, and political constitutions develop in dialectical relation to each other. Each needs and influences the other. The first proposal is the ethical basis for the other two proposals, and aims at reforming the international ideal constitution. This lays the groundwork for the legal and political proposals in the following two chapters which are aimed at reforming the international legal and political constitutions, respectively. Each contributes to the self-constituting of international society with the anticipation that the ideas and ideals expressed might eventually affect day-to-day politics and law. They are constructed as bridges to help close the gap between the non-ideal and Allott’s ideal world by improving the system of international law. They are grounded in the reality of the non-ideal conditions of the present day international realm. Adopting a solidarist Grotian approach through combining theory and practice, they seek to expand international law’s agenda to include justice and social change, aiming for a new world through ideas centred on the ethics and self-realisation of both individuals and societies.¹

The proposals address the third research question’s analysis in the previous chapter in which the lack of a practicable route in Allott’s idealist theory for a new international society was identified. A route is needed that can lead us from where we are now to at least a reasonable approximation of the state of affairs that satisfies Allott’s theory’s principles. These proposals aim specifically (and admittedly, boldly) to contribute to the ultimate realisation of a positive peace through the codification of a minimum threshold of effective protection from harm of crimes against humanity, war crimes and genocide.

That these proposals are aimed at a distant future needs to be emphasised. This is an exercise of exploration; of mooting ideas for ongoing debate. In contemplating distant possibilities, I am mindful of Richard Falk’s words:

The future appears to us neither as impenetrable darkness nor as broad daylight, but rather in a half-light, in which we can descry the rough form of the nearest objects, and vague outlines farther off.²

In the future’s half-light, some details remain dull or imperceptible but looking backwards can sometimes provide beacons for hope of advancement. Precedents of legal transformations (discussed further in the next chapter) can provide evidence for hope. The ideal of the elimination of atrocity on a mass scale is already articulated in charters, treaties, and conventions. This emerging global norm reflects an increasing intolerance of belligerence and the sanctity of the right to life. However, acquiescence to violence continues to blot human history, regardless of burgeoning codification.

Further transformation is needed in legal and political constitutions and institutions which first need to be based in transformed ethical principles – hence the development of the ethical proposal.

Each of the proposals is intended to facilitate an evolutionary transformation towards the ideals of a ‘true’ international society. The evolution would occur through the constant and often slow exchanges between ideals and real processes, laws and institutions. This is contrary to Allott’s idealist call for transformation in the form of a revolution of the mind. While he demonstrates that revolutionary shifts in consciousness have non-violent precedent, a less risky strategy is proposed. The proposals precede Allott’s consciousness-changing ‘moment’. Theory and practice are combined so that over long periods of time (decades and perhaps centuries) recognition of responsibility of all members of humanity to all other members would evolve. The evolution of new institutions and practices would reflect that evolving obligation. The proposals are situated in ethical, political and legal principles and processes, rather than from the transcendental level as in Allott’s theory. However, the proposals do draw on an ideal of the unification of humanity, not culturally, nor politically in the form a global ‘state’ or world government, but ethically and legally, in its individual members’

mutual recognition of, and responsibility for, each other’s protection, initially at least, from atrocity. How future political institutions might look within this new international community is not within the scope of this thesis. However, the legal, constitutional framework which Allott advocates (discussed in Chapter 5) provides a basis for institutional development towards the support of these new ethical and legal bonds.

7.1 Possibilities within the shadowland of emergent political realities

The proposals are cognizant of Falk’s ruminations in regard to endeavours to create a better world of humane governance. These, he argues, necessitate a special sort of creativity that blends thought and imagination without neglecting obstacles to change. He reflects:

We require, in effect an understanding of those elements of structure that resist change as well as a feel for the possibilities of innovation that lie within the shadowland cast backward by emergent potential structures of power. Only within this shadowland, if at all, is it possible to discern “openings” that contain significant potential for reform, including the possibility of exerting an impact on the character of the emergent political realities. This shadowland necessarily lies at the outer edge of the realm of politics, although this special emphasis is upon those political possibilities not yet evident to politicians...[T]he relevance of the shadowland is especially great when an emergent new structure has not yet fully superseded an old structure, in times of transition when the need for bridges between the past and future is the greatest.3

In the context of these proposals, an opening for potential reform is more likely seen in the political proposal made possible in the shadowland of emergent institutional structures of international law. These structures include institutions such as the ICC, truth commissions, and ad hoc official inquiries such as the recent British government’s inquiry into the decision to engage in the war in Iraq.4 Such public disclosure and scrutiny of formally sacrosanct, sequestered realms of authority and practice by governments is a relatively new development in the need for transparency and accountability to the electorate. Using Falk’s language, these developments represent

3 Ibid. pp. 36-37.
4 The Iraq Inquiry, launched 30 July, 2009, is an inquiry by a committee of Privy Counsellors to consider the United Kingdom’s involvement in Iraq, and the ways decisions were made and actions taken to establish what happened and to identify the lessons that can be learned to ensure that future governments are equipped to respond in the best interests of the country. www.iraqinquiry.org.
openings around the periphery of politics through which the following proposals are intended to proceed. The political proposal explores the possibility of a forum (in the form of an ad hoc panel, and an ongoing virtual forum) for generating reflexive conversation, or public international philosophy, that is, an exchange of words, ideas, and ideals using reasoning and imagination at the international level, about individual members’ ethical and potential legal obligations to protect each other from atrocity.

The ethical proposal provides a framework for this international conversation by providing a springboard for thinking about the form of obligation which might evolve between individual members of international society. ‘International society’ here suggests a democratised society populated by both states and individual members of humanity. This process of public international philosophy animates Allott’s idea of the idealising capacity of the human mind which enables us to imagine a second reality, a metaphysical universal reality behind the infinite particularities of the world. In being able to think of itself as something separate from its thinking, the mind is able to transcend itself. This transcendence is an instrument of the mind’s idealising capacity, assisting in the choice of a better human future or its self-harming. As words, or conversations, and the ideas and theories generated by them, are by-products of the whole social process, they are reality-forming, affecting consciousness in the way it sees the whole of reality. This creates an endless cycle of reciprocal action which affects society’s work on the perennial dilemmas in identity-forming, power-structuring, value-forming, and self-ordering. In idealising and conversation, we seek to clarify, resolve, or transform issues of identity, of the distribution of power, of value conflict, and of ways of ordering these perpetual societal dilemmas. How such processes will evolve at the public international level is unchartered territory for humanity, hence these proposals for providing a framework for part of the journey.

7.2 Distant legal possibilities: an international tort for the duty of care

Based on an anticipated thickening of ethical obligation between all members of humanity generated by, amongst other things, the ‘international conversation’ as outlined in the political proposal, it is possible that a new legal code would evolve. This potential code is explored in the legal proposal and represents the most distant of possibilities of the three proposals. It is ‘a vague outline’, farther off, but an essential

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6 See Chapter 5, Section 2 for a discussion of these perennial dilemmas.
ingredient in the troika of proposals. The intended function of this new legal code would be to act as a precursor (as one of many other necessary legal developments) to Allott’s international constitutionalism. Employing the mirror thesis, an analogy can be drawn with the development of law in national societies in which law is seen as a reflection of the development of values of a given society. Likewise, the legal proposal anticipates, in Allott’s words, the evolution of our sympathy, and moral and social responsibility extending toward the whole of humanity, and the physical world being reflected in a constitutionalisation of the international sphere. As already stated, the aim of this legal code is, as a minimum threshold, the prevention of atrocities, which is essential to the attainment of Allott’s ideal of an integrated international constitutionalism. Such a constitutionalism requires that international law is animated to respond to the rights and responsibilities of all members of international society (not just of states). It is proposed that an area of nascent common law, the law of tort, offers a segue for such animation, specifically, the law of negligence and the breach of the duty of care to protect from harm. Such an international legal obligation would enable international law to move steadily into new domains of influence, populating international society with its individual members as subjects of international law, while resituating its founding state members, and forging Allott’s integrated constitutionalism along the way.

7.3 An ultimate end of perpetual peace via an ethical obligation to protect

The ultimate aim of the obligation to protect from atrocity aligns with the aim of Kant’s political philosophy of cosmopolitanism in that it looks beyond the achievement of peaceful cooperation between a confederation of states, but ultimately at peaceful cooperation between the individual members of those states. Kant foresaw that perpetual peace cannot be achieved without individual cooperation, as state cooperation is based on mere agreement which he did not consider a rational foundation for a viable cosmopolitanism. Kant considered that formulations by Grotius, Pufendorf, and Vattel which supported the idea of Right in international relations justified depraved actions by states acting in their own interests. Kant’s formulation requires moral obligation beyond borders, between a society of humankind, a kingdom of ends – ultimately a perfect community – in which each individual acts freely and autonomously in

7 The thesis that law is a mirror of society that functions to maintain social order. Tamanaha, A General Jurisprudence of Law and Society. p. xi.
accordance with principals that are universally valid. Rather than acting in accordance
with an externally imposed moral law, individuals would be subject to, and authors of,
their own moral law. Kant saw that as rational beings we have the capacity to control
our own inclinations, and to act according to laws or principles of nature, that is, *a
priori* laws of morality or rules of action, independent from empirical principles. Such
objective principles are, he claimed, commands of reason, binding on the will,
imperatives from which we, as rational beings, cannot opt out of.

The proposition in the ethical proposal that individual members of humankind are
responsible for the protection of others from atrocity becomes, in Kant’s moral theory,
‘binding on the will’ when assessed against three fundamental principals which he
identified as necessary and universal. As necessary and universal principals, they are
applicable both domestically and internationally. The first principal is that actions must
accord with universal principles. It follows that acquiescence to atrocity would not be
universalisable as we would not wish our own community, family or selves to be left
unprotected from violent aggression or annihilation. The second principle is that people
(of all nations) are treated as ends, and never as means. This would require that no lives
are thought expendable for the gain of ends, such as is practiced in modern military
strategy where inadvertent loss of civilian life in the pursuit of gaining control of
territory, or the protection of strategic interests, is given the euphemism ‘collateral
damage’. The third principle is that each individual acts autonomously. This, in turn,
demands respect of the autonomy of all others, and requires, at the least, that others are
free from threat of aggression to be able to live according to their own moral rationality.
The test for the obligation to protect is the categorical imperative which is based on the
three principles above. The imperative is formulated as ‘what is right for me to do, is
right for everyone else to do’. This imperative is not hypothetical. It is a directive to
act, or not to act. It is not contingent on any end being willed as ends are subordinate to
the injunction to act in accordance with universal principals valid for all humans.

While Kant’s moral theory is based on principles, and not ends, his theory of
international relations seeks to realise the ultimate end of perpetual peace. His
optimism was such that he believed even with the many catastrophic failures in social

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9 Boucher, *Political Theories of International Relations. From Thucydides to the Present*, p. 272.
10 Ibid. p. 271.
11 Ibid. p. 272.
and political arrangements, progress was being made towards global peace. The proposals in this thesis share the same optimism in the face of what often appears to be regression, as in the Rwandan catastrophe of 1994, and in the protracted debates concerning Darfur while the threat of ongoing violence was guaranteed given the overt belligerence of the state’s governing party.

Kant believed that human progress was driven by a mechanistic, fatalistic drive of nature, or providence. A more feasible proposition might be found in Allott’s attribution of progress to the human capacity to conceive of ideals and to then choose to transcend the actual. Of course, much transcendence is still required. When looking at current global challenges, the question remains as to what would generate an ethical shift to such an extent that the work of the ICC would no longer be necessary, that is, that atrocities such as crimes against humanity, war crimes and genocide would no longer be suffered, and therefore, the Court’s mandate to prosecute perpetrators would become redundant. Many today would accept we have an objective, universal moral obligation which extends to the protection of others from these heinous crimes, hence the extensive support for the existence of the ICC. However, the work of the Court is, so far, activated by the aftermath of mass violence. The will to pre-empt these events, or the imperative to protect, is embryonic. When it comes to specific situations, the will to act too often wanes. The concept of pre-emption resonates with modern discourses on human rights, and liberal democratic ideals for individual freedom and self-determination, but when statal decision-making processes are activated, often geopolitical and economic self-interests trump the needs of the vulnerable. It is only later, once atrocities are well underway, that decisions to intervene are weighed, again, often against national and regional interests.

While decisions to intervene often engage large communities of states, non-governmental organisations, and civil societies, the discourse often remains at the level of principle, rather than the particular. The detail of atrocity is horrific and confronting. The reality of individuals suffering is generally edited out of images and commentary. This is also evident in the absence in most political philosophy and international legal literature (apart from recent critical international ethics work\(^\text{12}\)) of the particulars of trauma and the suffering caused by atrocity. Instead, to avoid disruption or discomfort

\(^{12}\) See for example work by Theodor Adorno, Gillian Rose, Judith Shklar, Kate Schick, Martha Nussbaum and Virginia Held.
to those engaged in theoretical discourse or decision-making on atrocity, suffering tends to be absorbed into statist and cosmopolitan historical narratives of order and progress (such as in Kant’s theory mentioned above) in which conventions of abstraction, instrumentalism and universalism are less disturbing.\textsuperscript{13}

Regardless of this behaviour of the dominant actors in international affairs, progress is evident. States are developing guidelines for intervention in another state’s affairs based on an emerging obligation to protect other states’ citizens. The object of protection has progressed from only the state, to the security of the community, and the individual. The language has changed from the norm of ‘the right to intervene’ to ‘responsibility’.\textsuperscript{14}

Even though there is progress, state self-interest consistently remains a primary driver of decisions to intervene, overriding moral rationalisation to act according to universal principals, human rights treaties, or states’ \textit{jus cogens} or \textit{erga omnes} obligations. The development of an ethical (and eventual legal) obligation, not just between state members, but between the individual members of states, may be the much needed catalyst for change in state behaviour. Of course, this would be only one of many catalysts needed to close the gap between current non-ideal conditions and Allott’s constitutionalised international society. It is emphasised that the development of such an individual obligation at the international level could not be in isolation of other extensive social and political changes.

\textsuperscript{13} Schick, “To Lend a Voice for Suffering is a Condition for All Truth: Adorno and International Political Thought,” p. 138.

\textsuperscript{14} B. Welling Hall, "International Law and the Responsibility to Protect," In \textit{The International Studies Encyclopedia}, ed. Robert A. Denemark. (Blackwell Reference Online, 2010), http://www.blackwellreference.com/subscriber/tocnode?id=g9781444336597_chunk_g978144433659711_ss1-32>
8 THE ETHICAL PROPOSAL: HUMANITY’S OBLIGATION TO PROTECT FROM ATROCITY

Ethics is rather the scruple that constantly discomfits law and implores it to move.¹

8.1 Introduction

This ethical proposal explores what might drive the universalising of a moral and eventual legal principle of responsibility of individual members of international society to protect each other from harm of atrocity. Various works are explored below that either deconstruct or endeavour to surmount entrenched, formidable obstacles to developing such a model. Essential to the endeavour is the overcoming, no less, of the constructs of self-preservation and autonomy, as well as social barriers of value incommensurability between individuals and communities, and social and power fragmentation.

The proposal is divided into five sections. It begins with the post-modern critique of the realist Hobbesian model and its attribution as the cause of alienation which empowers individuals, states, and international society generally to acquiesce to mass, unconscionable violence. However, it will become evident that while the post-modern lens is helpful in its phenomenological exposure of the causes of this alienation, it is not remedial. Further work is needed to overcome this obstacle.

The second section explores Habermas’ theory of communicative rationality as a possible practical route to overcome alienation and value incommensurability. Habermas also recognises the limitation of the post-modern critique and has constructed a theory which aims at emancipation, while at the same time ensuring a framework of universal morality. He undertakes an inter-subjective reconstruction of cognitivist theories such as Kant’s and Rawls’s in which the moral viewpoint is extracted from the necessities forced upon a rational subject reflecting on the world. Habermas instead extracts necessities forced upon individuals engaged in discursive justification of validity claims. Necessities are thus explored in the presuppositions of communication and argumentation. Such a route aligns with Allott’s theory on the power and symbolism of ideas and words in the self-creating of human reality, and their

¹ Manderson, Proximity, Levinas, and the Soul of Law. p. 16.
transformative capacity to re-create reality. However, limitation is found particularly in the feasibility of the presuppositions for deliberations which demand impartiality and an extraordinarily high threshold of moral development in order to achieve reconciliation of individual, solidarist and universal perspectives. It is suggested that further work is needed prior to the possibility of a functional Habermasian discursive exchange, particularly at the international level. However, consideration of his discursive procedure is useful as it will become an important component of the political proposal as a framework for the international forum for generating conversation about the ethical basis of obligation between members of humanity explored in this ethical proposal.²

In the third section, another possible route for generating an obligation to protect is explored in Levinas’ ethics of alterity. This offers an alternative ontology of the self and the other (at both individual and state level) at the pre-ethical stage, at which point the construction of subjectivity, based on the generation of responsibility, occurs through a phenomenological account of the face-to-face encounter. Rather than seeking sites of commonality upon which to build obligation (as is normally sought in the construction of community), it is found in our lack of commonality, or alterity. Uniqueness of the self, or human singularity, is based on the fact that each is singularly responsible for the well-being of fellow members.

The fourth section takes Levinas’ concept of alterity further by engaging with Manderson’s extension of Levinas’ work to law. This extension is achieved via Levinas’ concept of proximity, the unifying theme in common law for the recognition of a duty of care to avoid foreseeable risk of injury. It is here in the confluence of the generation of subjectivity, responsibility for the other, and proximity, that the ethical and legal obligation to protect from harm of atrocity takes ground.

In the fifth section, Manderson’s extension of Levinas’ ethics to law is taken further to the international level. The idea of a virtual proximity is explored, a concept now made possible through global communication technologies. This extends responsibility to the distant other, or ‘the third’ who makes unrequested calls to those with capacity to respond. Personal response-ability for others would become the new state of nature and the origin of the social and legal system, rather than a social contract through which to escape the state of nature and to gain autonomy.

² See Chapter 10.
The proposal concludes with a consideration of the demands of this model and the mediation of justice on potentially limitless demands. Capability and vulnerability become the scales of justice demanding a collective responsibility which sees harm to one group as harm to the whole. It is proposed that a thickening of ethical obligation to this degree could form the basis for an eventual international tort for negligence. This route bypasses the current consensual basis of international law, infiltrating it with already entrenched civil law principles, and potentially accelerating the democratisation and constitutionalisation of international society. As Manderson conjectures, ‘ethics would take its place as a maturation, a trajectory, and an optics by which to judge law’, \(^3\) and I will add, by which to also judge international law.

**8.2 Section 1: The post-modern cul-de-sac: Carty, Ricoeør, Der Derian**

Carty diagnoses the modern international legal order more as a ‘disorder’ and imbues the state with a psychosomatic ailment of paranoia and subsequent stifled socialisation. He views the fundamental amoral vacuum in the order’s Hobbesian/realist structure, and the consequent distrust and vulnerability it generates, as evident in its overriding concern for security, particularly at the state level. This concern for security defines the predominant anthropology for the place of international law as a radically subjective, individualist one based on states operating predatory doctrines of pre-emption in both security and economic activities. He identifies an explicit fear by states of the other, between which exists no moral relation.

[The modern state’s] gaze is one of fear and expresses a search for security…In the Hobbesian theory of knowledge, there is no place for a reflexive knowledge of self, save for an analysis of the extension…of the power of the sovereign self, that is, geopolitically, up to one’s frontier.\(^4\)

Carty observes that such preoccupation with security and power defines the current task of legal internationalists or constitutionalists to harness ‘the beast of the state’ into a disciplined framework.\(^5\) In summarising Paul Ricoeur’s work, Carty concurs that the supposed social contract provides a meta-ethical quality to the state which in turn provides security for men equal in their ability to kill one another, yet is absent of any ethical element in, or between, its members. In each person renouncing their right to

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\(^3\) Manderson, *Proximity, Levinas, and the Soul of Law*. p. 78.


\(^5\) Ibid. p. 311.
self-preservation to the sovereign state, the state through its absolute power and constraint is then able to form a unity of itself, void of moral relations.\(^6\)

Various attempts have been made to remedy this void within philosophical traditions including realism, idealism, and historical reason. In the 17th century, idealist Leibniz argued for the ‘putting back’ of the other person into the idea of law. He developed a rubric that law’s object should include that we not injure another, that we attribute what belongs to the other, and that we are also pleased with the happiness of another. Fichte developed this further the following century, connecting Hegel’s historical rationalist dialectic of indignation at injustice and the demand for an institutional structure of recognition, with his own concepts of self-assertion and inter-subjectivity. Fichte asserted that full recognition would mean accepting the other as an absolute.\(^7\) This recognition would also become the foundation of the ‘I’ or subjectivity, and the relation of the I to the other framed in terms of a contractual conception of rights. In other words, obligation to the other would be generated through a logic of rights. Such theories of recognition have continued to evolve, constructed generally within Hegel’s dialectic framework, each theory endeavouring to close the gap in the Hobbesian/Kantian traditions’ obsession with the separation between subject and object, and the self and the world, and to reclaim the unity of existence. Hegel saw this dilemma of the gap as part of a necessary stage in the odyssey of Spirit towards its own self-consciousness,\(^8\) a ‘laborious journey’ (although not a linear one) of Spirit toward Absolute Knowledge.\(^9\)

Ricoeur’s post-modernist work offers an innovative consideration of potentially working from within the Hobbesian model for the generation of moral motives to overcome its own moral void. He does this by working within the triad of rivalry, mistrust, and vanity. Through these primitive passions’ interaction, always in reference to another person (and I will impose here interaction at the state level), Ricoeur claims these passions can become sources for parallel enlargement of individual capacities. These emerge in what he identifies as the human capacity to overcome self in the form of ‘identity’. This ‘identity’ has both moral and political significance but is not

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7 Ibid. pp. 312-313.
reducible to explanation by norms or by discourse. It pre-supposes the idea of a person in relation to others, and the parallel idea of responsibility which expresses itself in indignation at injustice. Echoing Hegel, this responsibility may pass through struggle, from humiliation and indignation, into a capacity to express oneself rationally and autonomously on moral issues. Therefore, responsibility covers both the assertion of self and the recognition of the equal right of the other to contribute to the advancement of rights and the law. In so doing, a new understanding emerges of another’s world, comparable to learning another language. This capacity to translate and compromise (considered a weakness in the Hobbesian model) is claimed by Ricoeur as a capacity to recognise oneself as a figure of passage between regimes, but avoids the accusation of relativist disillusionment.

In a similar vein, Carty works ‘within’ primitive passions, but in particular on those evident in relations between states. He argues the fear which currently dominates the structure, membership and behaviour of international society generates defensive practices which provide an illusion of protection of selfhood. A practice of domination and lack of respect is evident, for example, in current internationalist/constitutionalist endeavours such as the UN and World Trade Organisation. These demonstrate Western states’ egotistical or subjective power considerations in their domination of the non-Western world. To counter this, and to engender enlargement of capacity for interaction, he argues that out of these contentious practices arises an opportunity for collective reconciliation. This would require ‘a wise deliberation, in the tradition of Hegel, for whom the recognition and reconciliation of difference [would be] the central task of the modern state’. While fully cognizant of the realities of American hegemony and the global imposition of its values and its liberal democratic order and law, Carty advocates an anti-foundationalist, inter-subjective dialectic to facilitate our moving from an order of fear to one of respect. He says:

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11 Ibid. pp. 311-112.
his fear-inducing vacuum has to be countered through a phenomenology of the person in community which restores the ethical dimension of society. At the same time, a critical phenomenology can expose the pathologies of fear, the use of force to dominate, and the consequences of the absence of respect.\textsuperscript{15}

To give up these pathologies would potentially open oneself (or one’s state) not only to an exposure of the constructed self to scrutiny, but also to a potential threat of violence from the other in an assumed natural state of war. It would also demand the relinquishment of a degree of autonomy in the sense of accepting that, by practicing a new ethics of responsibility for each other, there might in fact be a dependency on the other for the construction of one’s own (and one’s state’s) subjectivity.\textsuperscript{16}

As with Ricoeur and Carty, De Derian argued that the starting point of a study of international legal personality should be a phenomenology of the alienation among states. He argued that the source of this alienation was found in the binary of the domestic-foreign since the time of Westphalia which developed due to the primary focus for international law to discover how, or explain why, collective entities should construct themselves against one another. However, rather than aim at removing alienation, De Derian advocated a strategy aimed at mediating it, leaving it unresolved as a diffuse human experience. His work identified this binary as a projection of self-alienation from within the state community or nation onto the international plane for which diplomacy has performed the function of mediator. Anti-diplomacy, in the form of ideologies such as the French Revolution, Fascism, Bolshevism, and liberal market economy, has claimed to be able to remove, rather than mediate, this alienation. However, each of the ideologies failed to recognise such alienation as an ineradicable feature of the human condition. By extrapolating historical evidence, De Derian anticipated the contemporary edifice of international law in its desire to make human rights the ultimate goal of international law and society, and the trend towards a so-called global constitutionalism, to be based on the demonisation of collective and community life in favour of absolute autonomy, immune from scrutiny. He claimed

\textsuperscript{15} Carty, “New Philosophical Foundations for International Law: From an Order of Fear to One of Respect.” p. 311.
\textsuperscript{16} Ibid.
that these developments are indicative of how international law misunderstands itself and thereby will remain alienated from itself.\textsuperscript{17}

Carty holds a similar resignation to the ineradicable nature of alienation originating from within the self (again, this is at both state and individual level). He acknowledges the inspiration of natural law is the recognition of the other as similar, as reflections of the self, based on our common origins. Exclusion, expressed in state particularism, is the opposite of such mutual comprehension. Carty resigns, ‘the enemy is not on the outside but within the self, an evil which each has to rework.’\textsuperscript{18} Carty’s aspirations are as limited as Ricoeur’s and Der Derian’s:

An exit strategy from a world of fear to one of respect has still to recognise the limits imposed not so much by the difference of the other, as by the perplexity of one’s own opaqueness. The destructiveness of fear remains at this initial stage. However, one can never completely overcome it by coming out of the modernity of the isolated self. We are equally opaque to one another.\textsuperscript{19}

Carty is resigned to the idea of a law which must rest upon this anthropology of the person and of international relations being recognised as such, and the parties remaining opaque to themselves and each other. And, rather than being viewed as merely another ideology, he argues that this idea of law should be seen as an epistemology of human experience in an interdisciplinary application. So, instead of being a place of fear of the unknown and thus threatening, law can contribute to a process of discovery and understanding. He concludes this process is all the while undertaken in the face of perplexity, of sometimes mistake and misjudgement, and provides shape and management of the more or less immature anarchy of more or less immature societies.\textsuperscript{20}

While these post-modern discourses expose the pervasiveness of indifference and ultimate alienation that results from an underlying fear of the other, there is, within their analyses a sense of relinquishment to the inevitably of the actual. Aiming merely at international law’s role as mediator of the malaise of alienation, and resolving to an

\textsuperscript{19} Ibid. p. 311.
\textsuperscript{20} Ibid. pp. 329-330.
incommensurability of values, an embeddedness of fear, and the opaqueness that ensues, limits the possibility of transcendence. It fails to meet the Allottian entreaty to transcend the actual and to engage the idealising capacity of the human mind to imagine another reality, to surpass the particularities of the current system and to choose a better human future. Further exploration to surmount the Hobbesian model is required.

