Final Remarks

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I want to begin by thanking Philip for including me in this marvellous seminar. The so easy interdisciplinary conversation, combined with deep knowledge and profoundly important topics, have made it for me a marvellously enriching couple of days.

I next want to assure you that I am not going to attempt to 'summarize'. We will each carry away our own particular intellectual 'bookmarking' from these exchanges, and one person's resumé is pointless.

But I will offer a few thoughts – both personal and professional – on Philip and his work, and I have tried to build into this some of the central themes that have arisen in this seminar.

There is a reality that lies, silent and uncomfortable, beneath the table at all 'retirement' gatherings: it is that the friends there gathered are older – considerably older – than once they were. Philip Allott and I were classmates in the LLM group at Cambridge (then called the LLB) in 1959 and have been friends ever since, though seeing each other only occasionally. I could not have conceived that 45 years later I would be once again standing with him at Cambridge, beginning a speech with the words 'when Philip and I were young . . .' But, when Philip and I were young, legal theory was not in fashion. The sufficiency of pragmatism was the order of the day. Indeed, 'theory' was associated with an intellectualism that was irrelevant to the problems of the day. Pragmatism and a deep interest in primary sources of international law was what young people should aspire to. Indeed, as one who was exposed rather early to the titanic clashes of theory taking place in the United States in the late 1950s and early 1960s, I was left with the feeling that any expression of interest in such ideas was a black mark to be placed against any young person starting up the greasy pole of a career in international law.

Philip Allott, of course, has shimmied up the greasy pole in his own inimitable way, a spectacular feat for a self proclaimed recluse who lives in an ivory tower. In doing so, he has given pleasure to others along the way and changed forever our perceptions of how a proper English international lawyer may behave. By writing, radically, on *philosophy*, he made mere *theory* a respectable pursuit for others.

Not all legal theory can also claim the title of philosophy. Of course, with Philip, the philosophy comes first and the legal theory is but a consequence of it. As I have listened to the splendid papers at this gathering, it has occurred to me that philosophy comes in many forms. Just as there is high culture and popular culture, so there is high legal philosophy and – if not popular legal philosophy – then what I will call

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'legal philosophy lite'. I will leave each of you to decide which of our contributors falls into which category. But what, for me, is immensely pleasing in the current huge resurgence of interest internationally in legal philosophy and theory – and all of you here today have played your role in that phenomenon – is the openness and inclusivity of the current exchanges. All of us are here to participate, all are listened to with interest – whether grand masters of philosophy or those who are merely aware that their road building, or plumbing (to use two much heard allusions) will be the better for an understanding of what they represent, philosophically speaking.

This seminar has left me with interesting puzzles on what is philosophy, what is legal theory, and what is 'mere practice'.

Philip has said that 'theory is the purest form of practice'. I certainly share, and share profoundly, the view that everything that in international law is 'practical', is in fact silently premised on a premise of theory – a premise of which the actor is all too often unaware, which is why *talking about* theory is so important.

But I have certainly come away from this seminar with the feeling of a gulf between 'philosophy-at-large' and 'legal theory' – the latter is a more restricted field, and those of us who are interested in it, I am left feeling, have done less than we might to externalize and make the linkage with 'philosophy-at-large'. I am speaking, of course, for myself – and I will try to do better in the future . . .

Eunomia, a remarkable work of extraordinary depth and profound originality, is not an easy read. As Martti Koskenniemi has elsewhere observed, Philip employs his own language, in which nothing can be taken for granted and every term receives sense only as it is developed in the course of the book and in relation to the author's other concepts and past theories. His purpose in using his own idiosyncratic language is a profound desire to ameliorate the human condition. And that remains of shining purpose permeating his papers this weekend. The use of special language with the objective of improving the human condition is equally descriptive of the work of the late Myres McDougal. 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. Philip, however, believes that the state system itself is inherently inimical to the betterment of the human condition – though yesterday I heard what sounded like partial recantations, with Philip accepting that states will remain, but that they must lose their power role and instead take on a mediatory function between the individual and the realization of the ideal for society.