8.3 Section 2: Habermas’ theory of communicative rationality: transcendence through deliberative democracy

Habermas is also critical of the post-modern enterprise’s excessive pessimism, misdirected radicalism and exaggerations. He sees duplicity in its rejection of rationalism’s objectification of valid standards, yet its apparent animation by normative sentiments which are never clearly articulated. He also criticises the post-modernists’ totalising perspective on society and lack of differentiation between phenomena and everyday life and practices, or lifeworld, the ‘background’ environment of competencies, practices, and attitudes representable in terms of a person’s cognitive horizon. At the same time, he critically defends the rationalist or Enlightenment project, viewing it as an unfinished project, but one which needs redirection. He views the positivist epistemological domination of rationality as having created a civilisation with limited success due to its one-sided emphasis on the individual subject’s ability to manipulate nature and people through rationality. He negates this subject-centred reason by reason understood as communicative action.21

Habermas’ social theory of communicative rationality forms the basis of a far more optimistic perspective than the post-modern, in particular on the potential of a new era of political community in the form of global deliberative democracy. As with Allott, his work resonates with the Kantian tradition, aiming for an egalitarian and just world through the realisation of the unique human potential for reason, and also of communicative competence. The realisation of these potentialities is facilitated through the practice of discourse ethics. Habermas assumes that consensus is possible with inter-subjective agreement being achieved through mutual perspective taking. This competency is, however, currently suppressed by the formalising of systems such as the welfare state, capitalism, mass media and consumption, and the routinisation of politics as a substitute for participatory democracy. The generalising logic of efficiency and

control robs the mind’s capacity to synthesise. Boundaries have been blurred between public and private spheres, or in his terms, the system and the lifeworld, the latter colonised by reified, disconnected, differentiated sub-systems, resulting in the fragmentation of everyday consciousness.\(^{22}\)

To counter this late-capitalist phenomena of consciousness fragmentation, Habermas looks to the institutionalisation of our communicative competence. At the political level, the global public sphere would see the institutionalisation of international relations at the supra-national level through the UN, and at the trans-national levels of the major powers. It would also see the juridifying of international relations within a framework of cosmopolitan law. Legalisation and institutionalisation would become the telos of the deliberative procedure as both have the potential to tame, and eventually dissolve, relations of power.\(^{23}\) A new global political community would emerge and transcend national ethnic and cultural boundaries, based on equal rights and obligations of legally vested citizens.

Such institutionalisation would require active citizen participation in discussion within deliberative democratic processes. These discussions would be held in what Habermas describes as ideal speech situations in which participants are assumed to be equally endowed with the capacities for discourse, each recognising the others’ equality, and engaging in speech undistorted by ideology or misrecognition. Validity of a moral norm or ‘truth’ would not come through the reflection of an individual (as in the rationalist model) but would arise through the inter-subjective process of argumentation, or dialectic. Rightness would depend on the mutual understanding achieved in the process.

Such a process of discourse ethics necessitates certain pre-suppositions, idealised by the individuals participating in the dialectic, namely that everyone capable of speech and action is entitled to participate, and everyone is equally entitled to introduce new topics or express attitudes needs or desires; that no relevant argument is suppressed or excluded by the participants; participants are using the same linguistic expressions in the same way; that no force except that of the better argument is exerted; that all the


participants are motivated only by a concern for the better argument; that everyone would agree to the universal validity of the claim which is thematised; and that no validity claim is exempt in principle from critical evaluation in argumentation.\textsuperscript{24}

Habermas’ project is explicitly attempting to bridge the gap between the ‘is’ and the ‘ought’, to distil the idealised moral point of view of the matter at hand. Through mutual recognition and exchanging of roles and perspectives, a moral point of view emerges which belongs to all of the participants. Ultimately, a shared or universalised norm is deduced from a rational reconstruction of the presuppositions of communication, downgrading the strong transcendentalism of Kantian ethics by establishing a foundation in inner-worldly processes of communication.

While this theory of communicative rationality will be reconsidered in the political proposal below as a framework for international public conversation regarding obligation to protect each other from harm of atrocity, the assumptions that participants can maintain impartial judgment in discourse and sustain mutual perspectives needs further work at the ethical level. While Habermas argues that communicative competency has evolved in the human species, he is aware that the fragmentation of consciousness thwarts its efficacy and the ability for transcendence, hampering the achievement of outcomes of mutual benefit. In the broader political scheme, he proposes, along the lines of Allott, that where norms collide or tensions arise, for example, between human rights and democracy, constitutionalisation or a cosmopolitan law above the state and of international relations would be necessary.

In theory, discourse ethics holds potential for finding agreement on the content of moral norms between holders of diverse perspectives, but the presuppositions for this process seem, at this time in the social evolution of human morality, or consciousness, too demanding, or optimistic. It is suggested that a deeper exploration is required of the subterranean space surrounding inter-subjectivity, somewhere prior to the engagement of communication, at the construction of subjectivity itself, or what in recent literature is identified as the pre-reflective zone. It is here that the challenge of alienation persists, affecting (or infecting) daily, non-idealised forms of communicative deliberation, and potentially affecting any orchestrated, idealised Habermasian discourse. A

reconceptualising of subjectivity itself, no less, might enable us to take the step from the modern condition of ‘isolation-in-community’ (whether individual or at the state level) to one of mutual perspective taking, even mutual responsibility for each other. This is explored below in Emmanuel Levinas’ phenomenological work\(^2^5\) whose pedigree includes Heidegger, Merleau-Ponty, and Husserl. Levinas was influential to a small community of French philosophers including Blanchot, Sartre, and Derrida\(^2^6\) but his work has been more recently taken up by the critical legal community including Diamantides\(^2^7\) and Rose,\(^2^8\) as well as Habermas\(^2^9\).

### 8.4 Section 3: Levinas’ escape route – transcendence through an ethics of alterity

Levinas’ philosophy opens up new possibilities in ethics and law based on a reconceptualisation of the construction of subjectivity through the generation of obligation at the *pre-ethical* stage. As a pre-reflective approach it has the potential to by-pass the roadblock of enduring mutual opaqueness identified by the post-modern lens, as well as to address the void in the pre-communicative subjective space of Habermas’ idealised deliberative communication. It may also provide the potential for a spontaneous, non-rationalised, and inescapable entry for responsibility of all members of humanity to protect each other from harm of atrocity.

As a constructivist, Levinas proposes a phenomenological description and a hermeneutics of lived experience in the world. Akin to Ricoeur’s phenomenology of the person in community, his philosophy endeavours to explore the depths of what constitutes subjectivity, or sense of self, and how that is constructed by our moral relations with the other. He develops further the Grotian perspective of a natural human sociality through the idea of inter-subjectivity, and what generates our response to the other. Given the pre-reflective moment of the construction of subjectivity, rational theories of obligation such as Hobbesian contractarianism and the more contemporary Rawlsian version of justice as fairness, are up for challenge. Similarly, the regime of

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natural or inalienable human rights is contested, as responsibility, rather than right, becomes the primary ethical basis of morality. Levinas’ work inverts the Kantian perspective on the generation of morality through the rational choice of duty. The unrequested call of the other comes prior to any choice of duty. He also inverts Kant’s claim that the more we progress towards the goal of personal autonomy, the more conscious we shall be of our obligations towards others, and other nations. According to Levinas, it is the relinquishment of the idea of autonomy that gives rise to an appropriate response to the other. Further, he inverts Kant’s claim that only a rational being can be a moral agent. Rather, only a moral agent has access to reason – it is ethics that generates rationality and not the reverse.30

The Levinasian route offers the potential for the surmounting of alienation in a phenomenological encounter by a mutual exposing of our fear and assumed separation from the other in the moment of a face-to-face encounter. It is within this mutual response that Levinas sites the construction of an authentic self, an ‘I’, by its exposure to another’s gaze and its response back. This does not imply that an ‘I’ does not exist prior to the encounter with the other. Rather, the ‘I’ is authenticated by the encounter and, through ongoing mutual recognitions, the ‘I’ is able to incrementally construct itself in relation to the other, dissolving alienation in the process.

In the moment of exposure to the other’s gaze, and ‘my’ response, comes mutual recognition. However, this mutual recognition is not of mutual sameness, but of alterity, or otherness. This otherness of the other remains unknowable. It is an irreducible difference, or absolute alterity, outside the realms of knowledge. The effect of this is that the other can never be totalised. Levinas considers as violent any approach to the other as if in knowledge or understanding, or as if sharing a commonality, as claiming such knowledge confers a certain degree of ownership. To bring the other within the self’s comprehension is to treat them as something to be possessed. To comprehend the other subsumes them within the self and suspends their alterity, as if they can be ‘known’ to my own measure and scale. They, represented by

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30 Manderson, Proximity, Levinas, and the Soul of Law, pp. 67-68.
Regardless of these inversions, the outcome of this exploration leads to the same goals as Kant’s moral and international relations theories, that is, a universalisable ethics of responsibility and an international law which seeks to maintain a perpetual peace.
‘the face’, are outside the power and mastery of my self, my ego and my identity for if the face was in my control, I would be able to reduce the other to the same.31

The Levinasian face-to-face encounter is not with the object of a face with eyes, ears, and nose, neither is it necessarily a human face. The encounter is not representable, nor does it provide a signal of the other which we might think of as lying behind it. The unknowable, non-representable face is ‘found’ in an awareness of the call and command by the other to respond to their vulnerability and defencelessness. It is ‘the epiphany of infinity’32 that presents itself in ethical resistance (a ‘passive passivity’33) and reveals its destitution.34 Fagan articulates this as follows:

It is the discovery of the death of the Other, their destitution and nudity, that calls to me, that institutes responsibility to this Other…The face commands that I be responsible and I am ordered to respect and protect them, to do everything possible for them, to not take any action which may result, however inadvertently, in the death of the other…‘The face is what one cannot kill, or at least it is that whose meaning consists in saying “thou shalt not kill.”’35

This is not a choice I bring upon myself, or something I decide on. Thus, the ‘face’ is the origin of responsibility for the other, but also the origin of subjection to them.

This account of the phenomenological, spontaneous moment of the face-to-face encounter and the generation of responsibility contrasts starkly with the rationalist model of the free and autonomous self which, by the faculty of reason, chooses to act based on imperatives derived through rationalisation of principals. Ironically, the simplicity of the ‘moment’ and the reversal of common (western) assumptions of identity construction can create dissonance when Levinas’ work is first encountered.

The construction of subjectivity based first on responsibility for the other, or ‘first philosophy’,36 is the primer coat before the application of layers of ethics or rules, and social arrangements are possible. This is contrary to most orthodox analyses of

31 Madeleine Fagan, “From Difference to Alterity: Thinking the Other in Emmanuel Levinas,” in Annual Meeting of the ISA’s 49th Annual Convention, Bridging Multiple Divides (San Francisco, 2008), p. 13.
33 Levinas, Otherwise than Being, or Beyond Essence, p. 115.
34 Manderson, Proximity, Levinas, and the Soul of Law, pp. 177-178.
35 Fagan, “From Difference to Alterity: Thinking the Other in Emmanuel Levinas.” pp. 11-14.
36 This is using Husserl’s terminology in Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy—First Book: General Introduction to a Pure Phenomenology but supplanting Husserl’s epistemological character with an ethics-based First Philosophy that is particular to human interaction. Uriah Kriegel, “Moral Phenomenology: Foundational Issues,” Phenomenology of Cognitive Science 7 (2008), p. 3.
obligation based on rationalised self-interest of an already formed self-identity. In Levinas, the other is prior to the self. ‘Being’ is dependent on ‘otherwise than being’. This ‘otherwise’, a living for the other at the heart of humanity, is our first responsibility.  

Again, in stark contrast to much modern ethical theory, in the Levinasian world our freedom is found by living for the other. Freedom does not come prior, after which responsibility is imposed, but is constituted within responsibility itself. ‘Ethics inhabits a realm before, and is constitutive of, philosophy; just as responsibility lies before and is constitutive of freedom.’ Responsibility constitutes my subjectivity and is also the cause of my individuality. I am called to account, unable to hide behind rules, principles or rights, as when confronted by the demands of a beggar. The ‘I’ is put into question by the other, and it is at this moment that I am constituted as a unique self. 

This construction of responsibility is the opposite of contract or commitment. There is an irreducibility of subjectivity to choice, but rather than this being a tragedy or unpleasant necessity, responsibility is seen as the essence of what constitutes us. Responsibility emerges with our selfhood, with relationship, and with desire. It would seem there is a contradiction here – if responsibility emerges with desire, there must be choice involved. However, in typical Levinasian form, he does not equate desire with an unsatisfied need, rather ‘…it is situated beyond satisfaction and non-satisfaction. The relationship with the Other, or the idea of infinity, accomplishes it’. 

Responsibility for the unknowable other becomes the foundation of all relationships rather than commonality, the traditionally held rationale for concern for others, particularly between kin, tribe, or nation. It is in the lack of commonality, or alterity, that concern for the other is generated, and it is out of this concern that community arises. 

This lack of knowledge or understanding of the other, and the potential concern that is generated out of it, is advantageous when attempting to posit some form of ethical and eventual legal obligation to protect unknown, distant others from harm of atrocity. 

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37 Manderson, Proximity, Levinas, and the Soul of Law. p. 67.  
38 Ibid. p. 67.  
39 Ibid. p. 65.  
40 Ibid. p. 63.  
41 Ibid. p. 177.  
42 Fagan, “From Difference to Alterity: Thinking the Other in Emmanuel Levinas.” pp. 8-9.
community, based on responsibility, can be formed with the uncommon and the unknowable, the extension of ethical obligation beyond our own sphere of knowledge and experience becomes a possibility. However, within Levinas’ schema, politics, and by default law, are incommensurable with ethics. Levinas viewed ethics as unique and infinite, and politics as confining responsibility to definite, finite rules and to the pragmatic demands of the state and its social policy. He viewed law similarly and narrowly as a positivistic, codified, and rule-bound structure, and as merely politics by other means.\textsuperscript{43} His view is contrary to the predominant theories of the role of law which is to reconcile private and public interests and well-being. And, it contrasts starkly with Allott who views law as having the ability to link the totality of everyday human behaviour to the order of the universe. Allott attributes to law the creation of a virtual legal world which runs parallel to the real world into which persons, things and events and places attain a particular law-significance. He considers that such a function for law is essential for the health of nations.\textsuperscript{44}

Blending Levinas’ ethics with rules of obligation, or the infinite with totality, needs to be somehow resolved not only for the purposes of this proposal but generally, as incommensurability leaves a perplexing void for the application of his ethics, and for the role of politics and law. His limited attempts to engage his ethics in political questions has attracted criticism of his work as it appears to limit the ability of an infinite responsibility to communicate with political and legal worlds governed by regulation and imperfection.\textsuperscript{45}

8.5 Section 4: Manderson’s extension: melding legal responsibility with Levinasian ethics

_The duty of care emerges not because we have a will (which the law of contract respects) or a body (which the criminal law protects) but because we have a soul._\textsuperscript{46}

The incommensurability between ethics, and politics and law, is somewhat mitigated by Levinas’ consideration of their relationship being mediated through the familiar and

\textsuperscript{44} Allott, "The True Function of Law." p. 401.
\textsuperscript{46} Manderson, _Proximity, Levinas, and the Soul of Law_. p. 5.
contemporary use of the language of the duty of care. It is here that Manderson explores an opening to bring together Levinas’ ethics with the common law. It is specifically in the law of negligence that Manderson sees a unique location for the legal expression of an unwilled, non-reciprocal responsibility. He reasons that if law has a soul, it is to be found in the doctrines of the law of negligence in which the duty of care owed to others has been imposed without consent. The law of negligence provides a space for the suspension of Hobbesian mythology which pervades legal (as well as ethical and political) conceptualisations of what constitutes individuality and community. In much legal theory, the origin of law is found in hypothetical promises between originally-free but vulnerable sovereign selves in order to secure property or life. Ultimately, mutual vulnerability is understood as the justification of law and the State, ‘…a common Power to keep them all in awe…[without which]…they are in that condition which is called War; and such a war, as is of every man, against every man…And the life of man, solitary, poor, nasty, brutish, and short.’ A basis of distrust and fear leads to criminal law to protect individual self-interest, and the control of the violent other becomes the foundation of the apparatus of the state and its institutions. An alternative view to this isolationism is a concept of law as deriving from a collective of individuals with common goals – the individual is protected against difference, and the community overcomes and absorbs difference through assimilation.

Manderson sees these two perspectives as two ends of the same telescope – the I and we are reduced to sameness – mine and ours. In reviewing the literature, he finds these have formed the bases for justifications in tort law. However, he demonstrates that tort law is concerned with duties to others and not individual rights, and with relationship rather than agreement. The relationship is with a ‘neighbour’, prior to any contract. This emphasis on the other and relationship prior to agreement is evident in the development of the duty of care, particularly over the last century, transforming our obligations in our daily lives. New obligations include those imposed upon local councils, doctors, banks, professional advisors, drivers, homeowners to their guests and visitors, and even trespassers on their property. We are now responsible for our words, the economic consequences of our actions, and sometimes for the actions of others. These responsibilities are unchosen and personal. They arise out of encounter, prior to

47 Ibid. pp. 4-5.
49 Manderson, Proximity, Levinas, and the Soul of Law. p. 23.
consent, contract, community, or the self. The other becomes the origin of law, prior to the mine or ours.\footnote{Ibid. pp. 4-6, p. 24.}

Manderson acknowledges the criticisms and challenges of an unchosen and infinite responsibility and how law requires limitation in order to provide principles rather than homilies.\footnote{Ibid. p. 13.} He argues this tension between the infinite and totality is mediated by the flexibility or vagueness of the concept of proximity, a pre-condition of ethics for Levinas, and the unifying theme in common law for the recognition of a duty of care to avoid foreseeable risk of injury.\footnote{Ibid. pp. 66-67.} In the seminal case \textit{Donoghue v. Stevenson},\footnote{Donaghue v. Stevenson, [1931] UKHL 3 [1932] A.C. 562, 1932 SC 31, [1932] All ER Rep 1(1932).} proximity is used by Lord Atkin to describe who we owe a duty to, to identify who my ‘neighbour’ is, such that ‘I ought to reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question’.

Proximity has attracted much criticism within law, in that it lacks ‘specific content, [is] resistant to precise definition and therefore [is] inadequate as a tool.’\footnote{“Eskimo Amber Pty Ltd v Pyrennes Shire Council,” (1998). p. 414.} But Manderson views the role of this paradox in the law – the value of an idea not reducible to a rule, its incapacity of definition – as the very source of its ethical power. While it may not be codified, proximity is a kind of relationship that gives rise to responsibility, and must therefore, inevitably, be expressed in words (legal or otherwise) to define and conceptualise it.\footnote{Manderson, \textit{Proximity, Levinas, and the Soul of Law}, p. 15.} Regrettably, Lord Atkin’s adjudicative priority to reasonable foreseeability has become a standard formulation of the neighbour principle in negligence, obfuscating proximity. Manderson argues that rather than reasonable foreseeability, the correlative to the duty of care should be vulnerability since we are proximate to those who are distinctly vulnerable to us.\footnote{Catherine Mills, "Responding Responsibly: Manderson, Levinas and the Duty of Care in Law," \textit{Australian Journal of Legal Philosophy} 33 (2008). p. 155.}

For Levinas, proximity makes encounters or calls by the other possible. He viewed proximity as an experience, not an idea, and not reducible to a rule or contract. He likened it to a breath that one feels before one is conscious of its presence. It creates an obligation of non-indifference, calling us into question by singling us out as responsible
relative to the vulnerability of the other. Proximity is a closeness that marks the boundary within which we find ourselves responsible but it does not limit responsibility. Rather, it augurs and inaugurates it.\(^57\)

As proximity is already an assignation, prior to commitment, the responsibility generated by it is an asymmetrical obligation that chooses us because of our capacity to make a difference, through our power, and another’s vulnerability.

Strictly speaking, the other is the end; I am a hostage, a responsibility and a substitution supporting the world in the passivity of assignation, even in an accusing persecution, which is undecinable.\(^58\)

As responsibility is not from some abstract sameness, but from our particular difference to others, it is not a quid pro quo. It is ‘a duty to listen to the breath of others’.\(^59\) Thus, says Manderson, our capacity to respond to the predicament of another is the meaning of \textit{response-ability}. This response-ability cannot be determined – it is both unpredictable and a predicament. It is not a choice, because it precedes choice. The duty of care happens to you. The condition of being hostage to the gaze of the other compels a response from us. ‘The obligation to respond to the eyes that look at us in nudity and expectation is not our choice but our condition.’\(^60\) The other may be responsible for me as well, but that, according to Levinas, is their business. Therefore, my responsibility is incalculable against another’s responsibilities.\(^61\)

The concept of response-ability raises for Manderson the potential of logical circularity as proximity is both an experience of relationship, as well as a normative and descriptive one. One could be responsible simply because one is responsible. In reviewing Manderson’s work, Mills suggests that to remedy this, a differentiation between responsiveness and being responsible is needed, rather than collapsing them into the homonym ‘response-ability’. A distinction is needed to identify when one might be held to account for a lack or failure to live up to one’s responsibility as a response may not be a responsible one. She argues:

\(^{58}\) Levinas, \textit{Otherwise than Being, or Beyond Essence}. p. 128.
\(^{60}\) Ibid. p. 62.
\(^{61}\) Ibid. pp. 62-64.
This suggests that the issue might be reframed, to say that one must be held in responsiveness to be able to be held responsible at all. But holding one responsible does not immediately spring from relationality or responsiveness per se. In other words, though it may be a necessary condition for it, responsiveness is not equivalent to responsibility.\(^{62}\)

While not addressing Mills objection directly, Manderson defends the ‘collapse’ of responsiveness and responsibility as indicating a vision of responsibility in negligence which derives from our literal response-ability – an involuntary and singular duty to respond based on our particular difference. He concedes, however, that he supposes that he will not convince everyone of his vision that law could ever be genuinely ethical, or his vision of ethics genuinely legal.\(^{63}\)

An infinite responsibility also raises the issue of our never being able to fulfil our duty of care, and that we will always breach it. This renders negligence law incapable of redressing our failure to discharge our duty and makes calculative logic necessary, which Manderson resists in an endeavour to escape the current delimitation of responsibility. Mills suggests that Manderson overdraws the opposition between relational responsibility and choice, and that some room is needed to accommodate individual will and autonomy. While not sufficient for establishing and adjudicating responsibility, choice may be necessary in the equation.\(^{64}\) Therefore, ‘infinite’ responsibility needs to be somehow to be made ‘finite’.

The most notable implication of ‘contaminating’ law with Levinas’ ethics is that our responsibility for omissions, or the duty to rescue, is transformed. The law has drawn a distinction between moral and legal obligation. To come to the aid of another in peril or distress not caused by ourselves, for example to rescue the drowning child, would normally be viewed as not giving rise to legal responsibility. This reflects the origins of the common law in individual rights, freedom, and contract which emerged from the Industrial Revolution in which the law of tort ‘sits uneasily’.\(^{65}\) Through Levinasian lenses, Manderson views the duty to rescue as a paradigm case which sums up why we are responsible for others at all, and does better justice to our instincts than the current

\(^{63}\) Manderson, "Proximity and the Ethics of Law." p. 136-139.
\(^{64}\) Mills, "Responding Responsibly: Manderson, Levinas and the Duty of Care in Law." pp. 159-160.
\(^{65}\) Manderson, Proximity, Levinas, and the Soul of Law. p. 6.
legal rulings that we are not obliged to respond to those in peril. Rather than being an anomaly in law, he argues that the duty to rescue should become a core element of the duty of care.

As common law is not statutory law, but is judge-made, it informs of obligation after events ad or post hoc. It may be that we are unaware of our obligations until after we have failed to perform them. The duty of care has been understood as either a limitation on our freedom imposed by either the state to protect our collective well-being, or as a multitude of implicit social contracts between individuals. Manderson suggests the duty of care can be understood in another way which challenges our claim to autonomy. If others are to come prior to the self, rather than the duty being viewed as an imposition on our autonomy, it can be embraced as a source of our subjectivity and individuality.

The face of the other calls us into question and in the process shines on us the light that allows us to discover our be-ing. If we are to understand responsibility in law as a necessity, even as a welcome and constitutive event, and not as a problem – as the law of torts surely does – then this is why. It is the torchlight held by another that, shining on us, allows us to come to see ourselves.

There is within Levinas’ construction of asymmetrical responsibility and proximity a necessary connection with politics and law. This becomes apparent with the entry of ‘the third’. ‘The third party is other than the neighbour, but also another neighbour, and also a neighbour of the other, and not simply his fellow.’ Because the face of the other reflects the face of another, all are equal. Because of this parity, the self is no less responsible for the welfare of the third party than it is for the other. The implication is that responsibility extends not just to a single other, but to the rest of humanity. Thus, in the confrontation with the third, the self encounters the entire human collective.

The presentation of two faces, the other, and all others, demands a weighing of ethical obligations. Responsibility is infinite, but we are not. So, how do we reduce responsibility to all and choose? Practically, some measurement or limitation must be placed on the infinite demands of others. It is here at the entry of ‘the third’ renders law and justice as necessary. Institutions such as courts of law and public services testify to

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67 Ibid. p. 65.
68 Levinas, Otherwise than Being, or Beyond Essence. p. 157.
the ethical extension to ‘the third’ but also the need for limitation of those demands. These institutions enable us to bridge our relationships and also to fulfil our responsibilities.\textsuperscript{70}

Levinas did acknowledge the challenges non-reciprocity presents in society where there are various and overlapping relationships. While claiming incommensurability, he ‘concede[d] the unsustainability of his romance’\textsuperscript{71} and acknowledged that the personal ethics of responsibility can contribute to political and legal processes. In recognition of the third as also a neighbour, he saw justice as necessary to bring balance and equality. While the origin of justice is our asymmetrical ethical responsibility, justice enables ‘comparison, co-existence, contemporaneousness, assembling, order, thematization…’\textsuperscript{72} Thus, the relationship with ‘the third’ brings constant correction of the asymmetry of proximity in the face being looked at, limiting an infinite responsibility and equalising unequal relations. In other words, law takes over.\textsuperscript{73}

\textbf{8.6 Section 5: An extension of proximity and the duty of care to the international realm}

At this point Levinas’ concept of asymmetrical responsibility, and Manderson’s extension of Levinas’ idea of proximity to the law of negligence, are applied as frameworks for a new ethical and legal obligation at the international level. It is acknowledged that this could lead us into Falk’s shadowland of emergent, but also very distant realities. While being mindful of the limitation on asymmetrical responsibility by the entry of ‘the third’ as discussed above, what is considered here is the possibility of a global ethical and legal responsibility for failure to protect from harm of atrocity, triggered by a new ethical and legal category of \textit{virtual} proximity. \textit{Virtual} proximity extends the idea of proximity by it not being limited to a modality of distance or relationship. It is made possible by knowledge of distant others’ vulnerability. Such proximity is achieved via technologies whereby knowledge of others’ vulnerability is given immediacy, in fact blatancy, given the sometimes ‘embedded’ real-time nature of media reporting and individual transmission of unfolding events via mobile and the internet. The scope of \textit{virtual} proximity would extend between an individual and all


\textsuperscript{71} Manderson, \textit{Proximity, Levinas, and the Soul of Law}. p. 181.

\textsuperscript{72} Levinas, \textit{Otherwise than Being, or Beyond Essence}. p. 157.

\textsuperscript{73} Manderson, \textit{Proximity, Levinas, and the Soul of Law}. p. 182.
other members of humanity. Even though not all members of humanity are connected
through technology to the global community, many with response-ability are, and are
summoned by ‘the face’ of vulnerable others. The ambivalence of the first world is
relentlessly pierced by digital images and reports of unconscionable suffering in
‘lesser’-domiciled regions. The virtual gaze of ‘the vulnerable third’ pleads to the
response-ability of those with capability to respond.

As individuals, institutions, and states with capability to respond, many choose to
subject these calls to now redundant, but increasingly contested, rules of justice bound
within geopolitical boundaries. Or, they activate the dogma of a realist tradition of
international law which limits the intrusion of ethics and readily ignores others’ plight.
Alternatively, international law could be driven by an ethics of alterity, living for the
other and the third, ‘otherwise than being’, accepting unrequested asymmetrical
obligations, and offering a hospitality towards strangers – our global neighbours – based
on a capability to respond. Limitation of this obligation would be ‘calculated’ in
available capability, that is, it may be that a response is not possible because of
commitment of resources or responsibilities elsewhere, perhaps to a ‘near’ neighbour, or
one’s own security is of concern.

Such a form of social ontology, by its very nature, its ‘relationality’ of subjectivity
through the other, could potentially dissolve alienation of the self, or of the state.
Response-ability for others would become the new state of nature and the origin of the
social and legal system. The response-able ones’ subjectivity (formerly gated from
intrusion by others) would be constructed in part by their encounter with ‘the face’ of
the ‘vulnerable third’ and vice versa. This would replace the idea of social contract
through which to escape the state of nature and gain autonomy and to which, history
proves, there is no end to violence, for every reprisal merits its exchange.74

This form of ethics is already developing, evidenced in global social and cultural
movements; political inquiry, alignments and institutionalisation; codification of
international law (even though poorly enacted or enforced); and critical academic work
across many disciplines. The ‘capable’ states are beginning to acknowledge
scientifically evidenced culpability for having accelerated climate change and are being
forced to consider the plight of distant others, as well as future generations, in their

74 Ibid. p. 174.
immediate political and economic decision-making. Increasingly, the issue of liability is being raised in relation to historic exploitation of people, resources, heritage, culture, and language involving very distant others from previous times in history. The limitations of the regime of human rights are being recognised as global social and economic equality with the first world remains elusive for the majority of peoples. The political equation for an embryonic global distributive justice which has been based on undisturbed retention of all that the response-able nations already possess is being challenged. Increasingly threatening physical security issues require an urgent revision of these ethical bases and an expansion of participants in international society in order to resolve deepening cleavages between collectives with opposing worldviews.

These processes of global integration and disintegration require a new ethical model and the revision as proposed here is but one small step which could contribute to the emerging shift that is evident. By activating a global personal response-ability, democratic processes of participation could develop, inverted from the national sphere to a supra-state deliberative process. Global deliberative justice, as such, could drive global distributive justice and aid in the realisation of economic, political and social rights. Justice, or equivalence, could act as the compass for the reconciliation of self-interest and responsibility, guiding deliberations, with the scales of justice being capability and vulnerability.

The ethical blueprint in this proposal provides a basis for an eventual international tort for negligence to protect from harm which will be discussed in the legal proposal in the next chapter. As discussed above, tort law resonates with Levinas’ ethics in its concern with duties to others, and the proposed concept of virtual proximity provides a potential structural site for an international duty of care. This will raise the vexed legal issue of an unchosen duty to rescue and culpability for omission to act. However, the conventional defence that it is unreasonable to be expected to rescue without a prior undertaking of some sort, especially for unknown, distant others, could lose its force when virtual proximity is conceptualised as an assignation (through knowledge of others’ vulnerability) prior to commitment, triggering the duty of care on those with capability to respond.

The ethical blueprint also provides a basis for an international civil society intersubjective dialogue which will be explored further in the political proposal. Habermas’
ideal speech situation is made more feasible as potential for misrecognition and ideological distortion or manipulation of the other’s perspective would be reduced through a starting point of mutual recognition of the other’s alterity. Assumption of being able to attain knowledge, or totalise, the other, or any attempt at assimilation into a particular ideology or culture, would be reduced. Rather, the focus would be on the validity of a moral norm, in this case, that we are individually, asymmetrically responsible for each other, specifically for protection from harm of atrocity. How this would be fleshed out and appear in an agreed form would be discovered in the process of ongoing dialectic. An outcome of such a global forum could include the acceleration of participation by individuals in international society, and the democratisation of international processes generally. The blueprint also provides an alternative approach for international relations to be dealt with through discourse and mutual perspective taking, aiming at policies of recognition and consensus. Such means are in stark contrast to the current strategies of power politics for dealing with difference which include disempowerment, exclusion, or sometimes elimination, through sanction, or recourse to war.

8.7 Section 6: Reconciling the demands of a Levinasian ethics of alterity

At first glance, the demands of the Levinasian ethical model may appear too onerous. The uncalled-for non-reciprocal responsibility for the other sits uncomfortably within the current rationalist paradigm. Manderson’s activation of proximity presents a similar challenge to a usually predictable, delineated, codified, legal world. He concedes that living for the other is a difficult freedom, a jurisprudence for adults, but it can also be seen to ennoble an instability usually considered undesirable. The oscillation between infinity and totality, ethics and politics, can be recognised as part of our existence. Acceptance of this could be seen as part of our maturation, a coming of age, in moving towards the responsibilities of a collective maturity. On a global level, virtual proximity provides the opportunity to articulate where ethics might reside in the politics and law of a formerly statal-only society. With this ethical infusion, international ‘unsociety’ might then pass from the stage of self-absorption, fear, and opaqueness, towards adulthood, equipped to accommodate the needs of all members of all societies through an international law written by the whole human race.

76 Manderson, Proximity, Levinas, and the Soul of Law. p. 197.
The expanded consciousness of the human condition through the face of ‘the third’ generates what Levinas terms as fraternity, a binding of the human community to one another through collective responsibility; a shared ethical responsibility of everyone for everyone else. This is a heteronomous schema of individual dignity being grounded in shared moral obligations. It is at this point that Levinas’ route for defending the irreducibility of the singularity of the individual takes a theological turn which many critics find discomfort with. Without labouring the intricacies of his justifications for monotheism, the intended outcome is to argue for an inextricable linkage through a shared divine paternity. He claims this is the source of human communal coherence. God is essential for the collective recognition of human singularity, as His presence underlies the proximity that inheres human community.

Derrida struggled with Levinas’ messianic tendencies and with how to actualise an infinite responsibility. Rose was strongly opposed to Levinas’ work, arguing that he invited a return to theology under the guise of a ‘holy sociology’ and his ‘evasive theology, insinuated epistemology, [and] sacralized polity’ surrendered reason and knowledge in favour of a mere utopia or dystopia which by definition are both impossible and unintelligible. Manderson counters these objections as a misreading as Levinas did not intend a suspension of ethics, politics, and law in the wait for a utopian future. His messianism and eschatology were not separate from the world, nor were they to lead ultimately to a resolution of conflicts between the ideal and the real, nor did they terminate the need for ongoing discussion. Rather, they were a way to see the world within experience. Totality and infinity are understood as co-existent but incommensurable, each haunting the other.

Alternative accounts to theism of what shared ‘presence’ might underlie proximity could be found in more humanistic concepts based on physical or psychological need. These include the idea of the equality of humankind’s vulnerability to suffering and a universality of dependency at different stages in life. On a more fundamental and subjective level, a commonality might be found from within Levinas’ model in the

77 Derrida, "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas."
79 Ibid. p. 293.
80 Rose, Judaism and Modernity, p. 220 in Manderson, Proximity, Levinas, and the Soul of Law. p. 75.
81 Ibid. pp. 75-80.
mutual need for recognition. This is an enduring human need for individuals, and collectives through to nations. It is suggested that the efficacy of deliberations at the international level could be enhanced if the shared ‘presence’ understood as underlying virtual proximity is of a mutual need for recognition, rather than endeavouring to reach a ‘truth’ of any shared divine paternity. Based on human history, the latter endeavour would be futile.

Paradoxically, human communal coherence could also be sourced from within human singularity. Difference itself might also substitute for the external ‘presence’ that Levinas seeks in order to gain a collective recognition of human singularity. If difference is acknowledged, even celebrated, as the basis of responsibility, subjectivity, and relationship, it could be viewed as the driver of communal coherence. This is a very different view to that held throughout much of human history. The potential to elevate difference to such a status can be illustrated through an analogy of the human body where difference is fundamentally essential to the integrity of the body’s existence. Each cell in the human body fulfils a unique and essential function while being dependent upon the functionality of a greater community of cells (an organ or system), which in turn is dependent upon a systemic whole of multiple and diverse communities or systems. The failure of one of the parts could be fatal to the existence of the entire system whereas the unique functionality and the well-being of the parts expand the potential of the whole. Likewise, with recognition of each member’s, collective’s, or state’s unique functions, capacities and world views, the potential of the whole is expanded. Vulnerability, or worse, annihilation of a few would be seen as injury to the whole.

Such a realisation of unity-in-diversity could foster a collective human consciousness that would not monopolise a particular viewpoint or favour some collectives to the detriment of others. If the analogy works, the consequent unleashing of human capacity from diverse communities through all levels of international society could empower a pluralistic international community to conduct deliberative, normative dialogue on topics which have historically led to disintegration of relations with catastrophic results. If such an understanding was embraced by elite decision makers, educators and the mass media, vested oligarchies of self-interest and rivalries between economic, political, ethnic and religious interests could be weakened.
Alternatively, we could just continue to resolve our differences through killing each other. This seems fascicle in the light of the foregoing discussion as much thinking throughout human history has sought a way to secure perpetual peace, but with millions of lives lost in the process. However, within such human tragedy, a chain of consciousness can be traced throughout time, passing human social evolution through stages of maturation, from infancy, childhood, adolescence through to adulthood, socialising the human animal into what could now be identified as an emerging species consciousness. Waves of transition or gradients in social evolution have occurred, impacting the receptivity of human consciousness to events outside themselves, to undertake more complex mental analysis, and to feel deeper levels of emotional rapport. As new capacities developed, material advances followed, and with them, moral and social development.

Major ‘moments’ in social evolution and the development of human consciousness are readily recognisable and there is no reason to not expect this evolution to continue. An ethics of alterity may seem ‘out of scope’ given current human capacity but perhaps not when considered in the light of precedents. For example, the discovery of fire nurtured the fabrication of social bonds and animated the faculty of human imagination. The discovery that the world was round transformed the idea of earth’s, humankind’s, and the individual’s place in the universe, and transformed human understanding of the cyclical pattern of nature and of the interconnectivity of human experience within that cycle. The expansion of the European world introduced new thoughts to different cultures about language, laws, gods, religions, and values. The telephone broke through barriers of the impossible: the ability for simultaneous human thought and communication over great distances – a faculty we take for granted now but which at the time of its introduction transformed the boundaries of what and who constituted our neighbourhood. Material advances in technology have brought freedoms from manual labour, bringing more leisure time and allowing the human brain to spend more time on conscious forms. This has brought extraordinary benefits but also unimagined evils. Wars, exploitation, and prejudice have blocked advancement but have also acted as stimuli to assume new responsibilities.

Given the last century’s material advances in the capacity to kill, it is expedient to ask who has decided that morality is acceptable as it is? It seems that it is time to accept the responsibilities of producing such lethal power and to address the central issue facing
humanity – the need to discard a morality based on thinking from five hundred years ago and to lay a foundation for a global society that reflects a ‘coming of age’. This is essential as the issues we now face are global, therefore, a global social theory and law is needed, hence this thesis’ focus on Allott’s work and threads of other extraordinary thinkers whose works are funnelled through these proposals. Our choices seem limited – to either face catastrophe or to take another leap in consciousness, to literally develop new neural pathways that will enable us to transcend the actual, develop new ideals, and moral norms and laws to reflect them.

The question remains, however, as to what it would take to have individuals agree to such radical change. Perhaps Allott is correct in stating we need a revolution of the mind – the question is how would it be sparked? Catastrophe is often the catalyst for radical change. It took 1,200 lives in the sinking of the Titanic to have the shipping industry place enough life rafts on every boat. Perhaps another catastrophe is needed, or alternatively individuals could stand for higher principles of justice and deliberation at the global level. Another leap in our brain’s capacity is needed which will enable us to recognise that our thoughts, feelings, and actions have an impact beyond ourselves, not just within our homes or communities, but globally, and that we in turn are affected by others, near and far, that is, that we are now globally proximate.

This development appears to be hindered as it seems that, at least in the western world, a large number of people are sitting in a position of apathy in that they have handed over power to those around them. Mass consciousness is suffering from withdrawal, a sense of separation, resignation, and mental, emotional, and physical fatigue. We have been desensitised, bombarded by a world of verbal and visual viciousness. We see images of suffering over and over again and switch off. A level of complacency exists such that we are desensitised to death and assume death on the other side of the world is not our responsibility. Many can rationalise the logic of the need to correct the gross injustices in the world but the affective motivation for creating change is lacking. There needs to be, somehow, a big enough driver to interject this apathy.

Before periods of great change there are usually forerunners who resist the incumbent regime, or the pervading theory of knowledge or morality. The question now is, ‘who will act as facilitators and stand for higher principles beyond the basis of human thinking at this time? In the legal world, who will be the pioneers of justice? Who will
bring accountability? Who will lead the way for international law to become an instrument for the survival and flourishing of the human race?’

8.8 Conclusion

In summary, this proposal has been an attempt to ‘put back’ the other person into international law, and to overcome alienation and consciousness fragmentation by recognising the other as the foundation of the I. It has acknowledged endeavours to counter the ontology of the international system in which transubstantiated entities in the form of states are imbued with a self-identity and personage which operate on predatory doctrines of self-interest at unconscionable human cost. Levinas’ ethics of alterity offers an alternative epistemology, a way of understanding the world, an otherwise than being in which human selfhood is reconstructed away from identity and ego and towards the other. While aspiring towards the same goals as Kant in extending moral obligation beyond borders, Levinas looks to interpersonal relationships as the beacon for morality, rather than a system of rules and abstract principles. Such an ethics could make more feasible the inter-subjective dialectic which Carty envisions in order to shift the international order from one of fear to respect. Habermas’ goal of deliberative democracy built from within his framework for the institutionalisation of our communicative competence might also gain more traction if alterity is understood as a permanent, irreconcilable condition, but also a source of unity found in the commonality of human singularity.

In extending an ethics of alterity to the international realm, proximity, rather than privity, would be the new bond connecting us to the other, and the third, individual autonomy would be trumped by recognition of the suffering other, and the reconciliation of capability and vulnerability could become the central task of international law. Virtual proximity would provide the structural site for this unchosen, asymmetrical international obligation. It would allow evolving domestic common law principles on the duty of care to infiltrate the international realm, juridifying it, and driving an international constitutionalism written by, and for, humanity.

Contemplating such an ethical paradigm is a response to Allott’s entreaty to transcend the actual, to engage the idealising capacity of the human mind, and imagine another

85 Manderson, Proximity, Levinas, and the Soul of Law. p. 91, p. 132.
reality, surpassing current realities. Much deliberation is needed to flesh out these ideas, to find a way forward, to interject apathy, and to instigate another surge in human consciousness that might move us forward on the very long human journey towards perpetual peace. The legal and political proposals that follow will endeavour to contribute to any deliberation that might eventuate.
9 THE LEGAL PROPOSAL: TOWARDS LEGAL EXPRESSION FOR FAILURE TO PROTECT

It would be possible, and it is necessary and urgent, to destroy the old international unsociety and to create the theory and the practice of a true international society, the society of all societies and the society of all human beings, enacting and enforcing a true international law, the legal system of all legal systems, for the survival and prospering of all humanity.¹

9.1 Introduction: closing the gap between inchoate regimes of accountability

As mentioned in the prologue of this part of the thesis, the following legal proposal ventures into Falk’s shadowland of vague outlines of an international legal regime – a distant future, perceived through a half light of emergent political and legal structures. The proposal follows Allott’s coordinates which look to law as the actualiser of the ideal of a ‘true’ international society through the interlocking of its ideal, legal, and real constitutions. A contribution to the ideal constitution is outlined in the preceding ethical proposal. This proposal is an outline of a potential new law to form a part of the legal constitution. This is followed by the political proposal which seeks to assist in the realisation of the ethical and legal proposals. The aim of this legal proposal is to ‘pull in’ to international law individual members of international society as both subjects and objects of international law, forging a socialisation and democratisation of international processes. Through an incremental thickening of obligation between global citizens (rather than Allott’s proposed global revolution of the mind) we might move closer, and more safely, towards Allott’s vision of a ‘true’ international society.

The proposal first sets out the current international legal regimes which assign accountability for atrocities. A lacunae is identified between the regime of international criminal law and individual criminal responsibility, and the public international law principle of aggravated state responsibility which can be invoked by states for breaches of obligations arising under peremptory norms of general international law.² The ineffectiveness to date of these embryonic regimes creates a space for unaccountability of a vast number of legal entities and individual citizens – ‘bystanders’ to atrocity who acquiesce to mass violence. Further transformation of international law is needed. That

² "Draft Articles on the Responsibility of States for Internationally Wrongful Acts."
this might be possible is supported by a brief review of extraordinary precedents of legal transformations and moments of legal creativity over the past two hundred years, as well as consideration of emerging norms. Also reviewed are developments and moral and legal arguments concerning the increasingly codified duty to rescue. These precedents and contemporary developments support the rationale for looking to tort, in its role as both a reflection and modifier of social morality and behaviour, as a potential segue towards the eradication of atrocity.

The key attributes and advantages of tort are reviewed, followed by the legal proposition which is broken down into the key elements for an international hybrid tort for negligence for failure to rescue from harm of atrocity. Consideration of the conventional treatment of each element is followed by the proposed adaptation for the proposition. Remedies include compensation from a global public fund, along with non-monetary remedies to facilitate reconciliation and forgiveness between the victims and all other individual members of humanity. Likely objections and limitations of the proposal are then considered but the focus returns to the ideal of the eradication of atrocity in human history and the possibility of its actualisation using Allott’s model of the self-constituting of a society’s ideal, legal, and real constitutions.

The proposition is a specific form of tort law for incorporation into international society’s emerging legal constitution, thereby creating a more robust legal regime of accountability for atrocity. This is practical theory – taking international society’s ideals and making them an integral and functional part of day-to-day processes. It is an endeavour to take power over international society’s future, bringing the ideal into the actual. New legal relations based on evolving ethical norms between individual members of international society, when activated, will in turn modify social reality as behaviour modifies, actualising a potential future, predetermined by the common interest, which is no less than the ideal of perpetual peace.

9.1.1 The limitations of international criminal law and individual responsibility

As examined in Chapter 4, the 20th century saw the pendulum of international theory weighted towards the 18th century Vattelian synthesis of the liberal ideals of states as free and independent agents or ‘persons’ which drove the central task of international law – that of naked reason of state. In this worldview, reified abstractions inhabit an unsocialised and undemocratised international state of nature, driven by the ideal of self-preservation, and subject only to positive law through their own consent. This
international metaphysics has created a bifurcation (known as the ‘Westphalian duo’) between national societies’ and international society’s conceptions of social organisation, public order, justice, morality, and law. The ethical proposal is an endeavour to join the effort to swing the pendulum, to ‘put back’ the other person into international law, and to counter the ontology of the being of the state. An ethics of alterity looks to a new morality which has the potential to redefine the central task of international law, that is, to reconcile capability and vulnerability between international society’s individual members. This would relocate the emphasis on the self-preservation of states from a primary concern to one moderated by the interests of their citizens.

Prior to World War II, international law was seen as the source of authorisation to use violence as a legitimate tool and ultimate mechanism to resolve conflicts of interest between states. Just war theory, and its legal codification in the law of armed conflict and international humanitarian law, condemns but also guides and condones the conduct of mass murder, destruction, confiscation, and oppression under specified circumstances. Crimes against humanity emerged from these legal regimes and transposed responsibility to the individual. International criminal law now determines the gravity of individual misconduct within the framework of international humanitarian law. The legal validity of controlling the responsibility of those accused of crimes against humanity remains contested by a diminishing number of states and also international law theorists and practitioners based on their choice of philosophy that bears upon the interpretation of the sources, scope and content of international criminal law. Rigid positivism and absolutist naturalism are the two extremes, with pragmatic and utilitarian philosophies in between. The increasingly redundant positivist view claims that international criminal law does not exist in the true sense. Rather, so-called international crimes are merely municipal law crimes, with international law determining the extent of the state’s jurisdiction to apply its law to an accused offender outside the territorial jurisdiction of the prescribing state. The naturalist view

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3 Twining, "General Jurisprudence," p. 5.
4 The legislative history of these regimes includes Articles 6(c), 5(c) and II(c) of the London, Tokyo Charters, and Control Council Law No. 10, and the Hague and Geneva Conventions, Nuremberg and the ICC.
recognises certain crimes as international crimes seeking a tribunal with jurisdiction to apply the law and punish the criminal.