Eunomia thus explores the achievement of an international humanity not through the victory of one type of state over another, but through a reordering of society in a way that represents humanity as a whole and denies the state system. It thus logically follows that the classical subjects of international law will eventually disappear (here we have a Marxist echo, albeit in a very different context). Nonetheless, Philip finds that international law is an essential vehicle in the passage from here to there, being the mechanism by which society consciously re-creates itself. He calls for 'a revolution not in the streets but in the mind'.

Eunomia is a work of political philosophy in which international law has an important role. In what Philip has to say on 'War, Law and the Psychopathology of Human Societies',[1] it seems that he finds specific norms of law a malign influence.

In part – and we heard Philip come back to this yesterday – it seems to be the inherent uncertainty of normative application that troubles him. In best taxi cab driver mode, he told us that he doesn't want to have anything to do with norms that can be invoked by one side *and* the other. But this is, it seems to me, to have had a very positivist perception of the role of norms – as giving a 'right answer', and therefore, definitively, *not* to be available for invocation by both sides on any given occasion. But norms are the language by which we have identified what is in principle acceptable, and their application necessarily requires decision-making by reference to the specific context. Norms are not 'self executing', so far as application is concerned. But the fact that there have to be authorized decision-makers, (perhaps institutions), who engage in that task does make the norms of international law beyond all use. (Though I perfectly accept that identifying a court or other decision-maker, while perhaps a necessary condition for our 'common good', is not *per se* sufficient.) By the way, this 'duality' has resonated throughout our meeting – capitalism/democracy; religions/religiousness; globalization/diversity – each of these themes with the potential for good and bad. Even in the absence of footnotes, the intellectual sources on which *Eunomia* draws (which are cumulatively acknowledged) are extraordinarily diverse. I have found it a scholarly, dazzling, deep and original book, the more impressive for the holistic approach to life that it represents and the engagement that its author displays.

Philip's article on 'Language, Method and the Nature of International Law' attracted wide international attention and great admiration when it appeared in the *British Yearbook of International Law*.[2] Looking back, we now see that it characterizes the essence of his work – addressing legal issues through the eyes of philosophy, the making, in that context, of connections that are both stimulating and markedly different from what ordinary international lawyers do. As with a cubist painter, Philip possesses (and from time to time still chooses to display) the deep technical skills of his profession – but selects to use them in a very unusual manner. A central theme in this study is the opaque use of language by Myres McDougal. It is with a certain pleasure that I have heard Philip, in turn, admonished here this weekend, on the grounds that *Eunomia* and *The Health of Nations* are such a hard read – though I have to say that such a comment is a bit rich when coming from Marti Koskenniemi. My own position, by the way, is that *all* of these authors use their special language for real reasons, and that it's not really all so very difficult, if we make the effort.

I will return to Philip's article on 'Power Sharing in the Law of the Sea',[3] which is also characteristic of Philip's work in that legal phenomena are examined through a

[1] Allott, 'War, Law and the Psychopathology of Human Societies', in C. Warbrick and D. Kritsiotis (eds), *Beyond the Kosovo Crisis: Fundamental Questions and Enquiries in International Law* (forthcoming).

[2] 'Language, Method and the Nature of International Law,' *BYbIL* (1971) 79, republished in M. Koskenniemi (ed.), *The International Library of Essays in Law and Legal Theory – International Law* (1992).

[3] 'Power-sharing in the Law of the Sea', 77 *AJIL* (1983) 1, republished in R. A. Falk, F. Kratochwil and S. H. Mendlovitz (eds), *International Law: A Contemporary Perspective* (1985).

wholly unfamiliar prism. Throughout the article he displays a profound knowledge of the law of the sea (and an intimate understanding of how it was then developing), together with profound scholarship in philosophy – an imaginative mix that *does* 'come off'. He analyses the genesis of legal texts in the context of a study of consensus – consensus not as mere head counting but as a social phenomenon and process. He captures the sense of consensus: 'Instead of the will of a majority opposed to the will of the minority, there is the interaction of many wills within the groups and among the groups . . .'[4] *Total* disenchantment with texts and institutions hadn't yet set in. (By contrast, the Annexes to the article have always seemed to me already to belong to a different genre of scholarship.)