Besides the issue of recognition, numerous other challenges limit the effectiveness of international criminal law. These include the politicisation of the prioritisation of cases assigned to the ICC by the Security Council; the limitation on the number of cases which can be referred to the ICC due to its limited capacity; the narrowness of culpability for mass violence, absolving the collective; the burden on the victims to testify, their fear of reprisal, and for some, the need to relocate, and even create a new identity; the limitation on the effectiveness and correlation of incarceration to the crimes committed; and the limited deterrent effect on others contemplating similar crimes.

Similar to Allot, Mark Drumbl observes that while mechanisms of international criminal justice have been developed, there are lacking a criminology of mass violence, a penology for the perpetrators of this violence, and a victimology for those who are affected by the violence. A theoretical gap exists between the existence of institutions of international criminal law and the purpose of the punishments meted out. Because of the transference of domestic law to international tribunals, the sentencing judgements focus largely on notions of deterrence and retribution which Drumbl considers is probably inappropriate in the special situation of mass violence. While mass violence deviates from *jus cogens* norms and customary imperatives of international law, it might not deviate fully from the social norms and the reality on the ground in the times and places where it is actually committed. Drumbl does not suggest that this diminishes the heinousness of the violence, nor excuses the perpetrator, but it does make problematic concepts such as bystander acquiescence and passive complicity, collective responsibility, victim reintegration, reconciliation, and recidivism. Drumbl also sees as problematic the fact that the international community is judging action it did not prevent. By focusing exclusively on individuals, the end result may be collective innocence for all others.

The point of the matter is that mass violence calls out for a more searching and more penetrating explanation regarding the structural and transcendental nature of violence in the societies that are afflicted by such violence and the

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7 Drumbl, *Atrocity, Punishment, and International Law*, p. 44.
8 Ibid. p. 24.
acquiescence not just of ordinary people, but also of international organizations and foreign states.\(^9\)

### 9.1.2 The flawed regime of state responsibility

As discussed in Chapter 4, the regime of aggravated state responsibility has also proven inadequate. Its rare invocation is usually based on the self-interest of the injured or invoking states,\(^10\) rather than on remedying injustices.\(^11\) Where serious breaches of peremptory norms of international law have occurred, states have preferred to keep these outside the law of state responsibility as formulated by the ILC, and refer them instead to the Security Council.\(^12\) Primary rules of fault and obligation to prosecute, and secondary rules of attribution, defences, and remedies, are all under-developed.\(^13\) Further, the narrow jurisdiction of the ICJ means that the accusing state has to ‘fit’ its claim within a particular legal claim. For example, in Bosnia’s claim against Serbia, it could not just claim ‘crimes against humanity’ but had to show genocide (which is difficult to legally prove) because there was only jurisdiction under the Genocide Convention.\(^14\) Further, when state responsibility has been invoked, the function of reparation has been emphasised as there is usually no individual as such upon whom punishment can be meted out.\(^15\) When used, retributions such as sanctions often inflict greater harm upon those who have already suffered.

Based on the historic lack of inducement for compliance by other states of international peremptory norms or *jus cogens* rules which give rise to obligations *erga omnes*

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\(^9\) Mark A. Drumbl, "Remarks of Mark Drumbl" (paper presented at the International War Crimes Trials: Making a Difference? The University of Texas School of Law, 2003). p. 32.

\(^10\) Article 48 (1) of the International Law Commission’s Articles of State Responsibility specifies that states not ‘injured’ are able to invoke responsibility of another State if the obligation breached is owed to a group of states, including the invoking state, or the breach is owed to the international community as a whole. "Draft Articles on the Responsibility of States for Internationally Wrongful Acts."

\(^11\) The first state to be found in breach of the Genocide Convention was Serbia in which Bosnia alleged Serbia attempted to wipe out the Bosnian Muslim population in Srebrenica. The ICJ judgement of 26 February, 2007, confirmed the ICTY judgement that the Srebrenica massacre was genocide but that Serbia was neither directly responsible nor complicit for it. However, Serbia had committed a breach of the Genocide Convention by failing to prevent it; for not cooperating with the ICTY in punishing the perpetrators; and for violation of its obligation to comply with provisional measures ordered by the Court. *Bosnia and Herzegovina v. Serbia and Montenegro, General List No. 91* 2007).


\(^14\) State responsibility for crimes against humanity is expressly recognised for the crime of apartheid. Where individuals are charged with crimes against humanity, state responsibility could be considered in terms of responsibility for gross violations of human rights. Ibid. p. 618, ft. 18.

\(^15\) Where individual conduct is attributed to the state, there is an obligation to prosecute individual perpetrators. Ibid. p. 620.
(obligations owed to all), the likelihood of states pursuing civil liability suits against other states is slim. Alternative mechanisms of redress for violations by states such as scrutiny by treaty bodies have proven to be generally impotent. For example, the Human Rights Council, although recently restructured, lacks effective and timely mechanisms for enforcement for state violations. What may offer more promise is a hybrid international responsibility regime which may be emerging whereby the law of individual responsibility and the law of state responsibility are component parts and in which particular cases are interrelated.

9.1.3 The gap in accountability

In between these inchoate legal regimes there remains a gap in accountability of the ‘bystanders’ – those who acquiesce to violence within the society conducting the mass violence, and those ‘outside’ who are fully apprised of the impending or ongoing violence. Bystanders include international organisations, officials, and of particular interest in regard to this proposal, individual citizens. To justify their inaction in the knowledge of the impending or immediate violence, people often employ mechanisms for justifying, or even denying, large scale suffering. However, this is becoming less of an option. At the international level, discussion is developing on whether human beings are in some situations both the objects and subjects of international law. The assumption has been that the state is the subject of human rights obligations to its citizens. This is expanding to the idea that not only do states’ obligations now extend to third states via obligation *erga omnes*, but that individuals’ respect, for example for the right to life, now extends beyond their own state’s boundaries. The obligations to right to life, shelter, and health as articulated in human rights treaties are not just to states but to the individuals for whom the treaties are directed. Also being debated, particularly

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19 For example, the ICCPR and ICESCR treaties state in the Preambles:

> Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,
> Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,
> Agree upon the following articles: …

in the aftermath of the US invasion of Iraq in 2003, is the question of whether and to what degree citizens are responsible collectively for the actions of their state.\(^{20}\)

### 9.1.4 The power of political rhetoric and law to support non-rescue

While civil and political groups publicly denounce the violence and express outrage at state inaction in the face of atrocity, the decision to intervene is ultimately driven by states and international organisations self-interests, such as retention of funding and support based on compliance with major donors’ political agendas. Reference is made to the various charters, declarations, and commitments between states which articulate increasingly demanding standards to protect billions of vulnerable people. Each document defines which conflicts warrant intervention but the litmus test is ultimately based on state-centred criteria and self-serving foreign policy.

Inaction can be justified while referencing articles set in the UN Charter (in which the primary unit is the state) and the Geneva Conventions (which address both individual and state obligations and prohibitions), the ILC’s Articles of State Responsibility, the emerging state obligations of RtoP, the UN’s Millennium Declaration, and the many treaties which protect human rights. The Millennium Declaration states in Section I the principle of shared responsibility for managing worldwide threats to international peace and security. Section Two declares no effort will be spared to free peoples from the scourge of war, whether within or between States. In drafting the Declaration, the heads of State recognised that, in addition to their separate responsibilities to their individual societies, they have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level and therefore have a duty to all of the world’s people. Similarly, the Commission for the RtoP was of the view that human security is indivisible. In the UNGA resolution on the RtoP of October 2009, the threshold criteria of ‘just cause’ for military intervention focuses on large scale loss of life.\(^{21}\)

These commendable statements and obligations are used to justify the decision-making criteria which are ultimately based on whether a conflict will affect international peace and security, that is, state relations; if the interests of those states which have the power to authorise or veto such action are affected; whether the violence will create instability in neighbouring states; whether a refugee crisis will occur, affecting other states, near...

\(^{20}\) Parrish, “Collective Responsibility and the State.” p. 120.

\(^{21}\) “Resolution: Responsibility to Protect.”
and far; or if the use of modern weaponry will spill over the borders to neighbouring states. The questions are asked and debated in state-speak: do states have any authority, responsibility (but ultimately interests at stake) to intervene, and how can other states not be affected by it? The same criteria used to justify intervention or non-intervention have been used to justify invasion as in the case of the US and British action in 2004 in Iraq. Minimisation of personal empathy or association by the decision-makers (who invariably have roofs that do not leak and probably have matching bed linen) is deemed necessary in this ‘rational’ decision-making process. Millions suffer, legitimated by politics, and ultimately international law, by those who recognise it, or legitimated by the supposed absence of international law by those who deny its existence.  

9.1.5 Moving beyond legality to the reality of mass violence and suffering

To move international law discourse beyond these debates of (flawed) legality, work is needed on several fronts. Nicholas Tsagourias argues:

In the end, discussing the legality or illegality of humanitarian intervention becomes a futile rhetorical exercise in which almost any position can be legally and politically justified. What we should really address is the causes, effects and our reaction to events that shatter the lives of human beings.

D’Amato argues that the words used by positivists in these debates, such as ‘sovereignty’, ‘the inviolability of state territory’, ‘the dignity of states’, and ‘jus cogens’, are mere rhetoric. He believes that ‘[w]e should free our minds, as Wittgenstein urged, from the tyranny of words.’ During the conflict in the former Yugoslavia, he asked of international lawyers:

Are we really supposed to shut our eyes to the killing of boys because they are Serbs, the raping of women because they are Muslim, the severe maltreatment of elderly persons because they are Croats? Do we shut our eyes because the things

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22 It has been estimated that at least four million victims of armed conflicts or atrocities could have been spared in the 1990s had the Security Council intervened in time and resolutely. This figure includes approximately 250,000 casualties from the war in Bosnia-Herzegovina; 800,000 casualties in Rwanda; 300,000 deaths from political suppression in Iraq after the Gulf War; one million victims of the prolonged application of the UN sanctions regime against Iraq; 1.5 million people from the war in Sudan; and as many as two million deaths from the wars in Congo and Central Africa. Sourced from Joachim Krause, “Multilateralism: Behind European Views,” The Washington Quarterly 27, 2 (2004).


24 Anthony D’Amato, “There is No Norm of Intervention or Non-Intervention in International Law,” International Legal Theory 7, 1 (2001). p. 35.
occur in the territorial portion of the planet known as, or formerly known as, Yugoslavia?...What would today’s students think of a professor of international law who takes the position that the police and courts should not intervene in domestic disputes no matter how battered or brutalized a mother or her children might be? If you are unwilling to take this position in the classroom, but you support the exact same thing when it happens inside a[nother] state’s boundaries, then I suggest it’s time to ponder which you value more: abstract law or innocent lives?"25

Tsagourias’ and D’Amato’s appeals lead in the same direction as Allott’s and Drumbl’s. The call is to move beyond the rhetoric and limitations of current regimes of legality and to consider the reality of mass violence and suffering, and our acquiescence to it as bystanders, both individually and collectively. The ethical proposal explores those issues and forms the basis for the proposed legal code outlined below which imposes responsibility beyond individual perpetrators and states, to all of humanity, or at least those with capability to respond. While this does not address the immunity currently enjoyed by international organisations, the expansion of responsibility could help towards completing a model for a systemic and global responsibility to protect.

9.1.6 The vexed question of collective responsibility

Failure to protect from mass violence demands accountability on a collective scale. As discussed above, to hold only individual perpetrators to account absolves the broader contributors to mass violence. Likewise, to look only to states for protection in effect looks to no state. While commendable, the various international legal instruments hold no one state, or group of states, accountable for failure to protect. By all being responsible, all are effectively absolved when failure occurs. However, to hold humanity accountable raises the question of what individuals can do in the fulfilment of such a legal responsibility. For those who feel an ethical responsibility and empathy towards those who are subject to gross human rights violations, the issue of what action can be taken is a constant vexation. For those with no consciousness, or lack of empathy for others’ suffering, the imposition of such a responsibility could be considered unjust, or meaningless. The proposed remedies in the proposition suggest

25 Ibid. pp. 36-37.
several ways the collective of humanity can respond – these spread the burden of responsibility, responsiveness, remorse, compensation, and non-monetary remedies.

As this legal proposal is not anticipated to take ground without a parallel development of ethical bonds between global citizens, and a political transformation towards an international constitutionalism, any prognostication of how such a legal obligation would be responded to would be only that. An underlying assumption throughout this thesis follows Allott’s model that ideas and ideals are interlocked with a society’s real and legal constitutions. Legal obligations do not arise in a vacuum but are highly context-dependent on the social and political milieu of the time. Orthodox views suggest we need to be able to detect evidence of solidarity – bonds of sentiment, a community of interest, a collective pride and shame from which a collective consciousness and response is generated.26 Our intuitions to respond to vulnerable people, particularly a drowning baby, would need to extend to fellow human beings in distant places. It could be that the infiltration of international law by individuals as both objects and subjects will spawn international democratic processes and decision-making, and relationships, as yet not conceived of.

The current regime of international criminal law reifies individual responsibility – this reflects our ethical evolution to date and a Western fear of collective responsibility. Outside institutional liability, the concept of collective responsibility is generally considered negatively in liberal democratic societies with rights-bearing individuals. Ascription of a form of collective responsibility can even be considered primitive, or superstitious27 although in recent years it has been invoked, all be it cautiously, in the jurisprudence of international tribunals including joint criminal enterprise, conspiracy, complicity, command responsibility, and incitement. Drumbl would suggest that rather than caution, there is a schizophrenia evident in proceedings at the ICTY where the ‘systems incorporate vicarious legal elements in order to secure convictions, but then express concern that criminalization ought not be based on vicarious liability’.28

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Although the Nuremberg tribunal and both the ICTY and ICTR have invoked collective liability theories, the ICTY Appeals Chamber began to express concern with elements of vicarious liability that had influenced the Trial Chamber’s interpretation in the Blaškić case\textsuperscript{29} of ordering and command responsibility. The Appeals Chamber emphasised the need for proof of subjective awareness, or at minimum, recklessness, to secure a conviction.\textsuperscript{30} It also overturned the conviction of Krstić as a primary perpetrator of the genocide at Srebrenica based on joint criminal enterprise.\textsuperscript{31} It held that such a conviction can only be entered where the specific intent of genocide has been established unequivocally and that the intent must be shared by the co-perpetrators. The Appeals Chamber instead substituted a conviction for aiding and abetting genocide, resulting in a lesser sentence.\textsuperscript{32} Drumbl observes:

Consequently, and notwithstanding its circumspection, the ICTY continues to tinker with traditional understandings of individual criminal culpability in order to suit this culpability to the special context of mass atrocity…Viewed through the prism of [mass atrocity], recourse to generous – and at times somewhat vicarious – liability theories becomes eminently understandable in so far as these theories permit the tribunals to ascribe individual guilt in cases where violence has several, and often murky, organic sources.\textsuperscript{33}

9.2 Transformations, creativity, and emerging norms: reason for optimism

9.2.1 Revolutionary and incremental change

The confidence to submit this proposal is based on well documented precedents of legal creativity and legal transformation. The evolution of the Western legal tradition in modernity can be linked to a series of revolutionary social, political, and legal transformations including the Papal revolution, the Reformation, and the English, American, French and Russian revolutions.\textsuperscript{34} Each of these momentous events and subsequent power rearrangements created new laws, institutions, values, and

\textsuperscript{29} Prosecutor v. Blaškić, IT-95-14-A (2004).
\textsuperscript{30} Drumbl, "Pluralizing International Criminal Justice (Review Essay)." pp. 112-113.
\textsuperscript{32} Drumbl, "Pluralizing International Criminal Justice (Review Essay)." pp. 113-114.
\textsuperscript{33} Ibid. p. 114.
obligations. Recent decades have seen the incremental criminalisation of acts within domestic societies increasingly replicated at the international level through a rapidly developing regime of international crimes which are covered by *jus cogens* norms. In 1980, the *Filartiga v. Pena-Irala* judgement by the United States Court of Appeals stated ‘…the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.’ The growing list of crimes includes the protection of peace, criminalising the act of aggression; humanitarian protection during armed conflict (war crimes, unlawful use of weapons); the protection of fundamental human rights (genocide, CAH, apartheid, slavery, torture); protection against terror violence (piracy, aircraft-hijacking, the taking of civilian hostages); and protection of the environment (theft of nuclear materials). Each of the conventions’ conclusions invariably followed human struggle, massive loss of life, and eventual abhorrence of the formerly non-regulated, or sometimes justified, acts which were followed by aspirations to create a safer world.

### 9.2.2 Moments of creativity

Creativity in law also has innumerable precedents. Surveying 426 American law professors in 2005, Blomquist asked what they considered to be the most creative moments in American law. Through the various responses, and comparisons and contrasts, Blomquist ranked the 100 most creative moments. The top rankings were dominated by governmental foundational principles securing human freedom and flourishing. These were predominantly championed by constitution-makers and political revolutionaries in America’s founding decades such as the Constitution of the United States (1787), the Declaration of Independence (1776), the Bill of Rights (1791-1792), and Lincoln’s Emancipation Declaration during the Civil War (1863). Other notable creative moments relevant to this proposal, in descending rank on this list, include Roosevelt’s New Deal Legislation (1933-1936), Oliver Wendell Holmes Jr’s *The Common Law* (1880), *Roe v. Wade* (1973), the Civil Rights Act (1964), Carson’s *Silent Spring* (1962), Justice Douglas’ dissent in *Sierra Club v. Morton* (1972) citing Christopher Stone’s law review article ‘Should Trees Have Standing?’, the Endangered Species Act (1973), Eisenhower’s Atoms for Peace Program and the creation of the

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### 9.2.3 Legal fictions to guide the way

The canonised decision of the House of Lords in *Donoghue v. Stevenson* exemplifies a transformational moment in law and a milestone in the ethical and legal evolution of the duty of care between strangers. While the significance of the decision has been judged by some to have been overstated, it provided a basis for the law of negligence and, according to Peter Cane, represents a paradigm shift from formulary to non-formulary thinking about law.

...underlying [the development] lay an ethical injunction of extremely wide potential scope – namely “take care not to injure your ‘neighbours’.” As a legal principle, this injunction is hedged about with a complex web of qualifications and exceptions; but still, the foundation of the tort of negligence is not a set of specific rules or principles such as exemplified the forms of action, but an ethical principle of great generality.

Not all legal transformations are so singular or identifiable and this proposal anticipates an incremental development of its ethical and legal expression over decades, even centuries, to come. In his book titled *Legal Fictions*, Lon Fuller discusses the development of new fields of law generated by new social or commercial practices which necessitate the reconstruction of legal doctrine. These new fields nearly always present, at first, artificial constructions which evolve. Often these are through metaphoric extension, and exploratory, or in many cases, outright fictions. The practice of constructing fictions is also evident in the physical sciences, for example, the metaphorical and sometimes poetic terms used to describe gravitation’s ‘warping of


38 *Donoghue v. Stevenson*.

39 J. C. Smith, Burns, and Peter, “*Donoghue v. Stevenson* – The Not So Golden Anniversary,” *Modern Law Review* 46, 1 (1983). p. 147, citing Professor Heuston’s 1957 article which argued the significance of the neighbour principle has been over-emphasised by both its supporters and its opponents. “It was not intended to be, and cannot properly be treated as being, a general formula which will explain all conceivable cases of negligence. Even at a fairly high level of abstraction it needs considerable qualifications and reservations before it can be accepted. It is indeed a sign of the poverty of thought about the law of torts in this country that the proposition should have been called upon to bear a weight so manifestly greater than it could support…” Robert F. V. Heuston, “*Donoghue v. Stevenson* in Retrospect,” *Modern Law Review* 20 (1957). p. 23.

space’ or ‘crinkles in space-time’, and the sun’s ‘tug’ or ‘pull’ on the earth, and electricity’s ‘flow’. Often an empirical formula is discovered before its *raison d’être*, or the theoretical principles behind the process are fully understood. Similarly, legal analogies such as the corporation as a ‘person’ or the artificial construction of the social contract, indicate our congenital predisposition toward simplicity, to define, group, and bring order to the complexity and flux of reality. The goal is to somehow reach a ‘truth’, or a ‘right’, or at least orderliness to chaos. Fuller illustrates this in tracing the origin of the doctrine of vicarious liability for tort to the supposed ‘deemed negligence’ of a master for hiring a careless servant. This exploratory fiction, or artificial construction, was ‘feeling’ its way towards some as yet undiscovered principle.  

This proposal could be likened to Fuller’s concept of an artificial legal construction. It could also be conceived as scaffolding, in the form of an extended duty of care, from which a yet-to-be-formulated and viable form of collective responsibility could emerge. Once a viable formulation of ethical and legal responsibility has evolved, the scaffolding, or legal fiction, would be dismantled. If it is not dismantled to allow the appropriate legal code to emerge from within the contemporary social milieu, the new construction would be obscured by its own redundant legal code. While useful in the early exploration of vicarious liability, the mismatch to current times of limiting vicarious liability to the occasion of a master’s hiring of a careless servant illustrates this point. It is early days in the construction of a collective liability for distant others’ care. The half-light indicates an emerging international obligation of a duty of care, but the outline is vague.

**9.3 Emerging norms**

**9.3.1 An increasingly obligatory duty to rescue**

In practice, an international duty to rescue to avoid or mitigate natural disasters appears to be evolving – an indication that the good neighbour principle is infiltrating international law. The duty is not in regard to the right to intervene or the use of force, or part of the duty to protect, but a readiness and obligation to assist a neighbour in distress, usually in natural disaster situations which are characterised by an immediacy and immensity of adversity. A willingness to assist and to receive assistance in such

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41 Fuller, *Legal Fictions*. pp. 68-70.
situations are generally short term and do not raise macro-political issues which the fulfilment of other human rights norms such as the right to development may raise, particularly in regard to domestic policy.

The general common law rule in regard to rescue has been that the defendant has no duty to aid the plaintiff and there is no liability for omissions (or non-feasance). In 1987 in *Smith v. Littlewoods Organisation Ltd,* Lord Goff referred to Lord Diplock’s speech of 1970 in *Dorset Yacht Co Ltd v. Home Office* regarding the parable of the good Samaritan as authority for the lack of civil liability for an omission. However, Lord Goff conceded that the other examples used by Lord Diplock in that speech would (at the time of his comments in 1987) be repugnant in extreme cases and suggested that one day reconsideration, especially when compared with civil law affirmative duties of good-neighbourliness, may be necessary, even though strict limits may have to be recognised. Regardless, the absence of a duty to come to the assistance of someone in need of help remains the rule. The common law holds that ‘one is not required to rescue somebody who is in danger; one is not required to do so even when the potential rescuer can do so without risk for his or her own life.’

Nevertheless, in civil law jurisdictions and now a few common law jurisdictions, the categories of persons subject to a duty of easy rescue are expanding, often based on a special relationship with the plaintiff, or the plaintiff’s assailant, or if the defendant created a risk of harm, and where the criminal law can expect a willingness to be exposed to inconvenience, pecuniary loss, and personal danger. A duty of easy rescue is applicable in emergency situations where, if the plaintiff’s life or health is seriously threatened, the rescuer has a duty to rescue as long as it does not pose a significant risk or burden. Known as ‘bad Samaritan statutes’ in that they penalise non-rescue, these provisions are rarely enforced and are thought to provide more of an educational function. Laws vary between jurisdictions, depending on their interaction with other

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legal principles such as consent, parental rights, and the right to refuse treatment. In some jurisdictions, the duty may be as limited as requiring that the defendant call emergency services. US states which have adopted criminal statutes that require rescue, with qualifications, include Vermont, Rhode Island, Minnesota, Hawaii, and Wisconsin. In Quebec, there is a general duty to rescue in its Charter of Human Rights and Freedoms requiring every person to come to the aid of anyone whose life is in peril, with qualifications of safety.\footnote{Joshua Dressler, "Some Brief Thoughts (Mostly Negative) about Bad Samaritan Laws," \textit{Santa Clara Law Review} 40, 971-990 (1999-2000).}

In Germany, the obligation to rescue is codified in criminal law and a person could also possibly have grounds for a tort suit under the German Civil Code.\footnote{For example, the German Penal Code, Section 323c.} However, the courts have rejected civil liability as the statute is intended for the protection of society as a whole, rather than particular persons.\footnote{Basil S. Markesinis and Hannes Unberath, \textit{The German Law of Torts}, 4th ed. (2002). p. 27.} All US states have criminal statutes that require certain classes of people to report certain kinds of crimes. These statutes are usually held to not create private civil causes of action.\footnote{Davies and Hayden, \textit{Global Issues in Tort Law}. pp. 127-128.} The same holds in most other countries which have criminal statutes allowing for punishment for failure to assist. In France, wilful non-rescue, even if the person miraculously escaped harm, is able to be prosecuted, although most cases are limited to motorists who fail to help accident victims; doctors who fail to help sick people; parents who fail to call for assistance for sick children; those who assist suicides; and ‘healers’ who fail to advise their customers to seek expert medical advice.\footnote{Andrew Ashworth and Eva Steiner, "Criminal Omissions and Public Duties: The French Experience," \textit{Journal of Legal Studies} 10 (1990). p. 153 and pp. 158-160 in Davies and Hayden, \textit{Global Issues in Tort Law}. p. 122.} Interestingly, the French statute did not evolve from any high moral aspiration but rather from a duty imposed in Vichy France in 1941 which required French citizens to rescue German troops attacked by the Resistance. It also aimed to prevent sabotage.\footnote{Tomlinson, "The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement." p. 462 in Davies and Hayden, \textit{Global Issues in Tort Law}. pp. 122-123.}

Good Samaritan laws are emerging which aim to protect from liability those who choose to aid others who are injured or ill. They are intended to reduce hesitation in choosing to go to the aid of someone for fear of being sued for unintentional injury or wrongful death. Good Samaritan provisions are not universal, for example, in some
jurisdictions the legal principle of imminent peril may apply. In the absence of this, the actions of the rescuer may be considered reckless.\(^55\)

Despite convergence in recent decades between the common law and civil law traditions, there is still a striking exception in the duty to rescue. Significant numbers of common law commentators have argued for more than a century that the civil law approach is superior.\(^56\) On the basis of empirical research in the US, proven cases of non-rescue are extraordinarily rare and proven cases of rescue are exceedingly common, often in hazardous circumstances where the duty would not normally apply. According to David Hyman, ‘Even in the absence of a statutory duty, Americans appear to be too willing to undertake rescue if one judges by the number of injuries and deaths among rescuers.’\(^57\) On the other side, a civil law commentator, Alberto Cadoppi, laments that the duty to rescue statutes are too expansive and inconsistent and should be restricted to requiring that accidents be reported.\(^58\)

A distant extension of these emerging obligations to rescue is the Levinasian/Manderson model in the ethical and this legal proposal of a non-reciprocal responsibility on all with capability to protect ‘the vulnerable third’ from atrocity. Given the propensity of people to rescue those nearby, even at great risk to themselves, it is anticipated that the effect of virtual proximity will generate similar responses to distant people threatened by heinous acts of violence. When considered on a long term basis, even since Donoghue v. Stevenson in 1932, obligations of various legal agencies for the care, protection, and rescue of human beings, both near and far, have thickened rapidly. When extrapolating this trajectory out another 100 years, the possibility of a collective duty of care of all humanity to protect the vulnerable from atrocity does not seem so extraordinary.

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9.3.2 Exceptions to the doctrine of state immunity for civil liability

Of particular relevance to this proposal is the growth in the number of recent civil claims which are providing alternative recourse against individuals and governments where criminal prosecution is not an option. While the principle of sovereign immunity continues to dominate the legal relationship of citizens to their government in both common and civil law countries, immunity from suit in tort has been steadily eroding in recent decades. For example, the English Parliament set aside rules restricting liability in tort in The Crown Proceedings Act of 1947 where the Crown has to bear the same liability as a private party for damages resulting from its actions. Since 1964 in England, public funds have been available to compensate victims of police misconduct. By contrast, French administrative law imposes no-fault liability where the state has engaged in conduct that creates a risk of injury. Where injury occurs, the state must compensate the injured. The public pays the cost of government misconduct, ensuring an unequal burden does not fall on a particular individual or group. This exemplifies the notion of equity of burdens, a principle which is taken up in the proposition.59

Generally, there has been reluctance in both common and civil law jurisdictions to hold governments to account for failure to protect their citizens. The view is that a duty is owed to the public generally but this is not enforceable by individuals. In the US, this duty only falls within a narrow exception based on a special relationship with a governmental entity. In civil law countries, governments seek to protect their discretion to prioritise competing policy objectives.60

Latin American jurisdictions have responded to the threat of authoritarian governments by placing the right of redress against the sovereign in their constitutions, and conventions and treaties provide protection against torture, forced disappearances, and discrimination. The Inter-American Court of Human Rights requires states to guarantee that individuals can sue the sovereign when rights are violated. Until the 1950s judges, through interpretation of a ‘thin’ civil code, allowed cases against civil servants who had acted with malice or negligence. This restricted state responsibility only to cases where civil servants acted ‘irresponsibly’. With democratisation, statutory developments have reformed the area of state responsibility, constitutionalising all provisions relating to suing the sovereign. In Chile, a statute even allows for state

60 Davies and Hayden, Global Issues in Tort Law. p. 148.
responsibility for the tort of ‘lack of service’. However, all is not well as the same law immunised the armed forces and the police from the same liability.\textsuperscript{61}

In more recent years in common law jurisdictions, there appears to be an emerging norm for a human rights exception to the doctrine of sovereign immunity in relation to civil claims. Individuals, often backed by NGOs, are holding states or their leaders to account for their actions and seeking damages. And, the attempts are getting more sophisticated such as the following cases in New Zealand, the United Kingdom, and the US. While not a panacea, and collection on the judgement often difficult, civil suits may increasingly provide a measure of justice to victims and their families, and also act as an additional deterrent.\textsuperscript{62}

\textbf{9.3.2.1 Attorney General v. Simpson}

In New Zealand, a landmark case of the public collective’s wrong doing is found in \textit{Simpson v. Attorney General}\textsuperscript{63} (also known as Baigent’s case) where the plaintiffs sued on the grounds the police breached Section 21 of the Bill of Rights Act, violating the right to be secure against unreasonable search and arrest. Four out of five of the Court of Appeal’s bench held that: the fact that the Bill of Rights did not include a specific remedies section did not mean Parliament did not intend to compensate for breaches of the Act; the Bill of Rights had to be interpreted in light of New Zealand’s obligations under the International Covenant on Civil and Political Rights (ICCPR); the Courts can award remedies for breaches of the Bill of Rights; and the liability of breaches of the Act fell on the Crown. As the Court characterised the liability as being in public law, the Crown could not rely on the immunities in the Crown Proceedings Act 1950 which relate to actions in tort.\textsuperscript{64}

\textbf{9.3.2.2 Al-Adsani v. the United Kingdom}

The differences between the majority and minority judgements of 9 to 8 of the European Court of Human Rights in \textit{Al-Adsani v. the United Kingdom}\textsuperscript{65} indicated opposing approaches on the legality of the effect of the prohibition on torture as a \textit{jus cogens}


\textsuperscript{62} Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution."

\textsuperscript{63} \textit{Simpson v. Attorney General} 3 NZLR 667 (1994).


\textsuperscript{65} \textit{Al-Adsani v. United Kingdom}, (No. 2) 35763/97 (2001).
norm. For the majority the norm is not proved but for the minority, the norm is simply the standard by which any conflicting law is to be obviated. Each dissenting opinion attacked the majority’s conclusion that ‘there is [not] yet acceptance in international law’ that states are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state. Each argued this evaded the consequences of the jure cogens norm. Judge Bravo interpreted the ‘yet’ in the majority’s reference as an admission of lack of courage rather than lack of evidence to support the conclusions. Subsequent to Al-Adsani, in the Pinochet litigation, the English House of Lords held that a limited exception existed in the case of a former head of state’s criminal liability for torture.

9.3.2.3 *Mohamed Ali Samantar v. Bashe Abdi Yousuf et al.*

In March, 2010, the US Supreme Court heard arguments in a major case *Samantar v. Yousuf* testing whether torture victims living in the US can sue their tormentors also living in the US five plaintiffs sued for damages, claiming Somali’s then Prime Minister, Mohamed Ali Samantar, responsible for torture in the 1980s. The lawsuit was brought under the 1991 Torture Victim Protection Act which authorises lawsuits in the US against individuals who have committed torture or extrajudicial killings while acting in an official capacity for a foreign nation, as well as the Alien Tort Statute of 1789 which provides for district court original jurisdiction of any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the US Suits can only be brought in the US if there is no adequate judicial remedy in the nation where the torture occurred.

Initially dismissed in 2004 by a federal judge who ruled Samantar was immune to suit under the Foreign Sovereign Immunities Act (FSIA), the decision was reversed by a Court of Appeals which held the Act covered states, not individuals. The Court further reasoned that even if the Act did apply to foreign government officials, it does not apply to former foreign government officials. Further, at the time of torture, there was no

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67 *Al-Adsani*, para 66.
73 Beth Stephens, ”Samantar Insta-Symposium: The View from the Counsel’s Table,” in *Opino Juris* (2010).
recognised state government. Samantar appealed to the US Supreme Court contesting that there is no difference between a state act and the individuals who are instrumentalities through which the states act. With no dissent, the Supreme Court on June 1, 2010, declared the FSIA does not provide immunity to lawsuits aimed at current or former officials of foreign nations. Samantar had also claimed that he had immunity under the common law and customary international law, but the Court said Congress did not incorporate either of those concepts in the FSIA. Whether they would now provide immunity to the former Somali official was beyond the scope of the ruling; Samantar can now make those claims, and offer any other legal defences he may have, in the District Court when the case returns there.\(^{74}\)

Steven Ratner and Jason Abrams reflect that while they may not lead to the same degree of accountability as a criminal process, civil suits offer a way of seeking justice and represent one form of authoritative adjudication of legal issues relating to human rights violations.

Even if defendants flee the jurisdiction, such suits still bring attention to past atrocities, provide victims with a forum to present their claims, and deprive the defendants of foreign refuge in the countries where the cases are brought. Moreover, obtaining a judgement against the defendant affords the plaintiff an opportunity to pursue any of the defendant’s assets uncovered in jurisdictions willing to enforce the judgement.\(^{75}\)

**9.3.3 Emerging general principles of international civil litigation**

In regard to trans-national group actions, according to a report of the ILA Committee on International Civil Litigation and the Interests of the Public presented to the ILA 2008 conference, they were identified as one of the most pressing topics for attention given numerous difficulties these were posing in a trans-national context.\(^{76}\) ‘Interests of the public’ were defined as ‘collective interests larger than the parties involved in the litigation, such as interests of the society at large, or private enforcement of public or

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\(^{75}\) Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law*, p. 211.

market regulation or other similar interests’. The Report aimed to identify general principles and common themes or approaches across the various national models of private group action currently employed in the world. It also aimed to consider some of the uniquely cross-border and trans-national aspects of group actions and to propose guidelines or best practices for the specific issues facing courts around the globe when dealing with group actions which have some trans-national components to them. Common approaches to preconditions for a group action were identified. The Committee also considered the issue of recognition as res judicata of a judgement given by a court not in the country in which enforcement is sought. Questions of jurisdiction, notification, applicable law, evidence, case management, and trans-national cooperation between courts were also addressed. After presentation of the Report, the ILA invited the Committee to complete its work in particular on the subject of private litigation for violation of human rights.

9.3.4 Transformative possibilities

It is evidently a time of global change, no less for the role of law in establishing the limitations on appropriate behaviour and the accountability of governments and individual leaders for human rights violations. This augurs well for novel ideas which have the potential to raise the bar for international justice but which also offer alternatives to retribution and punishment after the failure to prevent mass violence. Mechanisms for long-term reconciliation and reconstruction, rather than criminalisation and containment of tensions, are increasingly preferred strategies. According to Emilios Christodoulidis and Scot Veitch, in more recent times, in the context of transitional justice in the aftermath of atrocity, law has been extended to play new roles in administering mercy, reconciling wrongdoing of the past for the sake of a shared future on a national level, negotiating a way between punishment and impunity, and acknowledging multiple truths in an effort to stimulate social reconstruction. Conventional notions of justice are unable to reconcile tragedy at a national level and the logic of amnesty is increasingly negotiating the notion of forgiveness and the problems of memory and forgetting. Conventional criminal notions of punishment


\footnote{Ibid.}
based in retribution have been disrupted. Rather, there are demands for truth, reconciliation and national unity.\textsuperscript{79}

In regard to the duty of care on individual citizens, while fraught with challenges, not least the search for a zone of reasonableness in imposing a duty, it is evidently evolving rapidly within both the common and civil law systems. Thickening ethical obligations of citizens towards strangers are populating new criminal and civil codes reflecting what a recent commentator called an emerging ‘empathetic civilisation’.\textsuperscript{80} Capitalising on this new consciousness, and in the same spirit as the palliative remedies which law is beginning to play in the aftermath of atrocity, the potential of an international tort to potentially pre-empt violence will now be explored.

9.4 Why look to tort as a remedy?

9.4.1 An international law of obligations

Tort resides within the category of the Law of Obligations, together with contract, restitution, and trust law. These provide protective rules of rights created through the Law of Property. The latter sets constitutive rules establishing propriety, rights and interests. The Law of Obligations protects these rights while the Law of Property is concerned with substantive questions of ownership.\textsuperscript{81} Given the emerging constitutional rules at the international level, the development of protective rules, or laws of obligation, would be expected. In the proposition, the duty to protect the vulnerable from atrocity protects the victim’s rights to life, physical freedom, individual capacities, and freedom from fear as defined by an emerging constitutional regime of treaties and declarations such as the UDHR, ICCPR, and International Covenant on Economic, Social and Cultural Rights (ICESCR). As discussed in Chapter 4, Section 4, Allott has suggested the ILC should focus on an international Law of Obligations in the form of a Bill of Rights in regard to a state’s behaviour, not to its own citizens, but to the rest of the community of states and its peoples. This proposal is for a Law of Obligations between the individual members of the community of states.


\textsuperscript{81} Cane, \textit{The Anatomy of Tort Law}. p. 182.
The evolution of the law of negligence over the past 100 years at the domestic level has reflected a ‘thickening’ of rights and responsibilities and the increasingly complex interactions and practices between individual members of domestic societies. As the international legal standing of individuals becomes increasingly recognised and codified in public and private international law, and more complex interactions and practices between individual members occur, it is probable that a regime of international tort of negligence, amongst other legal regimes, between individuals would follow. This might be accelerated if the forum as suggested in the political proposal should convene to discuss individual obligations to protect at the international level on the basis of this legal proposition, and the preceding ethical proposal.

### 9.4.2 A responsiveness to the complexities of human behaviour

The responsiveness of tort to the complexities of human behaviour and the infinite possibilities of its consequences permits a range of ideological, theoretical, and practical applications of tort law. It is tort’s ‘intimacy’ with individual moral choices, and social and political contexts, which provides an opportunity to anticipate potential legal obligations based on the new values and behaviours generated by virtual proximity between all members of humanity. This eases concern that any proposed legal formula might impose only Western legal traditions. Opportunity for input from multiple cultural perspectives could modify the proposition to incorporate a truly global expression of a duty to protect from atrocity should it be taken up in public conversation and explored within the framework for inter-subjective dialogue as outlined in the political proposal.

Peter Cane suggests tort is best seen as a social institution. As a result, it is sometimes messy and conflicting. It is not just a list of technical categories into which social life is forced in order to process legal remedies, but ‘…is best seen as a system of ethical rules and principles of personal responsibility (and freedom) adopted by society as a publicly enforceable statement about how its citizens may, ought, and ought not to behave in their dealings with one another.\(^\text{82}\)

According to Honoré, the tort system is justified as a means by which the state, subject to the constraints of justice, seeks to reduce undesirable conduct by treating certain individual interests as rights that the right-holder is empowered to protect when

\(^{82}\) Ibid. p. 27.
infringed by conduct marked as a civil wrong. Morality needs law and it is in tort that concrete content of rules and principles can be expressed, and mediation between conflicting views resolved. Social and political criteria determine the acceptance of rules and principles of tort law, ensuring they represent a fair and reasonable regime of personal responsibility for society to adopt and enforce against its members, given a range of views.\(^{83}\)

Tort is civil, as opposed to criminal, in that the initiative in bringing the matter to court is by the victim of the wrong, as the victim of the wrong. In criminal law, the matter is brought by society as a whole through its customary organs or representatives.\(^ {84}\) As there is no appointed prosecutor, court mandate, or political agenda driving which cases proceed, the opportunity for victims to drive the content of an action are greatly enhanced.

Generally, tort is non-retributive,\(^ {85}\) unlike criminal law which seeks to pay back the criminal for their crime and requires they suffer just what their victim suffered. The goal in tort is to compensate the victim for their loss in order to cancel or annul it, rather than pay back the defendant for their wrong.\(^ {86}\) It offers a milder sort of legal remedy than criminal law. This aligns with the goal of this legal proposal to bring reconciliation between victims and those capable of protecting them, rather than hunt down those who perpetrated crimes and incarcerate them, which international criminal law aims to do. Of further advantage for the purposes of the proposition, the moral stigma attached to tort liability is usually not as strong as that imposed by criminal liability. Further, sanctions are usually less harsh for failure to prevent harm, than for bringing it about.\(^ {87}\)

The bilateral nature of relationships recognised in tort law generally serves to emphasise the idea of one-to-one obligations corresponding to another’s rights. This view evokes the idea of tort regulating fairness in the distribution of rights and obligations in a society rather than emphasising a retributive punishment function as criminal law does.

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85 Of course, this ‘attribute’ is changing in recent decades due to the trend in courts to award ‘exemplary’ or ‘aggravated’ damages.
Tort is always correlative, that is, two-sided involving the plaintiff and defendant, obligation and right. As it is between individuals, it is private law. This is the very dynamic which the proposition seeks to foster – the forging of relationship, obligation, care, and ultimately love, between individual members of international society, but also fairness in the enjoyment of equal freedom and resources.

Cane defines a cause of action or principle of tort liability as having the balancing effect of two elements of the position of the victim and the injurer, or plaintiff and defendant, and three components, moderated by the idea of correlativity, including protected interests, sanctioned conduct and sanctions. Protected interests are of both parties. A balance is sought between freedom and responsibility. Sanctioned conduct is also correlative. The cause of action involves the conduct of both. The sanction, or legal consequence, is adverse to the perpetrator of the sanctioned conduct usually through the payment of damages to the victim, or there may be a refusal of a remedy, or a reduction in damages as they express and give effect to a balance struck by law between the positions of the two parties to each cause of action.88

9.4.3 Causation – the nexus between responsibility and harm

According to David G. Owen, the subject of tort law involves the nature and extent of an actor’s legal responsibility to a victim for causing harm. For the past century, the basis of tort liability has been ordered according to a tripartite responsibility scale based on the culpability of the actor. These are intentionally inflicted harm, negligently caused harm, and no-fault or strict liability for causing harm. The essentials of fault for intentional and negligence harm explain the bulk of tort doctrine. Three linking aspects of tort law connect an agent’s responsibility and a victim’s harm. These are choice, action, and harm.89 These together illuminate the fundamentals of moral responsibility for causing harm. The central nexus between responsibility and harm in tort is causation which brings together an agent’s misconduct and resulting harm. The questions to ask are: ‘what caused what’, and ‘what caused what’, that is, what counts as harm.90

Tony Honoré and H.L.A. Hart asserted that to be a cause of some event, a prior event must have been a causally relevant condition of the resulting event, that is, it was a

90 Ibid. p. 18.
necessary element in a set of sufficient conditions to produce the result. Richard Wright developed this further, propounding the NESS test, or Necessary Element of a Sufficient Set test, which has been widely accepted. Another causation theory is the ‘but for’ test which states that, but for the action, the result would not have happened. Honoré subsequently concluded that together with the NESS, neither is able to adequately explain the causal complexities of human decision-making and behaviour. Rather, something analogous to the idea of sufficiency can aid in understanding where liability should rest. He saw causation as important to tort law in explaining events, setting outer limits of social responsibility, and ensuring that liability is imposed only for conduct which changes the course of events for the worse. He emphasised, however, the importance of tying the plaintiff’s harm to the defendant’s breach of duty rather than just to the defendant’s conduct. This approach of tying harm with breach of duty is also taken up in the proposition.

While he acknowledged fault is an important basis of responsibility for harm, Honoré later developed the notion of ‘outcome responsibility’ defined as follows:

> On this view we are, if of full capacity and hence in a position to control our behaviour, responsible for the outcomes of our conduct, whether act or omission…The conduct that grounds outcome-responsibility includes what we do but does not include our not doing all that we do not do. Under non-doing it comprises only omissions which are violations of a norm.

At this stage in human history, a breach of the duty of care to protect from atrocity, a non-doing, would violate the emerging legal norm of the responsibility of states (only) to protect those vulnerable to atrocity. Based on the ethical proposal, the breach would also violate a norm of personal responsibility to protect the vulnerable other, and through the other, all others (‘the third’). Based on the legal proposal, a breach would violate a legal norm of the responsibility of all of humanity to protect all of its members from atrocity.

Jules Coleman describes the central notion of tort law is the moral notion of ‘ownership’, not the moral notion of ‘blame’. Tort law identifies ‘ownership’ of some

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of the untoward outcomes for which one is responsible by imposing a duty to make
good the costs one's wrongs have imposed on those one has wronged. Coleman
explains:

And so, rather than trying to determine whether the injurer has satisfied the
conditions that would warrant blaming him for what he has done, tort law
inquires into whether the injurer has satisfied conditions necessary to impose on
him a duty to repair the plaintiff's loss. In short, the law asks whether the loss is
attributable to him as his doing: whether, to use the currently fashionable phrase,
he is 'outcome responsible' for it.93

This emphasis on the ascription of responsibility for outcomes rather than on ascriptions
of blame or culpability makes sense within the corrective justice account of tort law in
ways in which it would not within a traditional retributive view.94 Corrective justice,
based on equality, requires to ‘put the matter right’ which, under tort, requires
compensation to the victim. It is one of two principle monist theories of tort law – the
utilitarian efficiency theory (maximising aggregate social welfare) which asserts the
purpose of tort law is efficient compensation and deterrence, and the Kantian-
Aristotelian theory of Right or justice (based on equal individual freedom) which asserts
the purpose of tort is just compensation and deterrence.95 Many theorists argue there is
no one normative ground to explain or justify tort, rather a plurality of competing norms
need to be invoked. Wright argues that a pluralistic normative theory must, however,
eventually resolve conflicting norms by appeal to a foundational principle. This would
suggest the theory, is in fact, monist at the deepest level. As tort law is concerned with
individual interactions, it is grounded in corrective rather than distributive justice. He
views the equal freedom norm is normatively more attractive than utilitarian efficiency,
as different standards of care are applied in different situations. These standards of care
depend primarily on whether the plaintiff or defendant put the other at risk and for
whose benefit, and whether the plaintiff consented to the risk. As compulsory no-fault
insurance schemes ignore this bilateral correlativity of rights and duties, Wright
considers that they are unjust and unjustifiable.96 The hybrid approach in the

http://plato.stanford.edu/entries/tort-theories/
94 Ibid.
proposition incorporates the bilateral dynamic of rights and duties, but spreads, what could be massive loss, through a compulsory compensation scheme, equalising the burden, but also seeks to maximise aggregate global social welfare. Moral rights to equal freedom are combined with instrumentalist objectives signifying a complementarity between corrective and distributive justice, with each exercising a desirable limiting effect upon the other.\textsuperscript{97}

### 9.4.4 Fairness and causation

In relation to the scale of tort liability contemplated in this proposition, the issue of fairness needs to be addressed. Jeremy Waldron observes that sometimes tort’s logic leads to a gross disparity between the degree of a victim’s loss and the degree of the actor’s fault. A disproportion between the moral character of a person’s actions and the consequences, and sometimes just bad luck, can violate notions of fairness and desert as much in tort as elsewhere in the law. By examining situations of moments of carelessness and massive loss, Waldron exposes the inability of tort’s so-called annulment theory to resolve the fairness problem in such cases. The goal of the theory is the simultaneous annulment of the actor’s gains and victim’s losses. This point is noted, as any endeavour to attain annulment after atrocity would be beyond the scope of any viable proposal. While aiming for corrective justice, as well as commitment to the attainment of a higher threshold of equality of freedom and justice than the original state of the victims, it would be offensive to suggest that any losses experienced by victims of atrocity would be annulled through remedies based on some form of economic formula. Alternative remedies are therefore considered in addition to monetary compensation, but with the acknowledgement that annulment is ultimately not achievable.

Waldron also considers tort’s causal requirement might be too strong in limiting the class of persons asked to shoulder an enormous loss and suggests that, in the case of accidental losses, a broader insurance approach may be preferable to the law of torts.\textsuperscript{98}

This same issue is addressed in the proposition but in the reverse – that is, how a very large group might be able to bear the liability of a mass scale loss by a group of victims.


It is proposed that the hybrid of tort and a global compensation scheme would together shoulder the burden of massive damages.