Today, what I will call traditional liberals, call for a greater parliamentary participation in all things legal – the appointment of judges, the approval of treaty texts, etc. I could offer Anthony Lester's pioneering efforts in the House of Lords as an illustration. For Philip, this all misses the point. As he has put it in his *Mare Nostrum*,[5]

> Text-dominated diplomacy tends toward monopolizing power in the text makers. Text making then becomes a form of sacramental behaviour, in which only the initiated may participate.

I pause there to say that this is apparently not to be decried so far as the realization of an enlightened society is concerned – we have heard the discussions about who can engage in this 'higher calling' and who will merely be the hand servants.

> Texts in the form of treaties may be submitted to national parliaments for retrospective validation, and, in some national systems, the parliaments may be involved in some way in formulating (validating in advance) the 'policy' that the adepts will seek to sacralize in the mystical text. The institution of treaty ratification is, perhaps, the leading international example of false validation. With its origins in predemocratic political structures, it puts a veneer of democratic propriety in the product of a system that is irredeemably improper.[6]

The conclusion of this observation is, of course, rooted in Philip's views about the anti-human nature of the nation-state.

Philip's 'The Theory of the British Constitution'[7] is essentially a work of political philosophy. He explains that it is part of the study of law as a total phenomenon, set in its relevant contexts. (Again, I might note, a perception shared with the late Myres McDougal, as is the notion that we are striving for 'the ideal'.) Philip offers a single objective – 'the removal of evil', and McDougal offered a range of decision-making techniques, tied to value-achievement. 'Law seems to be a first among equals among the manifestations of society's artificial necessity'.[8] He sees the 'special magic of the law' as lying in 'the way in which it carries the process of social self-constituting from society's past into its future'. That explanation having been made,

[4] *Ibid.*, at 6.

[5] Allott, '*Mare nostrum* – A New International Law of the Sea', 86 *AJIL* (1992),764, republished in J. M. Van Dyke, D. Zaelke and G. Hewison (eds), *Freedom for the Seas in the 21st Century. Ocean Governance and Environmental Harmony* (1993).

[6] *Ibid.*, at 781.

[7] 'The Theory of the British Constitution', in R. Harrison and H. Gross (eds), *Jurisprudence: Cambridge Essays (1992)* 173.

[8] *Ibid.*, at 180.

Philip then launches into an essay which is totally unusual, exhilarating and ultimately brilliant. He is able to encapsulate what Savigny, Freud, Marx, Wittgenstein and others brought to our notions of society and from there to examine the relationship between the constitution and the British people. This exercise which I confess has only the most indirect connection with international law, is full of delightful insights and thus

> The British people suppose that the British constitution is nothing less than the social genome of the British people. We feel that, in the very genes that make us what we are as persons, we have inherited the self-acquired characteristics of the British people.[9]

And

> . . . the absence of a materially formulated legal constitution has not prevented the British from believing that they have a legal constitution. That certainty manifests itself intermittently, but especially when the constitution is thought to be in danger. The British are most certain about their constitution whenever they think they may be losing it.[10]

As we ponder top-down-imposed, ersatz devolution, supreme courts without a shrinking down power, supreme court judges to be chosen, in the name of democracy, by a minister, these observations have a special resonance.

Philip, of course, enjoys shocking: 'The universities have become necessary instruments of general totalitarianism'. I find his analysis of benevolent totalitarianism as expounded in 'Kant or Won't',[11] ultimately unpersuasive. But his arguments as to the function of the word 'is' are extremely witty, just as was his analysis of the word 'our', in '*Mare Nostrum*',[12] and his erudition shines throughout.