9.5 The proposition – a hybrid tort of negligence for failure to protect

The proposition is now presented succinctly by working through the various elements of the tort of negligence. Each element is addressed, first by a brief comment on the conventional treatment of the element in a tort or no-fault scheme (if applicable), and second, by the proposed application or adaptation for the proposition. The key points of the treatment of each element are summarised in Table 2. It compares the differences between the conventional elements of tort, and the proposition’s appropriation, or adaptation, respectively.
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<th>The proposition</th>
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<td>- Tort – focus on causation and damages to return to original state or</td>
<td>• Combination tort and global public fund compensation</td>
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<td></td>
<td>- No-fault administrative system – focus on injury and compensation</td>
<td>• A component of an international Law of Obligations</td>
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<td></td>
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<td>• Corrective and distributive</td>
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<td>• Deterrent – pre-emption of atrocity</td>
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<td>• Justice – to acknowledge breach of duty of care to protect from atrocity</td>
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<td>through failure to rescue; to recognise gravity of suffering; to apologise; to</td>
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<td></td>
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<td>seek forgiveness; to compensate for mental, physical, and economic suffering;</td>
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<td>and additional burden of equalisation of enjoyment of justice and freedom</td>
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<td>Source</td>
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<tr>
<td>Adjudication</td>
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<td>• Tribunal with regional or global jurisdiction</td>
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<td>Plaintiff</td>
<td>- Legal individual or group</td>
<td>• Group who suffered atrocity – the ‘third’ represented by selves, appointed</td>
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<td>lawyer, or NGO</td>
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<td>Defendant</td>
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<td>leaders</td>
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<td>Cause of action</td>
<td>- Negligence – non-feasance for breach of duty of care; failure to rescue, and damages</td>
<td>• Negligence – non-feasance for breach of duty of care to protect from atrocity</td>
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<td></td>
<td>or</td>
<td>through failure to rescue; acquiescence to mass violence; and compensation for</td>
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<td></td>
<td>- No-fault administrative system – claim for compensation guided by policy</td>
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<td>Liability</td>
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<td>Not liable if:</td>
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<td></td>
<td>now an apportionment of liability</td>
<td>• if did respond and exceeded what reasonable person/s would do, but still</td>
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<td></td>
<td>- Not liable if did respond and exceeded what reasonable person would do, but still</td>
<td>harmed</td>
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<td>injured; or if unreasonable risk to defendant to rescue</td>
<td>• if unreasonable risk to defendant to rescue – lack of capability</td>
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<td></td>
<td>- Administrative scheme – no</td>
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<tr>
<td>Legal relationship</td>
<td>• Bi-lateral (between individual and everybody else)</td>
<td>• Unchosen relationship with ‘the third’ (all of humanity)</td>
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<td></td>
<td>• Special care relationship to establish duty</td>
<td>• Global civil relationship between individual members of international society</td>
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<td></td>
<td>• Voluntary (although increasingly involuntary)</td>
<td>• Involuntary – derived through international constitution.</td>
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<td>• Sufficient relationship between defendant and plaintiff that gives rise to responsibility</td>
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<td>• Created by proximity</td>
<td>• Created by virtual proximity</td>
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<td>• to mass violence</td>
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<td>• Duty of care is a paradigm rather than anomaly</td>
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<td>Duty of care</td>
<td>• To prevent harm</td>
<td>• To protect from mass violence of core crimes, i.e. crimes against humanity, war</td>
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<td>• To rescue from harm</td>
<td>crimes, or genocide</td>
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<td>• Proximity (which is indeterminate)</td>
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<td>• Failure to rescue from atrocity – that which any reasonable person would do –</td>
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<td></td>
<td>• Failed against standard of that which any reasonable person would do causing harm</td>
<td>causing harm</td>
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<td></td>
<td>• Did not reach relevant standard of care</td>
<td>• Did not reach relevant standard of care</td>
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<tr>
<td>Reasonableness</td>
<td>• Just, fair, reasonable to impose duty</td>
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<td>• Closeness of the connection between the defendant’s failure to rescue and the</td>
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<td>remoteness (i.e. physical or causal proximity)</td>
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<td>outcome of suffering</td>
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<td>- Limitation on foreseeability</td>
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<td>No fault schemes</td>
<td>- No fault schemes</td>
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<tr>
<td>Nexus between causation and liability is diminished</td>
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<tr>
<td>Reasonable foreseeability</td>
<td>- A yes/no threshold test analysed as fact</td>
<td>A yes/no threshold test analysed as fact of knowledge of impending violence and that failure to protect would precipitate atrocity</td>
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<tr>
<td></td>
<td>- A primary rule</td>
<td>A rule but subordinate to virtual proximity based on capability/vulnerability</td>
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<td></td>
<td>- Duty is breached because it was foreseeable and the other injured</td>
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<td></td>
<td>- Rule relating to liability and quantum of liability which determines damages = distributive justice</td>
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<td></td>
<td>- Compensation scheme – quantum not invoked. Only encompasses direct consequences</td>
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<tr>
<td>Protected Interests</td>
<td>- Balancing of rights</td>
<td>Balance between capability and vulnerability</td>
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<td></td>
<td>- Bodily integrity</td>
<td>Victims:</td>
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<tr>
<td></td>
<td>- Reputation</td>
<td>- Right to life</td>
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<td>- Property rights</td>
<td>- Physical freedom</td>
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<td>- Flourishing of individual capacities</td>
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<td>- Freedom from fear</td>
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<td>Defendant:</td>
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<td></td>
<td>- Freedom from too heavy a burden relative to capabilities and capacity</td>
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<tr>
<td>Defences – positive defences are available only once liability established</td>
<td>- The plaintiff consented to the risk of the damage or loss;</td>
<td>If the plaintiff was found culpable for or contributory (to a threshold) to events leading to atrocity</td>
</tr>
<tr>
<td></td>
<td>- Contributory negligence where the plaintiff contributed to the damage or loss suffered;</td>
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<td></td>
<td>- If the plaintiff was involved in illegal action</td>
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<tr>
<td>Damages – limited by reasonable foreseeability, therefore distributive</td>
<td>- Damages (correlative)</td>
<td>Global victim fund compensation</td>
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<td>- Punitive damages</td>
<td>Correction of disequilibrium of vulnerability</td>
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<td></td>
<td>- Administrative scheme – compensation</td>
<td>Equalisation of enjoyment of justice and freedom</td>
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<td></td>
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<td>Inquiry, reflection, remorse</td>
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<td>Apology</td>
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<td>Memorialisation/forgetting</td>
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<td>Peacekeeping/building</td>
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<td>Reconstruction</td>
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</table>
9.5.1 Legal remedy

Depending on the jurisdiction, the conventional legal remedy for tortious actions which cause harm or injury is the tort of negligence where the focus is on causation and damages to return the injured or harmed person to their original state. An alternative remedy is a no-fault administrative system which provides compensation based on the actual injury regardless of fault. This latter type of scheme usually limits the ability to seek recovery for damages. The proposition is for a hybrid of tort and a compensation scheme, as a component of an international Law of Obligations. If liability for breach of duty to rescue from atrocity is established, monetary compensation would be drawn from a global compensation fund. The fund would draw from levies payable by all states, prorated according to population, GDP, and the extent of militarisation. 99

9.5.2 Goal

The primary goal of tort is corrective justice, that is, putting the matter right, but it is also distributive in the determination of damages. It seeks to limit behaviour and to provide full compensation for harm, that is, restoration to the original state. The proposition seeks to deliver both corrective and distributive justice. It is corrective in the desire to right the harm, and distributive in its assigning of damages. It also seeks to act as a deterrent to acquiescence to mass violence and to limit an infinite responsibility triggered by virtual proximity by mediating the demands of ‘the vulnerable third’. 100

The specific goals of the tort are to: determine a breach of the duty of care to protect the vulnerable from atrocity through failure to rescue; compensate for the mental, physical, and economic suffering; facilitate formal acknowledgement, apology and to seek forgiveness from the victims; and equalise the enjoyment of justice and freedom through a correction in the disequilibrium of vulnerability to mass violence.

The weighting of each of these goals would depend on the specifics of each situation and the multiple catalysts that precipitate atrocity. There are potentially much broader benefits to humanity than these specific goals. As discussed above, when tort is understood as a system of ethical rules and principles of personal responsibility and freedom which are publicly enforceable, and which guide how a society’s citizens ought

99 The more militarised a state is, the higher the levy as its potential to enact or support mass violence is enhanced by the deployment, or threat of deployment, of its weaponry. Although the mass violence in Rwanda in 1994 used relatively unsophisticated weaponry, it is contested that the logistics of the operation were supported by France, a highly militarised state.
100 See Chapter 7, Section 4.
to behave, the tort could foster new practices. One such practice could be the cultivation of a global culture of care and compassion for the vulnerable.

9.5.3 Source

The source of conventional tort is judicial judgement, statutory law, international human rights law, and government policies. The source of the proposed obligation would, initially, be an international civil agreement similar to the people’s Treaty on the Constituting of International Society proposed by Allott included in the Appendices. Allott proposes the treaty would be ratified by each human being who makes a personal and specific commitment to serve the common interest of all human beings by accepting and implementing its terms. The proposed agreement might be better ratified by democratically appointed representatives of all states, obliging on their people’s behalf, and their future generations, the duty to rescue from atrocity. This would be more feasible than individuals signing, and would also entrench it. The agreement could become an integral part of an eventual global constitution or, if not embodied in a document as such, in the practice of an international constitutionalism.

9.5.4 Adjudication

Traditionally, adjudication is through a domestic or regional court. It is proposed that an international tort tribunal be established with regional or global jurisdiction. Panel judges, civil panel members, and staff would be representative of all regions. Amongst many other things, questions of jurisdiction, notification, applicable law, evidence, and case management would need to be addressed. Recognition of the judgements of the tribunal (which would evolve through a process of discovery) would be validated through the increasingly democratised UNGA and enforcement would come through appropriate UN bodies. The tribunal would also function as a stimulant for ongoing dialogue on the evolving obligations between the individual members of international society. A precursor to the tribunal would be the forum as outlined in the political proposal.

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101 See Appendix 2.
9.5.5 Plaintiff

The plaintiff in domestic or trans-national tort actions is either legal individuals (such as individuals or corporations) or groups. The proposition is that individuals or groups who are victims, or their representatives, or organisations such as NGOs on behalf of victim groups, would file actions.

9.5.6 Defendant

The defendant in conventional tort can be a legal individual or entity. In the proposition the defendant is humanity as a collective, represented by a panel of international civil society leaders appointed through a democratic process. The modality of this collective’s responsibility is considered below in Section 9.6.2.

9.5.7 Cause of action

A cause of action generally encompasses both the legal theory (the legal wrong the plaintiff claims to have suffered) and the remedy. The tort of negligence provides a cause of action of non-feasance for breach of duty of care, failure to rescue, and damages. To initiate a suit, the plaintiff pleads or alleges a set of facts in a complaint sufficient to justify a right to sue. A plaintiff must prove the elements of the cause of action. The elements of negligence are duty of care, breach of that duty, breach being a proximate or not too remote a cause, in law, and breach causing harm in fact. By contrast, a no-fault administrative system provides an avenue for the injured to claim for compensation guided by policy. The proposition is for a hybrid cause of action, incorporating a tort of negligence of non-feasance for breach of duty of care to protect from atrocity; failure to rescue; acquiescence to mass violence; compensation for suffering; and equalising of the enjoyment of justice and freedom through a correction in the disequilibrium of vulnerability.

9.5.8 Type of action

An action can be an individual or private group, or class, action. Preconditions for a group action usually include the requirements that the action has a reasonable prospect of success; that there are sufficient questions of fact; that proceedings will be more sufficiently disposed of by a group action rather than by individual claims; and that the

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103 In international criminal law, criminal charges against an individual are filed by an appointed ICC or tribunal Prosecutor with approval of a Chamber of the Court. Criminal charges against states for wrongful acts are brought by other states before the International Court of Justice.

104 This is rather than misfeasance because the defendant did not create or worsen the plaintiff’s needy condition.
proceedings will be manageable, due process respected, and, if the action has trans-
national components, that the judgement or settlement obtained will have a reasonable
prospect of recognition or enforcement in other countries.\textsuperscript{105} In the proposition, actions
could be either individual or class, comprised of victims, which are required to meet
similar preconditions as in domestic jurisdictions.

9.5.9 Liability

Liability in tort can be personal or strict. The latter is when the conduct was neither
intentional nor negligent. The most important head of strict liability is vicarious
liability and is the most likely candidate for the proposition. Vicarious liability can
arise when the person liable is in a particular relationship with a tortfeasor (the person
who committed the tortious act), such as an employer and employee. In the proposition,
the relationship is between all members of humanity, on all levels. If an agency such as
the U.N. fails to respond to the vulnerable, to avert violence, all are considered
vicariously liable.\textsuperscript{106}

In conventional tort, an ethical principle of distributive justice can sometimes justify
vicarious liability, whereby the distribution of resources overrides the correcting of
unfair dealings between individuals. Rather than finding personal responsibility for an
outcome, it looks to the one who ought to provide financial support to meet another’s
need, even though they are not personally responsible.\textsuperscript{107} In a similar way, a no-fault
administrative scheme compensates for losses based on the injury, regardless of fault.
These schemes usually impose monetary limits on the amount which can be claimed,
depending on the injury. As no one person bears the loss, no-fault schemes have been
judged as not punishing recklessness or negligence sufficiently. The same might apply
to the first example of tort where vicarious liability releases the wrongdoer from the
burden of damages and thus encourages disregard for the consequences of their actions
or non-actions. In regard to the proposition, the advantage of vicarious liability, when
combined with a compensation fund, is that the burden of liability and compensation is
spread. This is necessary given the likely massive scale of loss and the complexity of

\textsuperscript{105} "Report: International Civil Litigation and the Interests of the Public." p. 11.
\textsuperscript{106} In regard to potential UN liability for non-action, an association called the Mothers of Srebrenica is pursuing
litigation in The Netherlands in an effort to sue the UN for failing to prevent genocide. The Appeals Court in The
Hague concluded in March, 2010, that the UN cannot be sued in Dutch courts because of its immunity under
international conventions, upholding a 2008 ruling by a lower court. The Mothers intend to get the case as far as the
European Court. See www.srebrenica.ba.
\textsuperscript{107} Cane, \textit{The Anatomy of Tort Law}. p. 46.
assigning liability to any one person’s, group, or agency’s action or non-action. This may encourage apathy towards the vulnerable and could, arguably, defeat the purpose of the whole proposition. However, given the evident effect of tort in society, its success at restraint or modification of behaviour is unquestionable.\textsuperscript{108}

Grounds for finding a defendant not liable would include conventional grounds of whether the defendant responded and exceeded what a reasonable person would do, but the claimant was still injured; and, if there was an unreasonable risk to the defendant to rescue. In the proposition this would extend to a lack of capability because of commitment of resources or responsibilities elsewhere, if security is of concern. Of course, in the case of atrocity, failure to protect for any reason is a tragedy and in cases where genuine attempts are made or would have been made, if they were possible, appropriate remedies should still be awarded, regardless of the level of liability. At least the forum of the tribunal would give voice to the victims and due consideration of all the circumstances publicly recorded. Knowledge of more effective response mechanisms for future events would also be gained.

9.5.10 Legal relationship

In conventional tort, the legal relationship is bi-lateral – between an individual and, in effect, everybody else. For specific actions, a sufficient relationship between defendant and plaintiff that gives rise to responsibility is usually sought. A special care or voluntary relationship is needed to establish a duty of care. However, legal relationship is becoming increasingly involuntary as obligations of standards of care for specific roles and everyone in general, and duties to rescue, are developing. In the proposition, a global civil relationship between individual members of international society, facilitated by virtual proximity (arising from knowledge of others’ vulnerability) would create an asymmetrical ‘caretaker’ legal relationship which would drive an involuntary duty of care to protect from atrocity.

9.5.11 Ethical basis of duty of care

Conventionally, normative principles of equal freedom or utility explain the purpose of tort. In the proposition, moral rights to equal freedom are combined with instrumentalist objectives of distributive justice but the bilateral/reciprocal balance between rights and duties of conventional tort is disturbed. The other is prior to the self

\textsuperscript{108} Of course, it is likely that criminal prosecution would also proceed in some circumstances.
such that love would (ideally) imperil us to respond to others’ vulnerability. The proposition demands an asymmetrical obligation of non-indifference to the unknowable other. As discussed in the ethical proposal, the duty to rescue is a paradigm case which sums up why we are responsible for others at all. As Manderson argues, rather than being an anomaly in law, the duty to rescue should become a core element of the duty of care.109

9.5.12 The duty of care

A key question in tort is determining the appropriate standard of care which defines which conduct is tortious or not. To do this, the defendant must be under a duty of care. The duty operates negatively to restrict the scope of liability. There are various judicial tests for duties of care which differ between jurisdictions. Some use only one test, for example, foreseeability, while others use a multi-factor test, then universalise the facts and analyze them in the context of general public policy. The most common tests are: reasonable foreseeability where the defendant ought to have foreseen injury to the plaintiff; that a sufficient relationship of proximity exists between the defendant and plaintiff; and that it is just, fair, and reasonable to impose the duty of care.

Conventionally, proximity is an indeterminate rule. As discussed in the ethical proposal, proximity describes who we owe a duty to, to identify who my ‘neighbour’ is, such that ‘we ought to reasonably have them in contemplation as being so affected when we are directing our mind to the acts or omissions which are called in question’.110 In the proposition, proximity becomes determinate in the sense that an involuntary universal duty of care arises through virtual proximity. Although an assignation prior to consent, humanity is committed to this overtly through the global civil agreement. Within a Levinasian ethical framework, proximity is an experience rather than a rule; a closeness that marks the boundary within which we find ourselves responsible.111 Virtual proximity extends this idea to encompass all of humanity and becomes a primary rule for the determination of a duty of care.

The test that the imposition of the duty is considered just, fair, and reasonable may be considered ineffective for the proposition because of the involuntary, asymmetrical nature of the duty. Depending on one’s ethics, it could be considered just, fair, and

110 Donaghue v. Stevenson.
111 Manderson, Proximity, Levinas, and the Soul of Law. p. 103.
reasonable, or the exact opposite. When universalised, the measures of justness, fairness, and reasonableness, would prove that a duty of care to protect by all towards all would accord with the many legal obligations which protect all human beings. If claimed to be unfair, there is probable scope to trace indirect culpability to the entire global system of trade and economics, law and politics which affects the sequence of events leading to atrocity. This leaves the test of reasonable foreseeability for the proposition which is explored further in Section 9.5.15 below.

9.5.13 Breach of duty

In the tort of negligence, it is the breach of a duty of care which causes the harm. Breach involves testing a duty of care was owed (as just discussed) and that the defendant's actions failed against the standard of a reasonable person, which varies depending on the facts of the case. Reference might be made to a range of factors to determine what a reasonable person would do, such as: what the defendant knew (if the loss was foreseeable); what the degree of risk was; whether any precautions were reasonable; if the defendant's actions served a social purpose; and common practice. A breach consists of non-feasance when the defendant did not create or worsen the plaintiff’s needy condition. This would probably apply to the proposition as the defendant, humanity, would not put the plaintiff at risk for the defendant’s benefit, but rather would let the plaintiff remain at risk in order to avoid a burden to or loss of benefit by the defendant.112 In such a case, humanity would have acquiesced to mass violence, failing to exercise a standard of care a reasonable person would render so as not to burden themselves, causing unconscionable harm.

9.5.14 Cause-in-fact and proximate cause

After establishing that there was a duty of care and that the duty was breached, a factual link between what the defendant did or failed to do and the loss and damage sustained by the claimant needs to be established. For an act to cause a harm, two tests must be met. The first is to establish cause-in-fact which is determined by the 'but-for' test – but for the action, the result would not have happened. The second is a test of proximate cause to determine the balance between proximity and remoteness of an event which is sufficiently related to a legally recognised injury, held to be the cause of the injury. The test determines the closeness of the connection to the harm in a chain of

events which needs to be a single unbroken process between the act or failure and the suffering. The test is designed as a further limit on a cause of action to ensure that the liability to pay damages is fairly placed on the defendant.\textsuperscript{113}

In tort it is the causation, not the injury that triggers liability, whereas no-fault schemes diminish the weight on causation as the nexus between causation and liability is not essential. All participants in a no-fault scheme are subjected to the same levy but not to an arbitrary risk of liability by some proximate or remote causal link which could be one of innumerable other causes.\textsuperscript{114}

In the proposition, the cause-in-fact test would be ineffective as the complexity of events leading to atrocity and likelihood of concurrent causes of varying degrees would limit the validity of the test.\textsuperscript{115} It would be too difficult to prove that but for the omission, the atrocity would not have occurred. Also, the test for proximate cause would be weighted less than in conventional tort as the closeness of the connection between the defendant’s failure to rescue and the outcome of suffering would be an unbroken, but not single, process.

\textbf{9.5.15 Reasonable foreseeability}

Reasonable foreseeability is a yes/no threshold test analysed as fact and functions as a primary rule to determine if a duty exists and if it is breached. It is also a rule relating to the type of harm and liability, and to the quantum of liability which determines damages and thus delivers distributive justice. The proposed compensation scheme would not invoke a quantum of liability but would assess the direct consequences of the failure to rescue. As mentioned in the ethical proposal, Lord Atkin’s adjudicative priority to reasonable foreseeability has become a standard formulation of the neighbour principle in negligence, obfuscating proximity.\textsuperscript{116} In the proposition, the test of reasonable foreseeability would be a yes/no threshold test analysed as a fact of knowledge of impending violence and that failure to protect may precipitate atrocity. However, it is acknowledged that when there are a significant number of links constituting the chain the less likely that consequence may be considered reasonably

\begin{footnotes}
\item[115] The difficulty in proving causality is also an impediment to actions in relation to environmental issues.
\item[116] Manderson suggests that rather than reasonable foreseeability, the correlative to the duty of care should be vulnerability since we are proximate to those who are distinctly vulnerable to us. Manderson, \textit{Proximity, Levinas, and the Soul of Law}. p. 125.
\end{footnotes}
foreseeable. This test would verify the primary rule of virtual proximity which assigns a duty of care upon those with capability to respond.

9.5.16 Protected interests

Conventionally, tort seeks a balancing of protected interests of both parties. These include bodily integrity, reputation, and property rights. In the proposition, interests are extended from what the law would conventionally recognise in the failure to rescue, that is, the plaintiff’s right to compel the defendant to protect his person or property from risks that are wholly independent of the defendant’s conduct,\textsuperscript{117} to include interests which are entrenched in treaty law and recognised throughout domestic jurisdictions as fundamental human rights. These include the right to life, physical freedom, flourishing of individual capacities, and freedom from fear. In the balancing of these rights, the defendant’s protected interests include freedom to enjoy the same rights, and the assurance that the burden of protecting the vulnerable ones’ rights does not infringe on the continuing enjoyment of rights already secured.

9.5.17 Defences

Successful defences either absolve the defendant from full damages or reduce the amount of damages payable to the plaintiff. Three principal defences are: where the plaintiff has consented to the risk of the damage or loss; contributory negligence where the plaintiff contributed to the damage or loss suffered; and if the plaintiff was involved in illegal action at the time of the alleged negligence.\textsuperscript{118} In the proposition, the defences could be similar, in particular if the plaintiff was found culpable for or contributory to events leading to atrocity or were engaged in acts violating human rights.

9.5.18 Damages

The main form of remedy against tortious loss is compensation in damages, or money, limited by reasonable foreseeability. Other remedies include orders and injunctions. Punitive damages relate to the defendant’s misconduct and are likened to fines. In the proposition, the primary monetary compensation would be funded by the global compensation fund. The level of compensation would be determined by the scale of harm – the loss in economic terms and mental and physical suffering. However, as the defendant did not cause the harm, but failed to prevent it, the damages would be less


\textsuperscript{118} Cane, The Anatomy of Tort Law. pp.58-64.
(relatively) than if they caused the harm. Monetary remedies would also be balanced by other non-monetary remedies. Monetary and non-monetary thresholds would allow broad interpretation by the tribunal. This is appropriate given the variability and complexity of each case. If the original state of the community of the victims is deemed below a reasonable standard (measured against recognised thresholds of economic, social, and physical well-being), compensation would also cover raising the community to recognised thresholds, and the securing of freedom and justice equivalent to recognised thresholds of civil and political rights. The aim would be a balancing of compensation for loss, the correction of the disequilibrium of vulnerability, and equalisation of enjoyment of justice and freedom.

Non-monetary remedies could include a multiplicity of forms which would be discovered within the tensions of the bilateral relationship between the two groups, the correlativity of the protected interests, and the effect of non-action. It could also be that the remedy may only be in the form of an apology for failure to protect. The process of the tort action would foster inquiry, reflection, and potentially remorse for non-action. It might be that after apology, memorialisation is appropriate. Parallel to these remedies would be state and international organisation contributions in the form of peacekeeping, reconstruction, and processes of (re)integration into international society.

9.6 Challenges with the proposition

9.6.1 The vexed issue of an unchosen duty to rescue

An international tort for failure to protect from atrocity raises the vexed ethical and legal issue of an unchosen duty to rescue, of forced charity towards unknown people and for rescue from harm not caused by the rescuer. However, the conventional defence that it is unreasonable to be expected to rescue without a prior undertaking of some sort, especially for unknown, distant others, could lose its force when the idea of a global civil agreement of mutual protection is widely endorsed. If an ethics of alterity, of living for the vulnerable other, and virtual proximity, gain credibility as a bridge to relationship with distant others, the response from citizens to knowledge of impending mass violence could be transformed, which would most likely change the response of their politicians, and of international organisations. The eventual constitutionalisation of a duty of care would alleviate the 'surprise' of an unchosen duty to rescue experienced during the formative period of the obligation. If included in an
international constitution as an obligation in a charter between the peoples of the world, it could then be considered a form of international statutory tort.

The dilemma of who should be liable for non-rescue when there are many ‘present’, that is, witnesses either directly or through other means, would be addressed in the proposition by all being liable, as a collective. In Kantian legal terms, an objection to this could be that no one is required to go beyond the requirements of Right, that is, corrective and distributive justice, if the obligation requires a significant sacrifice to one’s autonomy or freedom for the greater good of others.\textsuperscript{119} However, for most members of humanity, rescue of those threatened with atrocity would not sacrifice autonomy or freedom as the burden would be indirect. Actual intervention would be conducted by UN forces or coalitions or, ideally, mediation professionals prior to the outbreak of conflict. Contributions to a monetary fund would also be indirect. The only potentially direct involvement might be in the non-monetary remedies such as forums and ceremonies of apology, reconciliation, and memorialisation, and perhaps personal involvement in the reconstruction of the affected society and in programmes aimed at equalising the enjoyment of rights.

The question of obligation-creep, that is, of ever-expanding areas for which the duty of care might be applied, would need to be considered. For example, plaintiffs might wish to extend actions to historical exploitation and suffering. Rules of the tribunal would need to specify the elements and scope of appropriate causes of action.

Major objections to a duty of rescue, particularly easy rescue, are the indeterminateness and impracticality of implementing the duty.\textsuperscript{120} In the proposition, the determination of when a duty is activated would be evident to a vast number of ‘potential rescuers’. The plight of people facing potential genocide, for example, is usually on the world stage. Objections of indeterminateness or impracticality would be unacceptable ethically, legally, and politically. The rescue of men, women, and children from slaughter should be the highest of all causes and the appropriate resources and logistics deployed.

The incorporation of these objections into fair and reasonable judgements by the tribunal is an example of what Allott describes is part of the function of law and a

\textsuperscript{119} For a more detailed argument on Kant’s possible stand on easy rescue see Wright, “The Standards of Care in Negligence Law.” p. 273.

\textsuperscript{120} Ibid. p. 274.
society’s self-creating – the struggle between what is, what is not, and what could be.\textsuperscript{121} Law’s dialectic, its ceaseless reciprocating motion between the particular, to the general, to the universal, and back again, reflect the dialectical character of any society.\textsuperscript{122} Through a dialectic of change, the ambiguous duality of the human condition, that is, the capacity to find opportunities for unlimited self-fulfilment and self-giving, as well as for selfishness, cruelty, and oppression, might find an opportunity for unprecedented self-giving.\textsuperscript{123}

The current equilibrium of ‘no duty of care’ by those with capability to protect the vulnerable would lose its balance as the opposing values in the dialectic are articulated, demanding that all people have rights to life and security, and beyond those, to self-fulfilment. Propositions such as the one above will discomfort, even disturb – and that is the intention – to create a dissonance which awakens consciousness, imagination, and reason to create words and ideas, and out of those, theories and values for the survival of the whole human race.

\textbf{9.6.2 Identifying a modality of collective responsibility}

Given the growing complexity of actors in the international realm, the variation in form and degree of moral responsibility and legal liability for atrocity depends on the type of agency involved. These might include individuals in their private or official capacity, institutions, or states; whether they are moral and/or legal agents; and whether they possess certain capabilities, deliberative capacities, and executive functions.\textsuperscript{124} The emphasis in the proposition is on the collective of private individuals comprising ‘humanity’ in general. The ontological status of the collective of humanity would need to be addressed as it would act as a morally responsible agent, and be regarded as an entity distinct from its members. The issue of bystanders in the local community where the atrocities occurred would be explored through a local truth commission.

In regard to the form of collective responsibility, Joel Feinberg developed a number of modalities of group moral responsibility arrangements which may offer a guide.\textsuperscript{125} One is called ‘contributory group fault: collective but not distributive’. It provides for group

\textsuperscript{121} Allott, \textit{Eunomia}, p. 52.
\textsuperscript{122} Allott, "The True Function of Law." p. 403.
\textsuperscript{123} Allott, \textit{Eunomia}, p. 55.
moral responsibility that is independent of any responsibility or moral fault ascribable to its individual members. It is the group itself that is at fault and the group's moral responsibility is not equivalent to the sum of the responsibilities of its members. Another modality is the arrangement of ‘group liability without fault’ where a whole is held morally responsible for the actions of one or several of its members. Since liability, as well as shame, guilt, and the effects of any punishment directed at the group, will be borne by each and every member as a result of the wrongdoing of one or a few, the liability of all of the others will be vicarious. Vicarious liability is a responsibility arrangement in which the party held to be liable to punishment is not the party that performed the morally or legally faulty action that caused the harm. The advantage of the first option is that the group is only responsible for the actions of the group and individuals are still accountable as individuals for their own actions. In the second option the responsibility for actions of individuals are borne by the group, rather than only the actions of the group as a collective. This second option follows the French commitment to equality of burden when a burden could fall on a particular individual or group. These options need further exploration and would be appropriate agenda items for the forum proposed in the next chapter.

9.6.3 Political implications

There is no question that the world community carries a burden of guilt for its non-action in Rwanda. Even though there have been affirmations of ‘never again’, atrocities continue. Regardless of this collective angst, powerful states’ citizens would likely resist the idea of responsibility to protect and exposure to liability given that they are the primary actors, or non-actors. However, the requisite democratisation of the international realm, and the elevation of the status of global citizenry which would need to accompany these proposals, would imply a rearrangement in entrenched power relations, a tempering of the role of the state, and the transfer of responsibility to the whole of international society, including its individual members.

A harbinger of such a new international order might be seen in the idea of neighbourhood being driven by environmental concerns. The threat to the commons of humankind is being considered serious enough, at last, to modify the behaviour of

126 Ibid. p. 247.
127 Risser, “Collective Moral Responsibility.”
agents ranging from governments and corporations, to individuals, as well as to modify social and legal relations. This, and new obligations such as a duty of care to prevent harm from atrocity, could accelerate progress towards a democratised international law which holds its primary subject as all individuals. The common interest would be determined by legislation of a democratic global political body; the judicial process would interpret the common interest in particular situations. Drawing on the ideal constitution, politics would provide the forum to present conflicting ideas of the common interest which are in competition with the real constitution – the day to day practices of international politics.¹²⁹

Legal codification would generate an appropriate institutional framework just as the incremental codification of individual criminal responsibility actuated the ad hoc tribunals and eventually the ICC; human rights treaties actualised human rights courts such as the European Court of Human Rights and other monitoring institutions; processes of post-conflict amnesty and reconciliation actuated truth commissions; thickening obligations of state responsibility the ICJ; trade agreements the WTO; and monetary policies the International Monetary Fund (IMF). The vision came first. Ideals were articulated; words created new ethical and political obligations around which codification, legislation, resolutions, or general agreements created institutionalisation and entrenchment of the ideals in the day-to-day real constitutions of states, and the international realm.

9.7 Summary

In this chapter, a potential contribution to close the gap in accountability for mass violence at the international level has been explored. The majority of legal instruments aimed at preventing atrocity were shown to be sources for justifying inaction, and consequently, millions of lives have been shattered. There is a need to move beyond the rhetoric and limitations of current regimes of legality and to consider the reality of mass violence and suffering, and our acquiescence to it as bystanders, both individually and collectively. This is why the proposition looks to tort as its flexibility allows for a responsiveness appropriate to the challenges and complexities of mass violence. Precedents of legal transformations and creativity, and emerging norms suggest that both incremental and revolutionary transformations are inevitable. Of particular

relevance is the expansion of the categories of persons subject to a duty of care and of easy rescue in its various formulations in a large number of jurisdictions.

The attributes and advantages of tort were reviewed, then the elements of an international hybrid tort for negligence for failure to rescue from atrocity outlined. The hybrid approach in the proposition incorporates the bilateral dynamic of rights and duties, and spreads the burden through a compulsory compensation scheme. A complementarity between corrective and distributive justice was sought, with each exercising a desirable limiting effect upon the other. Remedies to facilitate reconciliation and forgiveness and equalisation of the balance of capability and vulnerability were briefly considered.

Likely objections and limitations suggest some predictable arguments will be raised against the proposition. Political implications of such a responsibility are not underestimated. The reconfiguration, no less, of the balance of power and the elevation of the status of individuals to become subjects of international law, would be integral to the viability of the proposition. As suggested, the proposition can be likened to scaffolding within which a yet-to-be-formulated and viable form of collective responsibility could emerge – a topic around which ongoing inter-subjective dialogue could be conducted in the forum proposed in the next chapter.
10 THE POLITICAL PROPOSAL: ACTUALISING THE IDEALS

The significant problems we face cannot be solved at the same level of thinking we were at when we created them.¹

The following proposal briefly explores the possibility of first, in the short term, a virtual forum, and second, in the long term, a tangible entity in the form of an ad hoc chamber associated with the ICC.²

10.1 A virtual forum

A virtual forum would seek to generate a global reflexive conversation, or public international philosophy, that is, an exchange of words, ideas, and ideals using reasoning and imagination at the international level, about individuals’ ethical and potential legal obligations to protect each other from atrocity. The ethical and legal proposals would provide an agenda for this conversation, specifically regarding the validity of the proposed norm that we are individually, asymmetrically responsible for the protection of each other from atrocity. It is anticipated that the validity of the norm, or some modified form of it, would develop through a Habermasian intersubjective process of argumentation, deduced through a reconstruction of the presuppositions of communication.¹

Specific goals and outcomes of this proposal include:

- the establishment of a virtual foundation as a focal point for global civic dialogue on the topic of obligations of individual members of humanity towards each other;

- eParticipation through online fora facilitated through mass collaboration software which would enable the development of shared understandings which, through transparent tracking and analysis tools, could eventually lead to resolutions;

- dissemination through publications in local and global mass media and academic journals of analyses on the various areas of dialogue that evolve and of any resolutions;

¹ Albert Einstein.
² Further exploration of this proposal is planned to be undertaken during post-doctoral study.
³ See Chapter 7, Section 2.
• presentation of the resolutions to multilateral institutions, and at conferences and public fora for ongoing debate; and

• a distillation of shared ideas and values on the role of an ad hoc chamber to investigate international civil society’s role in, and potential impact on, the prevention of atrocities.

Primary audiences for the dissemination would be high level politicians, bureaucrats, academics, civil society advocacy organisations, transformational activists, commentators, media, and not least, global civil society. Given the magnitude and relevance of the topic to humanity, there is potential to promote debate in public fora, panel discussions, conferences, and policy debates, both nationally and supra-nationally. In the short term, the impact could be multi-dimensional – influencing national civil society and individual participation in international civil society, and affecting national and supranational political practice and legal codification. It could also stimulate interdisciplinary academic inquiry, bringing together discrete discourses in the areas of philosophy of international law, international relations, political and legal philosophy, and sociology.

10.2 An ad hoc chamber associated with the ICC

It is proposed that the ad hoc chamber would be convened after each case on a particular situation has been concluded by the Court. It would be led by a panel of expert members of civil society including independent experts, academics, citizens, social critics, and victims to reflect on the acquiescence of humanity in that particular situation and to explore the obligations of humanity to the victims based on the norms which have evolved through the virtual forum.

The forum would produce a Report to record the culmination of moral choices, or lack of them, that led to the power imbalance and/or structural failure of the society or societies involved, and which precipitated crimes against humanity and other atrocities. The Report would be given a name such as ‘Humanity’s role in the atrocities against the people of Gaza’. The title would underscore the idea that all members of humanity are inextricably linked to all other members and events. The weight of condemnation would be against the whole of humanity as an organic body of individual human beings acting in all possible capacities.
The report would be similar to those produced by Commissions of Inquiry. Rather than attempting to prove the guilt of the perpetrators, this exercise would endeavour to find the truth of the role of international society in precipitating and allowing the atrocity. The Report would have official status, not individual or academic ownership. It would be a truth report, like a confession of moral choices, with the goal of catharsis – a process that cleans out the darkness of the past and renews vigour to aspire to a higher moral order. It is intended that it would promote international conversation about what humanity really is, what its ideal self-constituting should be, and how this would manifest in its real and legal constitutions.

The Report might include a record of:

- why detrimental policies were implemented by the officials of other states or international organisations that precipitated the rise to power of the perpetrator/s of the atrocities;
- why strategic interests of funding agencies, trade organisations, and other states’ were preferred over the protection and flourishing of people;
- why there was a lack of response to warning signals by officials of international organisations and states;
- why there was indifference, or relegation, by editors and owners of the media and the reading public, and the world’s citizens generally, to the suffering being experienced;
- the experiences by those who suffered – the fear, violence, oppression, deprivations, poverty, ill-health, emotional trauma, and their ongoing suffering and challenges they face;
- the effect of the atrocities on the culture, local economy, local traditions, power balances, and cultural relations of those involved;
- the extent of environmental degradation and the suffering of animals;
- what appropriate responses should have been undertaken;
- what appropriate actions should now be taken;
- how to prevent repetition;
• how to aid the healing of the psychological, physical, environmental, social, economic, and political damage; and

• how to bring peace and reconciliation between humanity and the victims.

It is appreciated that to suggest that amorphous systems such as media, finance, trade, aid, as well as individuals, should reflect upon their role, and possibly their moral responsibility, in the event of atrocities is provocative. Frameworks for such self-reflection are limited, although the practice of independent reports, or commissions of inquiry, is increasingly considered an important component of post-conflict reconciliation, and sometimes closure.

Often, denial of atrocity and any form of connection to it, whether tangible or emotional, is the expedient route for dealing with non-intervention or acquiescence to suffering of fellow human beings. For those closer to the pain, legal remedies which mete out retribution can provide some distance towards closure. For those not so close, they often provide an opportunity to forget. An insightful analogy is provided by Christodoulidis and Veitch which illustrates the potential role of law in administering this dichotomy faced on both a global and individual level between recognition and denial, or forgetting, of atrocity. The book is about law, memory (or the loss of it), and truth. Christodoulidis and Veitch inform their readers that they ‘explore the logic of law’s disclosures and concealments, its tapping of memory and, when this is the case, its facilitating of oblivion.’  

They outline the myth of Lethe which is recounted by Hesiod in the *Theogony*. Lethe (whose name means ‘ oblivion’) is imagined as a river. To drink from this river does not quench thirst, but rather mortals thirst as they drink and by drinking, forget their lives and lineages. Socrates recalls Lethe in Plato’s *Republic*:

> The soul in this situation, as Plato writes of it, lives in a futile effort to replenish itself with immediacies that flow away as they come to presence. Its life is like an unremitting effort to be here now, continuously unsatisfied, thirsting for what Lethe gives in withdrawal. 

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The relevance of Lethe in regard to this proposal is found in Heidegger’s construction of the word *a-letheia*, the negation of Lethe, meaning the recovery of an original memory, or pushing back of the borders of oblivion. For Heidegger, the connection to truth is in the notion of *unconcealment*, Dasein’s disclosedness. Christodoulidis and Veitch reflect:

If Lethe connotes the moment when meaning and imagery fall away and are lost to awareness, “a-letheia” as reversal of forgetting, signals the recovery of an original knowledge. Truth becomes unconcealment and, in Heidegger, reveals its true nature as an *Erschlossenheit* – a sudden openness to what was removed from view – a moment when obscurity falls away.6

In the case of atrocity, the existence of the ad hoc chamber and the process of fabrication of a legal framework resulting from its work, could bring to the fore crucial questions which would otherwise remain latent, or even forgotten. *A-lethia* then, could well describe the process of dredging, disclosure, or exposure of memory, and a self-reflection on what role ‘we’ (as entities or individuals) had, or did not have, in the tragedy of atrocity.

This proposal anticipates that an opportunity for global reflection, of remembering, could contribute to the evolution of an international social theory and legal framework. This would be in addition to Allott’s *Eunomian* and *Eutopian* projects which look to philosophers for the generation of ideas and ideals. By including the voices of civil societies and their individual members, laws and institutions could evolve that promote the wellbeing and protection of all of humanity, resembling what Habermas identifies as a post-national constellation of a global society, and what Allott calls *eunomia*, the good order of a self-ordering society.

In conclusion, by developing a structure and process to reflect and report on international society’s role, or omission to act in the event of atrocities, a dialogue could develop on the normative obligations of international society towards its individual members. An eventual additional Chamber and the production of a Humanity Report for each ICC case could be part of the roadmap, a way to move forward towards actualising constitutional elements within an international constitutionalism.

PART 4 – A POSSIBLE WAY FORWARD TO PERPETUAL PEACE

11 SUMMARY

11.1 Part I: The causes of the current disorder

The thesis has followed a time-based exploration. A chain of human endeavour since early modern times was traced which sought, through international law, to make sense of and regulate an ever expanding world. Through Allott’s theoretical lenses, analysis of the past and current disorder, and possibilities for a better human future were contemplated. It was seen that the bifurcation between the domestic and international realms and the lack of the development of a co-requisite social structure for international society thwarted aspirations for international law to secure peace between sovereign nations. Anomalies in liberal political theory, leading to aggression in the international realm, allow to this day the outbreak of violence and unconscionable suffering in the name of ‘state interests’. Justification for this barbarous behaviour is adeptly articulated by state leaders while making reference to a version of international law that suits their needs. This phenomenon, accepted as natural and inevitable, occurs regardless of the extraordinary advancement in moral obligations and legal codification which, at the domestic level, would make the taking of one life worthy of criminalisation.

Two mythologies contribute to this incongruity between the domestic and international realms. These are the state of nature and contractarianism – both based on a Hobbesian view of human nature driven by self-preservation and autonomy. They form the foundations of the current system, creating fault lines which continue through to present day international law. Grotius’s thin notion of human sociability, appropriated from the international realm, viewed interpersonal relationships as guarded cooperation geared toward pre-emptive strike. This notion was ‘upgraded’ by Hobbes to a permanent state of war. Driven by fear, individuals were preoccupied with their own protection, willing to use any violence necessary to ensure survival. This untenable state of nature was ended by a social contract to form a state, and through obedience to a sovereign, peace and security was secured by the sovereign’s absolute authority and use of force.
Vattel reappropriated this idea of the natural state of war of individuals to states, as ‘persons’. This justified aggression as a natural and inevitable outcome of international relations. By international law being subject only to the consent of sovereign states, the unresolved theoretical gap of an international sovereign was avoided. As states were the sole external entities, contractarianism absolved these sovereign states of any democratisation and socialisation of the international realm. Humanity chose to regard its international world as an unsocial world in which the internal public realms of member states were presented externally. The dysfunctionality of such an ‘unsociety’ has generated continuous theorising to justify its condition as natural and inevitable, but mostly to justify an international law which retains the interest of states as the primary subject, with the interests of individuals as secondary. The Vattelian worldview of two separate mind-worlds of society and international ‘pre-society’, the internal and the external, has generated two conceptions of morality, law, justice, public order, public administration, and social organisation.

By contrast, Allott’s social theory and universal law rests on the idea of the embeddedness of law in all social and transcendental reality. His field-theory classification of legal philosophies seeks to integrate all of the explanatory horizons of law which have evolved. This integration creates a new paradigm which contains all national and international legal phenomena, from which the common interests of humanity are disaggregated throughout all subordinate societies. A legal constitution would be created by, but also influence, the ideals of an international society with its own self-consciousness, theories, values, and purposes. It would be able to choose its own future and politics. A constant cycle of constitution and re-constitution would reflect ever-evolving ideals of this ‘true’ international society.

The construction of a theoretical spectrum illustrated the complexity of the contemporary theoretical landscape over which Allott’s field theory classifications were superimposed. The exercise also identified the coordinates of Allott’s theory. An orientation towards certain constitutive theoretical elements placed his work within the idealist horizon. A subsequent evaluation in Part II of the thesis placed the theory below the threshold of accessibility and moral accessibility. The location on the spectrum of the remedial proposals submitted in Part III were positioned towards a centralised, solidarist Grotian location. This demonstrated the intention of this thesis to bring Allott’s theory towards a more accessible position, moderating his idealist
formula of ‘theory is practice’ to a blend of ‘theory and practice’. Ironically, this repositioning would have the effect of socialising and democratising Allott’s own theory by first, including social processes of inter-subjective dialogue through which to identify and contemplate the ideals of an international society and, second, by populating international law with individuals as subjects, diluting somewhat the totalising effect of Allott’s focus on the ‘oneness’ of humanity.

An overview of theoretically homologous and normative theories of international law and international relations demonstrated how Allott belongs to a community of critical theorists and practitioners who share a vexation with the dominance of the positivist/realist perspective. Like Allott, Anghie calls for broader accountability than individual criminal responsibility for international crimes. Twining observes that marginalised non-Western perspectives are needed to ameliorate a predominantly parochial international jurisprudence. Falk seeks to develop through his constructivist, analytical, and normative approach a conceptualisation of world order and global governance in an effort to illuminate what can be confusing through experience and perception. In close range to Allott, Falk anticipates dialectical effects between the challenges of globalising forces and the spiritual messages of the great world religions, and the possibility of reconstructing human security on a foundation of non-violent politics. Teson’s liberal international law seeks congruent, legitimate representation at both domestic and international levels, arguing the ends of states and international law must be the wellbeing of humans. Rawls offers a contractarian, less-demanding confederation of liberal and non-liberal peoples, with unitary nation-states of limited sovereignty. Kuper refines Rawls’ two stage domestic/international original position with a reassertion of the individual over peoples. He also offers institutional proposals for a functional plural sovereignty, and global democracy. Nussbaum aims for a quality, flourishing life measured not in terms of bargaining for mutual advantage as in Rawls’ theory, but in terms of capabilities of what people are actually able to do and to be in certain central areas of human functioning.

Kingsbury’s work takes an historic view and observes a dialectic throughout international law’s history between theory and practice. His solidarist Grotian integration of the two helped to guide the development of the thesis’ proposals, moderating Allott’s idealist international constitutionalist approach for current non-ideal conditions, making it more feasible for implementation. The positivist stance of the
sovereign equality of states appears increasingly redundant when critiqued from a constitutionalist point of view. Breau points to the evident existence of a society of states in which states not only protect their own interests, but also those of the international community. She also argues that an informal international democratic constitutionalism with a transcivilisational perspective does appear to be emerging, although she admits that interpretations and predictions on its trajectory differ. While Slaughter’s analysis of trans-national networks parallels Allott’s, her scheme of disaggregated sovereignty in a new world order of global governance was shown to counter his goal of disaggregation of the common interest of humanity through a democratic constitution. Slaughter’s lack of a social or legal theory to guide the distribution of the disaggregated power raises concerns of factionalising the international arena, rather than integrating it.

11.2 Part II: Allott’s theoretical analysis and prescription

Allott’s contribution to resolving the dysfunctionality and the ineffectiveness of international law and international society was then reviewed. The reasons why Allott chose to develop a new social theory were first summarised. He argues international society’s dysfunctionality is a theoretical problem because it lacks a theory of itself. This creates an unsocial international society. By failing to recognise itself as a society, it has not known it has a constitution. When a constitution reflects ideals in the interests of the people, it is capable of promoting their well-being and conversely, when it does not do this, it is capable of great harm.

Allott’s analysis of the current world disorder revealed transformations are taking place at the international level which necessitate an urgent re-examination of the theory of international society and its law. These transformations include an interdependence at ‘meta-strategic’ levels including military, economic, and environmental interests. Also, a geopolitical metamorphosis of the international realm is occurring due to developments at the national level escaping into a formless global realm. Opposing trends of disintegration and integration are creating a multiple dialectic of change. Within this dialectic a number of phenomena are emerging. These include a universal social consciousness, or public mind, along with a universal species consciousness of our relationship to our habitat, a universal social system and universal legal system, a
universal economic system, and not least, a universalising of social evil which magnifies human suffering.

Also emerging is the flawed regime of state responsibility which exemplifies the legal discontinuity between domestic and international law, and the moral discontinuities between the personal obligations of the government official and the obligations of the government. This discontinuity explains how governments are able to behave externally in ways which would be inconceivable internally, bringing about human deaths by the million as a matter of policy. Allott argues that these discontinuities can only be overcome through theory, by a higher moral and social order that negates disorder and transcends the apparent necessity of the actual. The current disorder has been caused by the social reality of liberal democracy being in dialectical tension between the power of the people and the power of oligarchies, and at the international level, the competition of power between the oligarchies. The lack of democracy and accountability by this bureaucratised, international aristocracy has absolved it of responsibility, which leaves room for abuse of power.