What Philip has said to us yesterday and today is interesting not only in itself – *of course!* – but also as a continuum of what he has done thus far.

Philip's recent piece of 'War, Law and the Psychopathology of Human Societies'[13] is a darker piece: the propensity to war is an addiction, the fevered talk about legal obligation is but 'a ritual antagonistic dialogue which immediately precedes the descent into the mass murder and mass destruction known as *war* – the atmosphere is thick [he says] with the sickly smell of obligation talk'.[14] We can all recognize in recent history that phenomenon. The pointlessness of it all is encapsulated by his comment that: 'The only judge of the behaviour of war matters is the retrospective judgment of history, a judgment which is the most worthless form of judgment, never final and binding, always subjective to appeal and revision'.[15]

I do not agree with Philip that 'all efforts to sensitise the war-making mind . . . to legislate for the making and conduct of war have only made war ever more inevitable'.[16] They have, in my view, been neutral as to the advent of war. And they *have* been

[9] *Ibid.*, at 182.
[10] *Ibid.*, at 185.
[11] Allott, 'Kant or Won't: Theory and Moral Responsibility', 23 *Review of International Studies* (1997) 339.
[12] Allott, *supra* note 272.
[13] Allott, *supra* note 268.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*

ameliorating for those caught up in war. To insist that the killed or disabled person gets no benefit from knowing it was done either in conformity with, or contrary to, the rules of *jus ad bellum* and *jus in bello*, ignores an important reality – that *some* people at least *will* be better treated precisely because of the existence of such norms. *Jus ad bellum* will not stop war; *jus in bello does* ameliorate it at the margin. Ask any *individual*, who has been caught up in such events, and they will tell you so. All is just the same with human rights – the endless texts (of which phenomenon Philip is so understandably cynical) do not prevent continuing massive abuse. But when the telescope is inverted, a potentially affected individual would certainly want the text to exist and in some cases at least, they will benefit. The *circumstances* of which that benefit may occur is, of course, another topic, but our ever interacting and globalized world allows helpful light to be shed on law compliance in ways that were previously impossible.

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It is assumed that international lawyers are dreamy idealists, proceeding along life in a perfumed cloud of optimism. Like Philip, I am profoundly pessimistic at the human condition and am deeply cynical about the role played by states – all states. In my case, this is clearly a confession to *une déformation professionele*. I share much of Philip's view on what international law *can't* do. But I take such small comfort as I can muster in believing that, if it can help at the margin in our wretched world, then the effort must be made and is worthwhile. Philip, of course, has grander designs, and seeks to show us how a quantum change – 'an enlightenment moment' could lead to a better world. *Individuals* all want to live in peace, says Philip. Yes. And I believe too that all individuals want to be free from torture, having adequate food, to speak freely – which is why I believe in the universality of human rights, and reject cultural particularity, which I believe is just a crude phrase for state dominance over the individual.

But I also think, and here I join Iain Scobbie – that the repositioning of individuals in society will probably not achieve our ideal society. Philip has himself somewhere conceded that 'states' are but individuals; and individuals are social creatures, and will inevitably regroup into other clusters that will repeat all the dreadful behaviour we see around us, albeit in new form. So, while I share so much of Philip's perception about what is wrong, while he continues working, as we all hope he will, with the Grand Design, I shall continue to follow the 'finger in the dyke' approach – with occasional reference to theory and philosophy, of course.

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Let me conclude with some very personal remarks. As I mentioned at the outset, Philip Allott and I were classmates in the international law LLM at Cambridge in 1959. Andrew Jacovides, Kurt Ginter and Hugh Thirlway were in our year. And so, at the very centre of our common friendship, was John McMahon, who died so tragically

young while on the threshold of a great career. Hisashi Owada had just concluded his BA before embarking on his stellar path. Not a bad bunch, all in all . . .

But we all knew, even then, that the brightest of us all was Philip: and nothing in the intervening 45 years has caused me to change my mind. Moreover, he's a lovely human being. Philip, you have our thanks and all our good wishes.

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