Allott claims that if international society is to survive and progress, it will need to transform in the form of a revolution of the mind. A new social theory is needed to negate the 20th century’s nominalist ‘unphilosophy’. A ‘true’ philosophy is world-making and is ruled by a moral imperative. It is universal, and contains the idea of the ideal, and also contributes to public enlightenment. The generation of this type of philosophy requires a response of self-surpassing, that is, of going beyond our current human consciousness as individuals and as societies. At the global level it requires the self-transforming power of law, together with a re-imagining of our ideas and our ideals of human self-socialising. This type of human self-contemplating will enable the development of an international philosophy towards which it is anticipated that minds from all traditions and cultures would contribute.

Explication of Allott’s theory commenced with an outline of the theory’s elements. These include words, ideas, idea structures, theories, values, and processes of constructing a society’s social theory (its self-constituting) including the formulation of ideals. This process of self-creating is a work of consciousness using imagination and reason to create the words, ideas, theories, and values, which are organised through law.
These elements move in a ceaseless reciprocating motion between the particular, to the general, to the universal, and back again, reflecting the dialectical character of society.

Allott’s model demonstrates the construction of a social theory occurs through the interaction on three levels of theory – practical, pure, and transcendental. Practical theories are the theoretical basis of our willing and acting. Pure theories are the explanation of our practical theories, articulating a society’s values, purposes, and ideals. Transcendental theories are our theoretical explanation of theory itself. At the level of pure theory the dialectics of change reflect the duality of the human condition evident in the dilemmas of identity and power; will and order; and of becoming. In its struggles with these perennial dilemmas, a society becomes, forming its own unique structure system through this endless activity. A society applies practical theory to the making of its own social reality in the taking to effect of its ideas in the process of day-to-day social self-constituting.

Allott’s analysis of the ‘half-revolution’ of the EU demonstrated how it is doomed for failure in practice because it lacks an idea of itself due the lack of a pure theory. He argues that if it is to succeed it must generate ideals both in the public mind of its institutions, and the private mind of its citizens. Allott sees the EU as a purpose-built economic-political society – a precedent for the re-forming of national societies as economic-political societies and the subsequent forming of an international society dominated by the economic aspect and the malformation of its politics. Likewise, in the non-social, undemocratised, unsocialised international society, self-constituting has taken aberrant forms. This is evident in the use of force and threat as substitutes, and its deployment of a stunted process of diplomatic interaction between the public realms of states-societies through international relations.

Allott’s antidote for these failures is constitutionalism. A constitutionalised society’s theoretical structure contains law about law, law above law, and law before law. All public power is subject to the law. Law would restrain law, and also set legal limits of social power. Such a nomocracy would ensure the core-paradoxes of the democratic ideal, freedom under law and self-government, are realised. Constitutionalism is a mental ordering of the reality within which a society constitutes itself, functioning in three dimensions in the form of ideas, practice and law. These correlate to the ideal, the real and the legal dimensions, each developing in dialectical relation to each other. In a
society’s ideal constitution it constitutes itself in the form of ideas – theory, values, purposes, and ideals – which is its pure theory. In its real constitution, a society constitutes itself through the actual day-to-day social struggle of political, social and economic power. A society’s legal constitution reconciles its ideal and real self-constituting in the form of law.

The practice of constitutionalism enables and requires a society to self-constitute in conformity with its transcendental idea of itself. In an integrated constitutionalism which conforms to the ideals Allott prescribes for international society, the ideals, law, and the real day-to-day processes would interlock and actualise a democratised and socialised society. Generic constitutional principles facilitate this integration and require that law is conceived as part of the total social process.

Anomalies in democracy’s full actualisation are attributed by Allott to an intense development of the past 500 years in the ‘super-socialisation’ of the practical theory of society. This enables society to have a theoretical view of itself which transcends the actual by ‘throwing back’ the theoretical explanation of what is to be explained onto something which is not itself subject to explanation. Examples are religion, philosophy, and sovereignty which integrate individual and social consciousness in a society’s pure theory and position it in opposition to its practical theory. Sovereignty was thus conceived as a source of unwilled willing, resulting in the public realm of state society being under the authority of government, rather than the people. In the dialectical struggles of the perennial dilemmas of identity, power, will, becoming and order, social consciousness eventually surpassed the idea of sovereignty and generated the pure theory of democracy. However, it was found that democracy’s actualisation in the real constitution of societies supported corruption and tyranny. In the ongoing dialectical struggle, citizens subsequently developed the theory of constitutional sovereignty, then limited sovereignty through natural law and natural legal relations, and then the ultimate embodiment of the sovereignty of the people. In the 20th century, social consciousness took another leap in the supersocialising of democracy in the name of social justice. Yet to be realised is the integrating of the public and private realms into a single universal value expressing the same justice, law, and morality for all, unified in a single order.
Concomitant to the development of democracy in domestic societies, international society chose its own pure theory, the Vattel tradition, and regarded itself as comprised of undemocratised, unsocialised, and externalised states, denying the idea and ideal of democratisation. Its practical theories created separate worlds between internal statal social processes and an unsocial international social process. Diplomats and international lawyers seek to bridge these two worlds through various palliatives including the constitutional extrapolationism of domestic institutions, supposed ‘enlightened’ economic self-interest, and semiotic pragmatism through talk about international law or international morality used to manipulate other states’ actions.

Democracy-capitalism is now driving global economic, social, and cultural trans-national transactions and has created a complex network of national-law legal relations and new intergovernment universal legislation, alongside the old international law system which focuses on conflict between governments, territorial limits, and dispute resolution. The old and new forms of international law form the bases of an emergent universal legal system which transcends the imaginary frontier between the national and the international. It is creating an international oligarchy of oligarchies, unbounded by the rule of law, comprised of governments and intergovernmental organisations, and institutionalised self-appointed, self-legitimating representations of individual interests in the form of a supposed global civil society. According to Allott, this condemns international society to a pre-revolutionary or counter-revolutionary system.

Revolutionary transformation has historically involved the taking of public power by the people, not just institutionally, but also in a conscious form. Power then became regarded as a delegation from the people, granted and controlled by the rule of law. Allott argues that the realisation of a similar transformation at the international level is the most formidable of challenge for the 21st century.

Allott’s constitutionalism aims to realise a democratised and socialised international society which would disempower the myths of liberal political theory which condone a lazy individualism, relinquishing governance to the bureaucratic elite and the concentration of power in the formalist state system. Further, a lazy naturalism reassures us that the social evil by which millions suffer is natural and inevitable. The confrontation of these myths by the various mutations of sovereignty (constitutional, limited, and of the people) is at the final stage in which sovereignty will be conceived as
a self-willed order in the name of justice, with a view to the well-being of society and all its members.

Allott’s behest is that in order to actualise this self-willed, integrated constitutionalism, we, the people, have to take power over our self-constituting. We have to break the mould and take power off the people who have dominated the formation of social reality. This is achieved through the ordering power of the human mind to reorder the disorder and to choose the human future. In the mind’s ability to imagine a second metaphysical universal reality behind the infinite particularities of the world, and to think of itself as something separate from its own thinking, Allott claims it is able to transcend itself, assisting in the choice of a better human future. A ‘true’ international society is a society of the whole human race and the society of all societies. It, and international law, would embody the social purposes humanity chooses for itself. People, as well as all subordinate societies, organisations and state-societies, would be members of it. Its constitution would determine the creation and distribution of social power throughout the world. In its dynamism, it would be constantly reformed by ideas and the aspirations of humanity, and respond to the social development of the world. State-societies and intergovernmental organisations would be organs of the constitution, with functions and powers delegated by international society.

Without such a fully integrated constitutionalism, Allott warns the globalising of social phenomena will take place in a philosophical vacuum. This vacuum is particularly evident in the ongoing rationalisation of war, regardless of the plethora of codification, treaties, and international security systems. This is the ultimate challenge for international society – to accept the idea that war, as a negation of the human common interest, cannot continue as a legal category. Principles are outlined in treaties which Allott presents as challenges to our current day sensibilities, that is, to feel the disconnect between the ideals expressed in the treaties and the current reality of our international world.

The third thesis question asked whether Allott’s theory provides practical guidance for improving the system of international law, and whether it is a feasible and accessible normative theory that can be implemented in morally acceptable ways. An evaluation demonstrated that Allott’s theory is feasible in that it provides an adequate explanation and solution for improving the system of international law, but it lacks in accessibility
by not providing practical guidance for working within current conditions. Allott looks to (certain) others to explore new and better lines of thought and connections between ideas. He looks to philosophers (or ‘geometers’) to think at the level of the human race and to push the limits of the capacity of the human mind. He argues that this is imperative given the challenges we face. It is understood that his Eunomian Project (the reconceiving of society and law) and his Eutopian project (the reconceiving of the human mind through a new intellectual discipline – international philosophy) seek to bring together the best minds from all traditions and cultures to explore the connection between the self-constituting of the individual and the public mind, and to form new ideals for the future which would empower us to overcome social evil.

While it is acknowledged that a certain expertise is required to reconceive international society and law, the values and ideals which would drive this process of self-constituting should resonate with all the peoples of the world. Inter-subjective dialogue is needed beyond that of the philosophers to activate a global dialectical process. This would also animate the peoples’ imagination to begin to conceptualise what being a member of a ‘true’ international society would entail.

There are also challenges with the theory’s moral accessibility. A necessary shift in human consciousness, in fact, a revolutionary transformation, suggests an extraordinary risk of destabilising the current system and balance of power. The theory relies on a favourable response by the international system to the relocation of power from the current inter-statal regime to a constitutionalism ruled by ‘the people’. There are also concerns as to the new function of somewhat demoted states in this democratised international society.

11.3 Part III: Combining theory and practice

The evaluation led the thesis from ideal to non-ideal theorising which allows for conditions in which there is serious non-compliance. Non-ideal theory begins with the institutions we have now, in particular the state system, and looks for mechanisms that do not involve unacceptable moral wrongs in the process of transition. The aim was to identify a practicable route that might lead us from where we are now to at least a reasonable approximation of the state of affairs that satisfies Allott’s theory’s principles.
Three proposals were developed which draw on Allott’s fundamental principal of law as the actualiser of the ideal of a ‘true’ international society. A trajectory of increasingly ‘thick’ international obligation between individuals was extrapolated to an imagined point in the future which would see their full integration as both subjects and objects of international law. Allott’s model of the self-constituting of a society through the interaction of the ideal, legal, and real constitutions provided an anchor for each of the proposals and for what could have been an unwieldy exercise. Each of the proposals is intended to facilitate an evolutionary transformation towards the ideals of a ‘true’ international society, contrary to Allott’s idealist call for transformation in the form of a revolution of the mind. The proposals aim to contribute to the ultimate realisation of a positive peace through the codification of a minimum threshold of effective protection from harm of crimes against humanity, war crimes, and genocide.

The political proposal sketches the framework for a forum, initially in the form of a virtual forum, and eventually as an ad hoc panel associated with the ICC. The forum is intended to generate an open, global conversation about individuals’ ethical and potential legal obligations to protect each other from atrocity. In Allott’s terms, this would be thinking at the level of the human race; the contemplation of the ‘idea of the ideal’. Out of this conversation, humanity’s common interests could be distilled. This would be public international philosophy, in addition to the Allott’s Eutopian project. In the exchange of the two groups’ ideas (the dialectic), their respective endeavours could be enhanced.

An agenda for this global conversation is provided by the explorations in the ethical proposal. The proposal first considered, through post-modern lenses, the causes of the modern condition of alienation which manifests in an indifference and acquiescence to the suffering of others. While helpfully descriptive, the post-modern perspective looks to international law to merely mediate the supposedly ineradicable malaise of alienation, an incommensurability of values, and an embedded fear. This analysis fails to meet the Allottian entreaty to transcend the actual and to engage the idealising capacity of the human mind to imagine another reality, to surpass the particularities of the current system, and to choose a better human future.

This impasse led to consideration of Habermas’ social theory of communicative rationality. Similar to Allott’s, Habermas’ theory seeks to facilitate a new era of
political community in the form of a global deliberative democracy through the realisation of the human potential for reason, and also of communicative competence. In order to counter what Habermas describes as the late-capitalist phenomena of consciousness fragmentation, a deliberative procedure following certain presuppositions would seek to formulate and establish an international institutionalisation of our communicative competence, and the juridifying of international relations within a framework of cosmopolitan law. These discussions would be held in *ideal speech situations* in which participants are assumed to be equally endowed with the capacities for discourse, each recognising the others’ equality, and engaging in speech undistorted by ideology or misrecognition. However, Habermas acknowledges that consciousness fragmentation thwarts its efficacy and the ability for transcendence, hampering the achievement of outcomes of mutual benefit.

While taken up in the political proposal as a potential framework for *ideal* dialogue, the presuppositions for deliberations appear to be too high at this point in the evolution of human rationality and consciousness. Further exploration of the subterranean space surrounding inter-subjectivity was needed, prior to the engagement of communication. This led to the consideration of Levinas’ ethics of alterity which offers an alternative ontology of the self and the other. It provides the potential for a pre-reflective, spontaneous, and inescapable entry for responsibility that recognises each individual as singularly responsible for the well-being of fellow members of humanity. Activated by proximity (the unifying theme in common law for recognition of a duty of care to avoid foreseeable risk of injury), the generation of responsibility through a phenomenological account of the face-to-face encounter becomes the point at which subjectivity is constructed. Responsibility emerges with our selfhood. Thus, contractarianism is surpassed. While there is an irreducibility of subjectivity to choice, this is not an unpleasant imposition as it is contextualised within relationship. As proximity is an assignation prior to any commitment, the responsibility generated by it is an asymmetrical obligation that chooses us because of our capacity and another’s vulnerability.

Manderson’s extension of Levinasian ethics to law was then explored with the intention to segue the ‘localised’ concept of proximity, the construction of subjectivity, and asymmetrical responsibility, to individuals occupying the international realm. The preliminary extension of Levinas’ ethics to law was made possible via the law of tort.
Manderson identified tort as offering a unique location for the legal expression of an unwilled, non-reciprocal responsibility as it is concerned with duties to others, rather than individual rights, and with a ‘neighbour’, prior to any contract. By ‘contaminating’ law with Levinas’ ethics, Manderson saw that our responsibility for omissions, or the duty to rescue, is transformed. He suggests that rather than the duty to rescue being viewed as an imposition on our autonomy, it can be embraced as a source of our subjectivity and individuality.

Levinas’ scheme claims the face of the other reflects the face of another, known as ‘the third’. Thus, through the other, the self encounters the entire human collective. As all are equal, the self is no less responsible for the welfare of the third party than it is for the other. Responsibility extends not just to a single other, but to the rest of humanity. This demands a weighing of ethical obligations as while responsibility is infinite, we are not. This makes law and justice necessary.

The idea of a virtual proximity was then introduced, seeking to extend the obligation of the duty of care to the distant other in real terms, not just in theory. Through this inescapable virtual proximity created through communication technologies, personal response-ability for all others could become the new state of nature. Limitation on this limitless call would be found in the balance of new scales of justice – capability and vulnerability. Such a route of personal responsibility of individual members of international society bypasses the current statal consensual basis of international law, infiltrating and juridifying it with already entrenched common and civil law principles on the duty of care. Individual autonomy would be trumped by recognition of the suffering other, and the reconciliation of capability and vulnerability would become the central task of international law.

In the legal proposal, a lacunae was identified between the regime of international criminal law and individual criminal responsibility, and the public international law principle of aggravated state responsibility, creating a space for unaccountability of a vast number of legal entities and individual citizens – ‘bystanders’ to atrocity. It was within this space that a proposed international tort for negligence for breach of a duty to rescue from atrocity is intended to occupy. Precedents of legal transformations and emerging norms, and increasing codification of the duty to rescue were noted. Increasingly sophisticated civil actions for a human rights exception to the doctrine of
sovereign immunity were also noted as a possible precursor to an international tort regime.

A legal proposition for an international hybrid tort for negligence for failure to rescue from atrocity was outlined. This incorporates a global public fund for compensation, along with non-monetary remedies to facilitate reconciliation and forgiveness between the victims and all other individual members of humanity. The hybrid approach equalises the burden of compensation, while also seeking to maximise aggregate global social welfare. Moral rights to equal freedom are combined with instrumentalist objectives signifying a complementarity between corrective and distributive justice, with each exercising a desirable limiting effect upon the other. This would impose a just burden on those with capability to respond to the needs of the vulnerable.

The legal proposition was likened to an artificial legal construction, or legal fiction, assembled as scaffolding in the form of an extended duty of care for a yet-to-be-formulated and viable form of collective responsibility in which the whole of humanity is responsible for the actions of its individual members. It is anticipated that once a viable formulation of ethical and legal responsibility is developed out of the dialectic of international society’s ongoing dilemmas, this scaffolding would likely be dismantled.

The proposals are practical theory – taking international society’s ideals and making them an integral and functional part of day-to-day processes. This is an endeavour to take power over international society’s future, bringing the ideal into the actual through new legal relations based on evolving ethical norms between individual members of international society. When these norms are activated, they will in turn modify social reality as behaviour modifies, actualising a potential future, predetermined by the common interest of peace. This common interest would be disaggregated through legal relations between the individual members of international society, made possible by an international constitution. International law would no longer be subject to the consent of states, but to a constitution through which states would be empowered to ensure against the abuse of power in their own territories.

If an ethics of alterity, of living for the vulnerable other, and virtual proximity, gain credibility as a bridge to relationship with distant others, the response from citizens to knowledge of impending mass violence could be transformed. This could also change
the response of their politicians, and of international organisations. The eventual codification of this response, the constitutionalisation of a duty of care, would alleviate the ‘surprise’ of an unchosen duty to rescue which might be experienced during the formative period of the obligation. If included in an international constitution as an obligation in a charter between the peoples of the world, it could evolve into a form of international statutory tort.

11.4 Conclusion

The purpose of the foregoing study was to take up Allott’s challenge to think beyond the confines of academic and professional disciplines, to formulate new ideas that will transcend the current order, and to create a better human future. After the explication of Allott’s theory in Chapter 5, there is reference to the completion of the geometer’s work, referring to his contribution to the discourse on the nature and function of law in humanity’s integrated future, and the need for more detailed carpenter’s plans. The proposals in this thesis are intended to contribute to those plans so that humanity might begin to transcend the recurrence of mass slaughter which is both condemned and condoned by the current regime of international law. The proposal of an ethical responsibility, and eventual legal obligation, of all individual members of humanity to protect each other from atrocity, is submitted in the hope that merely the contemplation of these ideas, let alone their realisation, might accelerate the socialisation and democratisation of international society by ‘the people’, and the infiltration of international law by individuals as both subjects and objects. It is anticipated that these processes 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.

The challenge is to dare to think and to hope and for humanity to take another leap in consciousness to transcend the actual. It is time to discard a morality based on thinking from five hundred years ago and to lay a foundation for a new global society and law. Allott’s theory of social idealism provides a prescription; the proposals provide a roadmap.
APPENDICES
Appendix 1: Treaty on the Elimination of War

(WBT – War Ban Treaty)

We, the people,

Recalling that, throughout human history, it is the people who have paid the price of wars caused by governments,

Considering that the practice of war is an abuse of public power due to the folly, the arrogance, and the incompetence of holders of public power, with the connivance of those who profit from the practice of war,

No longer willing to endure the suffering caused by war,

Determined at last to cure the holders of public power of their addiction to the practice of war,

Have agreed as follows.

Article 1

In this Treaty, war means the mass murder and maiming of human beings and the mass destruction of property caused by holders of public power claiming to act in the public interest. War includes such acts done by a government against people who are under its own responsibility.

Article 2

We undertake to do everything possible to eliminate the practice of war.

Article 3

We undertake not to preach, teach, or otherwise propagate the idea that war is, or may be, politically or morally or legally justifiable, either in general or in particular situations.

Article 4

We undertake to do everything possible to re-condition the minds of the holders of public power to help them to resist the temptation to cause war.

Article 5

The manipulation of public consciousness by holders of public power seeking to glorify or justify war, in order to evade the moral responsibility owed to its victims, shall cease.

Article 6

1. The anti-social and dangerous practices hitherto known as foreign policy and diplomacy shall cease.
2. Holders of public power are subject to an overriding obligation under international law to do everything possible to reconcile particular human interest, including political economic interests, with the common interest of the international society of all-humanity, the society of all societies.

Article 7

The costs of war shall not be borne by the people. The costs of war may not be met by governmental contributions to intergovernmental organisations.

Article 8

Nothing in this Treaty shall entitle the people to enforce this Treaty through the use of armed force against holders of public power.

Article 9

The present Treaty is a people’s treaty. It is ratified by each human being who makes a personal and specific commitment to serve the common interest of all human beings by accepting and implementing its terms.
Appendix 2: Treaty on the Constituting of International Society

*(ICT – International Constitution Treaty)*

We, the people,

*Recognising* that the human species is one species of living being among countless species in a natural habitat shared by all,

*Considering* that the human species has created a human world, its second habitat, by creating human societies,

*Recalling* that human societies have as their purpose the survival and prospering of human beings, and hence that international society has as its purpose the survival and prospering of all human being everywhere,

*Determined* to make a better human world through the constituting of a better international society,

Have agreed as follows.

**Article 1**

International society is the society of all-humanity, the society of all societies. All human beings are members of international society. All subordinate human societies, including state societies and legal corporations, are members of international society.

**Article 2**

International law is the law of international society embodying the common interest of all-humanity.

**Article 3**

All public power is conferred by or under international law. Public power is legal power which is subject to the condition that it is to be exercised solely in the public interest.

**Article 4**

We undertake to respect, and to ensure respect for, international law. We will require and expect that holders of public power acknowledge that their power derives from, and is subject to, international law.

**Article 5**

We undertake not to preach, teach or otherwise propagate the idea that national interest, or any other sectional interest, overrides the common interest of international society as embodied in international law.

**Article 6**
1. We accept that ideals of justice and social justice are applicable to all human beings everywhere, as equal members of international society.

2. We undertake to do everything possible to ensure that the holders of public power, especially those participating in the work of governments or intergovernmental organisations, and all others who take decisions affecting large numbers of human beings, accept that ideals of justice and social justice are applicable to all human beings everywhere, as equal members of international society.

Article 7

The manipulation of public consciousness by holders of public power seeking to justify or excuse the political oppression or economic exploitation of human beings anywhere shall cease.

Article 8

1. The individual personality of human beings and the cultural diversity of human societies are the bio-diversity of the human world. Respect and affection are the binding forces between human beings and within human societies.

2. We undertake to do all that we can to safeguard human bio-diversity in the common interest of all humanity and to protect and promote mutual human respect and affection.

Article 9

The protection and enhancement of the natural world shall be regarded as a common interest of international society.

Article 10

The people shall not bear the cost of any violation of international law, or other abuse of public power, by holders of public power. Such cost shall not be met by governmental contributions to intergovernmental organisations.

Article 11

Nothing in this Treaty shall entitle the people to use unlawful means to enforce this Treaty against holders of public power.

Article 12

The present Treaty is a people’s treaty. It is ratified by each human being who makes a personal and specific commitment to serve the common interest of all human beings by accepting and implementing its terms.
Appendix 3: Treaty on the Elimination of Force in International Society

(\textit{FBT} – \textit{Force Ban Treaty})

We, the people,

\textit{Recognising} that inequality of governmental power in international society tempts governments to use force to take advantage of, or to redress, that inequality,

\textit{Considering} that such use of force is an abuse of public power,

\textit{Recalling} that, throughout human history, the use of force in international society has been due to the folly, the arrogance, and the incompetence of holders of public power,

\textit{No longer willing} to endure the suffering caused by the use of force in international society,

Have agreed as follows.

\textbf{Article 1}

In this Treaty, force means the threat or use of public power by one government against people under the responsibility of another government with a view to forcing the latter government to alter its behaviour. Force includes the use of military, political or economic power for such a purpose. In this Treaty, international society means the society of all-humanity, the society of all societies.

\textbf{Article 2}

We undertake to do everything possible to eliminate the use of force in international society.

\textbf{Article 3}

We undertake not to preach, teach, or otherwise propagate the idea that the use of force in international society is, or may be, politically or morally or legally justifiable, either in general or in particular situations.

\textbf{Article 4}

We undertake to do everything possible to re-condition the minds of the holders of public power to help them to resist the temptation to use force in international society.

\textbf{Article 5}

The manipulation of public consciousness by holders of public power seeking to justify the use of force in international society, in order to evade the moral responsibility owed to its victims, shall cease.

\textbf{Article 6}
1. The anti-social and dangerous practices hitherto known as foreign policy, diplomacy, and sanctions shall cease.

2. Holders of public power are subject to an overriding obligation under international law to promote the international public order necessary for the survival and prospering of all human beings.

Article 7
The costs of the use of force in international society shall not be borne by the people. Such costs may not be met by governmental contributions to intergovernmental organisations.

Article 8
Nothing in this Treaty shall entitle the people to enforce this Treaty through the use of force against holders of public power.

Article 9
The present Treaty is a people’s treaty. It is ratified by each human being who makes a personal and specific commitment to serve the common interest of all human beings by accepting and implementing its terms.
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